Basic Estate Planning and Administration 2017

Cosponsored by the Estate Planning and Administration Section

Friday, November 17, 2017
8:30 a.m.–4:45 p.m.

5.75 General CLE or Practical Skills credits and 1 Ethics credit
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   — Katharine West, *Wyse Kadish LLP, Portland, Oregon*
   — Eric Wieland, *Samuels Yoelin Kantor LLP, Portland, Oregon*
SCHEDULE

8:00  Registration

8:30  Nontaxable Trust Administration
    ♦  Understanding the trustee advice letter
    ♦  Calendaring notices to creditors
    ♦  Trustee reporting requirements
    ♦  Spotting and solving problems for difficult assets, beneficiaries, and procedures
    Nicole Erickson, Wyse Kadish LLP, Portland, OR

9:30  Ethical Questions Raised by the Fifth Edition of the ACTEC Commentaries on the Model Rules of Professional Conduct
    ♦  Avoiding conflicts of interest
    ♦  Using engagement letters for married clients
    ♦  Representing a fiduciary who is also a beneficiary
    ♦  Joint representation of related parties
    Professor Karen Boxx, University of Washington, Seattle, WA
    Philip Jones, Duffy Kekel LLP, Portland, OR

10:30 Break

10:45 Planning for a Family Member with Special Needs
    ♦  When to use special needs trusts
    ♦  Primary types of special needs trusts
    ♦  ABLE Act
    Emily Hogan, Fitzwater Meyer Hollis & Marmion LLP, Portland, OR

11:30 Will Contests
    Jan Kitchel, Cable Huston LLP, Portland, OR

Noon Estate Planning and Administration Section Annual Business Meeting

12:05 Lunch

1:00 Legislative Update
    ♦  Tracking legislation
    ♦  Probate modernization
    ♦  Advance directive
    ♦  Uniform Trust Code
    Ian Richardson, Gleaves Swearingen LLP, Eugene, OR

1:30 Oregon’s Elective Share for Surviving Spouses
    ♦  How and when to make the election
    ♦  Elective share or “the augmented estate”
    ♦  Payment of the elective share
    June Wiyrick Flores, Miller Nash Graham & Dunn LLP, Portland, OR
2:00  Bonding Basics for Probate Matters
✦ The bond and how it works
✦ The application process—get it done before you petition for appointment
✦ Bond transactions—changes and cancellations
✦ Bonding special needs trusts and protected minors
Jennifer Tuomi, JD Fulwiler & Co. Insurance, Portland, OR

2:30  Break

2:45  Community Property
✦ Utilizing community property agreements to convert and transfer property
✦ Transferring property upon death of spouse
✦ Receiving a double “step-up” in income tax basis upon death of a spouse
✦ Committed intimate relationships under Washington law
Justin Curtiss, Landerholm PS, Vancouver, WA
Randall Grove, Landerholm PS, Vancouver, WA
Philip Janney, Landerholm PS, Vancouver, WA

3:45  Hot Topics in Estate Planning and Administration
✦ Advising clients on selecting fiduciaries
✦ Leaving a vacation home to the next generation without starting an intra-family war
✦ What to do with estate planning documents prepared by your client’s last lawyer
✦ Issue spotting for trust and estate administrations
Philip Jones, Duffy Kekel LLP, Portland, OR
Robin Smith, Butcher & Smith Law LLC, Portland, OR
Margaret Vining, Davis Wright Tremaine LLP, Portland, OR
Katharine West, Wyse Kadish LLP, Portland, OR
Eric Wieland, Samuels Yoelin Kantor LLP, Portland, OR

4:45  Adjourn
FACULTY

Professor Karen Boxx, University of Washington, Seattle, WA. Professor Boxx teaches in the areas of trusts and estates, estate planning, community property, conflicts of laws, and professional responsibility. She is a Fellow of the American College of Trust and Estate Counsel and a member of its Elder Law Committee. She is chair of the Washington State Bar Association Real Property, Probate and Trust Section, vice chair of the ABA Real Property, Trust and Estate Section Elder Law, Disability Planning and Bioethics Group, the ABA Real Property, Trust and Estate Section liaison to the National Guardianship Network, and a member of the WSBA Rules of Professional Conduct Committee Task Force. Professor Boxx has been active in legislative reform, including chairing a WSBA task force that drafted major revisions to Washington trust law enacted in 2011.

Justin Curtiss, Landerholm PS, Vancouver, WA. Mr. Curtiss’s practice focuses on estate planning and probate and trust administration. He is a member of the Washington State Bar Association Tax Law Section and Real Property, Probate and Trust Section, the Clark County Bar Association, the Oregon State Bar Taxation Section and Estate Planning and Administration Section, the Multnomah Bar Association, and the American Bar Association. He is admitted to practice in Washington and Oregon.

Nicole Erickson, Wyse Kadish LLP, Portland, OR. Ms. Erickson practices in the areas of estate planning, trust and estate administration, postmortem planning, and tax planning. She holds an LL.M. in Taxation, and she is admitted to practice in Oregon and Texas.

Randall Grove, Landerholm PS, Vancouver, WA. Mr. Grove’s practice emphasizes wealth transfer, estate planning, probate, and business succession planning. Mr. Grove is a Fellow and Regent of the American College of Trust and Estate Counsel. He is admitted to practice law in the state of Washington and the state of Oregon. He holds an LL.M. in Taxation from the New York University School of Law.

Emily Hogan, Fitzwater Meyer Hollis & Marmion LLP, Portland, OR. Ms. Hogan’s practice emphasizes estate planning for taxable and nontaxable estates, establishing special needs trusts, probate, trust administration, and small business planning. She is a member of the Oregon State Bar Estate Planning and Administration Section, the Multnomah Bar Association, Oregon Women Lawyers, and the Financial Planning Association. She routinely speaks on the topic of estate planning throughout Oregon and has lectured to moms’ groups, elderly living facilities, women’s financial groups, and a Veteran’s Association group. Ms. Hogan also teaches legal research, legal writing, estate planning, and contract drafting courses for community college paralegal students.

Philip Janney, Landerholm PS, Vancouver, WA. Mr. Janney’s practice focuses on estate planning, charitable giving, family business succession planning, probate and trust administration, and tax planning. He is a Fellow of the American College of Trust and Estate Counsel. He is a member of the Washington State Bar Association Real Property, Probate and Trust Section and Tax Law Section, the Oregon State Bar Estate Planning and Administration Section, the Estate Planning Council of Southwest Washington, and the Clark County Bar Association. Mr. Janney is a frequent instructor at continuing education programs for attorneys and other professionals, as well as for local civic groups. He is admitted to practice in Washington and Oregon.

Philip Jones, Duffy Kekel LLP, Portland, OR. Mr. Jones practices primarily in the areas of estate planning, estate and gift taxation, estate and trust administration, fiduciary income taxation, tax procedure, tax controversies, and estate and trust litigation. He is a Fellow of the American College of Trust and Estate Counsel and a member of the Estate Planning Council of Portland. He served as an Adjunct Professor of Law at Lewis & Clark Law School for 20 years, where he taught Estate & Gift Taxation and Federal Tax Procedure. He is the author of numerous articles in the Journal of Taxation and other publications. He has argued cases on behalf of taxpayers in the Oregon Supreme Court, the United States Tax Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. Mr. Jones is admitted to practice in Oregon and Washington.
Jan Kitchel, Cable Huston LLP, Portland, OR. Mr. Kitchel focuses his practice on catastrophic personal injury, wrongful death, will and trust contests, and insurance coverage claims in the Pacific Northwest. He represents both plaintiffs and defendants and both individuals and businesses. He has also arbitrated cases in a number of forums, both as a litigant and an arbitrator. He is a member of the American Board of Trial Advocates, the Oregon State Bar Litigation Section, the Washington State Bar Association Litigation Section, the Oregon Trial Lawyers Association, the Washington State Trial Lawyers Association, and the Multnomah Bar Association. Mr. Kitchel has contributed to numerous CLE publications and presentations on trial practice, personal injury, wrongful death, will contests, and other probate litigation.

Ian Richardson, Gleaves Swearingen LLP, Eugene, OR. Mr. Richardson’s practice focuses on business law and estate planning. His business law practice includes a substantial focus on information technology companies, and he has acted as general counsel to software and equipment developers, manufacturers, resellers, and other technology companies. His estate planning practice involves sophisticated tax planning and compliance with an emphasis in federal tax law. He is chair-elect of the Oregon State Bar Estate Planning Section, past chair of the Lane County Bar Association Probate Committee and Computers & Technology Committee, past president of the Eugene-Springfield Tax Association, and past president of the Oregon Estate Planning Council Eugene Chapter. Mr. Richardson regularly presents to professional education organizations, business groups and charitable donors on estate planning, business transactions, and charitable giving.

Robin Smith, Butcher & Smith Law LLC, Portland, OR. Ms. Smith focuses her practice in the areas of estate planning, trust administration, nonprofit organizations, tax, and real estate. She has taught Charitable Giving and Tax Exempt Organizations in the University of Washington Graduate Program in Taxation. She is a member of the Estate Planning Council of Portland, the Oregon State Bar Estate Planning and Administration Executive Committee, the Oregon State Bar Elder Law Section and Nonprofit Organizations Law Section, the Multnomah County Bar Association, and the Washington State Bar Real Property and Probate Section. Ms. Smith is admitted to practice in Oregon and Washington (inactive). She holds an LL.M. in Taxation from New York University.

Jennifer Tuomi, JD Fulwiler & Co. Insurance, Portland, OR. Ms. Tuomi has been in the insurance industry since 1979 and has managed the Court Bonds Division of JD Fulwiler & Co. Insurance for 15 years. She holds the Certified Insurance Counselor (CIC) designation.

Margaret Vining, Davis Wright Tremaine LLP, Portland, OR. Ms. Vining is of counsel to Davis Wright Tremaine LLP. She counsels high-net worth individuals, business owners, and families in trust and estate matters. She advises on wealth transfer, estate, gift, and business succession planning and represents clients in the administration of trusts and estates. She also works with tax-exempt organizations and charitable foundations. Ms. Vining is a member of the Oregon State Bar Sustainable Future Section Programs and CLE Committee and the Estate Planning and Administration Section Executive Committee.

Katharine West, Wyse Kadish LLP, Portland, OR. Ms. West’s practice focuses on wills and trusts, estate and gift tax planning, probate and trust administration, and guardianships/conservatorships in Oregon and California. She is a member of the Oregon State Bar Estate Planning and Administration Section CLE Planning Committee, the State Bar of California Trusts & Estates Section, and the Multnomah Bar Association. She is admitted to practice in Oregon and California.
Eric Wieland, *Samuels Yoelin Kantor LLP, Portland, OR.* Mr. Wieland works in the areas of estate planning, business planning, taxation, qualified retirement plans, ERISA compliance, and trust and estate administration. Mr. Wieland is a member of the Oregon State Bar Estate Planning and Administration Section Executive Committee and chair of the section’s CLE Committee. He is licensed to practice law in Oregon and Missouri. He holds an LL.M. in Taxation from the University of Washington School of Law.

June Wiyrick Flores, *Miller Nash Graham & Dunn LLP, Portland, OR.* Ms. Wiyrick Flores works with families, family businesses, and closely held businesses to develop and implement succession strategies. She is also experienced in estate and trust administration and assists both fiduciaries and beneficiaries. Her practice also focuses on charitable and nonprofit organizations. In addition, she helps clients with asset protection. She is president of the Estate Planning Council of Portland, Inc., chair-elect of the Oregon State Bar Sustainable Future Section, an advisory board member of the OSU Austin Family Business Program, and a board member of the Portland Tax Forum. She is a member of the Oregon State Bar Estate Planning and Administration, Elder Law, Taxation, and Business Law sections, the Family Firm Institute, Attorneys for Family Held Enterprises, the American Bar Association, the Multnomah Bar Association, and the Washington State Bar Association Taxation, Real Property, and Probate and Trust sections. Ms. Wiyrick Flores is admitted to practice in Oregon, Washington, and California. She is a frequent speaker on family business, estate planning, and tax planning topics.
Chapter 1
Nontaxable Trust Administration

Nicole Erickson
Wyse Kadish LLP
Portland, Oregon

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Nontaxable Trust Administration

• Scope of this CLE is limited to trusts which were revocable during the Settlor’s lifetime and have become irrevocable upon Settlor’s death.
• Nontaxable.

What is a nontaxable estate?

• Global assets owned are less than $1 million. Although the minimum assets required for a federally taxable estate are $5.49 MM (2017) (increasing to $5.60 MM for 2018), the minimum assets required for an Oregon estate tax purposes are $1MM.

• This includes assets held anywhere and of any kind – out of state, out of the country, tangible or intangible.

• Decedent’s owning at least $1 MM will need to file an OR 706, even if no tax is due. The reported value on the return will be the basis of the asset for the beneficiaries.
Decedent’s final income tax return

• Although the Decedent in our hypotheticals does not own assets equal to or greater than $1MM, there are still tax returns to be filed.

• Basic Rule = tax year is from the 1st of the year through the date of death.
  – An income tax return will be due April 15 the year following death.
  – Ex: D dies April 5th, 2018. D’s 2017 return is due April 15, 2018, just 10 days later. D’s 2018 return, reporting income from Jan. 1, 2018 until April 5, 2018, is due April 15, 2019.

Final income tax return cont’d

• Income tax return must only be filed for a decedent who would have been required to file a return if alive during the tax year.

• 1040, 1040A, or 1040 EZ in the final tax year, as appropriate. Whether or not a return is required depends on specific facts: e.g. amount of gross income or if there was self-employment income > $400. You cannot obtain a refund without filing a return.

• “DECEASED” + Decedent’s name + DOD needs to be written across top of first page of the return.
Final income tax return cont’d

• Return can be filed by trustee or other fiduciary.
• A joint return can be filed with the surviving spouse.
• Decedent’s fiduciary can disaffirm joint return by filing separately.
• If a refund is due, the fiduciary must attach Form 1310 or copy of court certificate showing appointment. Surviving spouse can claim refund without Form 1310.

At death, the trust becomes a new taxpayer.

• Common practice is to obtain EIN for “[Name of Trust] Administrative Trust”.
• Complete a Form SS-4 (Application for Employer Identification Number), including 3rd party designee section. Keep this in your files.
• Have client sign “Authorization to Obtain EIN” letter and keep it in the file.
• December is the default closing month on the SS-4 unless 645 election is made.
• The 645 Election is made by selecting “Trust Filing as Estate” CHECK THE BOX.
Option for efficient reporting - 645

- 645 election allows the estate and trust to report together for up to 2 years on 1041.
- Consider this election if probate is needed and only 1 return is expected to be needed (1 and done), or if fiscal year is preferred. Fiscal year may be preferred if Decedent dies in the fall or winter and a calendar year return would be due shortly.
- 645 allows trust to be reported on same return as estate, resulting in the option of a fiscal year for the trust.

645 continued

- Ex. Date of death is December 1, 2017. Trust reporting period will end December 31, 2017 unless 645 elected. With 645 election plus fiscal year election, reporting will end on November 30, 2018. Return will be due on 15th day of 4th month following close of reporting period. March 15, 2019 will be the due date of the return.
- Use caution with DNI (in general), but specifically if 645 election is made. Estates and Trusts are treated as separate shares for purposes of calculating DNI. Treas. Reg. 1.645-1(e)(2)(iii).
- What is DNI? A trust accounting deduction allowed for income distributed from a trust or estate to a beneficiary.
- What is the separate share rule? The income distributed from the estate is only deductible from estate income and income distributed from the trust is only deductible from the trust. If estate has $10k income and makes $0 distributions but the trust has $1k income and makes a $9k distribution, the estate will have $0 DNI deduction. The deduction is wasted due to the separate share rule.
Forms 56, 4506, 4810, and 5495

- Notice of fiduciary or termination of relationship. Form 56
- Request decedent’s prior tax returns. Form 4506 for full return, or Form 4506-T for Return Transcript (often free).
- Request for prompt assessment of taxes – this shortens the time for assessment from 3 years to 18 months, generally. Form 4810 – caution because of the increased incidence of audit.
- Form 5495 – Release of personal liability for trustee. Request after returns have been filed. 6 months after request filed, trustee will be released from personal liability for any deficiency found after that time.

Notice of Trust Administration

- Who - Qualified Beneficiaries - generally are current and remainder beneficiaries of income or principal. Settlor can waive these during the time that surviving spouse is alive and financially capable or by designating a person to act in lieu of the qualified beneficiaries.
  - Consider Survivorship Provisions in Trust – if survival by 90 days, be aware that interests do not vest until 90 days after death. Consider value of giving notice to secondary beneficiaries if notifying before survival period has closed.
- When - Within a reasonable amount of time after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by death of settlor or otherwise ( UTC 813 states 60 days, OR modifies)
- What must the Notice inform the QB of
  - trust’s existence
  - identity of settlor
  - the right to request a copy of the trust and
  - the right to the trustee’s report.
Qualified Beneficiaries

• Who are Qualified beneficiaries – ORS 130.010(14) defines further: on the date the beneficiary’s qualification is determined, the beneficiary is
  (a) currently a permissible distributee;
  (b) would be a permissible distributee if the interests of all permissible distributees terminated; or
  (c) would be a permissible distributee if the trust terminated.

“Material Facts”

• ORS 130.710 (1) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for those beneficiaries to protect their interests.
• Tseng v. Tseng, 352 P.3d 74(2015) – the court held that under the Oregon UTC, after the death of a settlor, the beneficiaries have the right to certain information about the administration of the trust before the settlor's death.
Copy of Trust

• Notice only required to inform the beneficiary of the right to request a copy of the trust. ORS 130.710(2)(c)

• However, sending a copy of the entire trust along with notice informing the person:
  • the trust's existence,
  • trustee's name and address, and
  • time allowed for commencing a proceeding (4 months)

  – This notice starts the 4 month period running for beneficiaries to contest the trust. ORS 130.515(1)
  – Without it, statute of limitation to contest the trust is 3 years from Settlor’s death.

Beneficiary Waiver of 4 month period

• If the trustee completes all the duties of a trustee and is ready to distribute the trust assets in less than four months, trustee can request the beneficiaries to waive the 4 month period and approve early distribution. See ORS 130.840 generally.

• Be sure to inform the beneficiaries of their right to contest within 4 months in the waiver.
Trustee Report

- Trustee must report annually and at termination of the trust to permissible distributees and qualified beneficiaries who request the report. ORS 130.710 (3).
  - Exceptions for surviving spouse (restrictions apply) or waiver by settlor.
- The report must include:
  - list of trust property
  - liabilities
  - market values of trust assets, if feasible
  - all receipts and disbursements of the trust, including the source and amount of the trustee’s compensation.

Value of Assets

- The date of death value will be used for tax returns and for the initial values in trustee report.
- Bank Accounts – obtain copy of bank statement during the time decedent died.
- Stocks, bonds, and mutual funds valued using average daily price for the date of death.
- Tangible personal property – fair market value on date of death. Valuable property should be appraised.
Creditor Claims

• Petition - Trustee can opt in to abbreviated claims process by filing petition to determine claims of creditors of the settlor under ORS 130.355. Otherwise general statute of limitations applicable to claim governs.
  – Petition can be filed any time after death.
    • Only for claims against assets of trust and based on debts and liabilities of settlor.
    • This does not include claims that arise after the settlor’s death. Such claims are not “claims against the decedent’s estate,” and are not entitled to summary determination process.
    • Previously revocable trust now irrevocable.

Petition and Statute of Limitations have some limitations

– 1 year tolling of Stat. Limits. = Any claim not barred by statute of limitations at decedent’s date of death is not barred by statute of limitations until 1 year after death.

– Petition to determine claims and any SOL do not affect:
  • Mortgage, pledge or other lien on property of estate;
  • Quiet title or reform any instrument to title to property; or
  • In a Proceeding to establish liability of settlor or trustee who are protected by liability insurance, to the limits of the insurance protection only.
Petition

- Must include Information about settlor, trustee, and trust.
- May file proceeding in the county where:
  - Settlor’s domicile or “abode”;
  - Assets of trust were located at time of death or at the time the proceeding is commenced; or
  - Settlor died.
- Court will have personal jurisdiction over trustee, even if not a resident of Oregon.

Notice to Creditors

- Publication of Notice – general notice to any claimants published once in 3 consecutive weeks in newspaper in the county where petition filed.
  - Creditors have 4 months from 1st publication to present claims.
- Notice to Individual Claimants – trustee must give notice within 3 months (longer if court allows) to
  - Known Creditors;
  - Department of Human Services; and
  - Oregon Health Authority.
  - Creditors have 30 days to present claims.
Types of Claims

- Debt due or judgment – allowance of debt remaining on date of allowance.
  - Judgment prior to death? Present claim as if no judgment entered.
  - Unless Judgment was lien a/g ppty in trust on DOD, present as claim on debt due w/ security.
- Debt not yet due – present as debt due regardless of security.
  - Allowance equal to value of debt on date of allowance.
  - Creditors can w/draw claim w/o prej. other remedies.
  - Payment discharges debt and security, if any.
- Secured debt – creditor can present as debt due or rely on security.
  - If presented as debt due, allowance of debt remaining unpaid on date claim allowed.
  - If NOT presented as debt due, limited to security interest.
  - If security surrendered, payment made on the amount allowed.
  - If security not surrendered,
    - Security exhausted? Payment is amount allowed less amount realized on exhausted security.
    - Security not exhausted? Payment is amount allowed less value of security (determined by agreement or court order)
- Contingent or unliquidated debt – presented as any other claim until further events.
  - Trustee may need to hold back sufficient funds to cover debt for 2 years.
  - Otherwise beneficiaries may be liable.

Allowance and Disallowance of Claims
ORS 130.400

- Trustee has 60 days from receipt of claim to
  - Mail or deliver
  - Notice of disallowance
  - To claimant
  - And Claimant’s attorney, if a
- Disallowance must inform claimant that claim will be barred unless claimant:
  - Requests summary determination; or
  - Commence separate action;
  - w/in 30 days after date of mailing or deliver of notice of disallowance.
Disallowance Cont’d

• If summary determination requested, trustee has the option to notify the claimant that they have to file separate action.
  – Trustee has 30 days to give notice after the request for summary determination served.
  – Claimant has 60 days from receipt of notice to file separate action.
  – Claim is barred if a separate action is not filed within 60 days.

Summary Determination

• On a claim which has been disallowed by the trustee, court will require evidence other than claimant’s testimony. ORS 130.410
• Trustee’s choice of summary determination proceeding vs. separate action:
  – No appeal can be taken from Summary Determination
  – Civil action allows trustee to petition court for disposition of claims or treatment of claims.
  – Consider In re Estate of Ramey, 260 Or App 652, 320 P.3d 586 (2014). Here the Court of Appeals that ORS 115.145 and .165 do not permit counterclaims. This case was in probate administration and not a trust.
## Payment on Allowed or Established Claims

- If payment is not made 6 months after publication of notice
  - Claimant can apply to court for order directing trustee to pay.
- Trustee can collect from beneficiaries who received distributions in an amount equal to the amount their distribution would have been reduced by timely payment. ORS 130.405

## Priority of Claims ORS 130.425

- Trust administration expenses
- Funeral/burial expenses
- Debts and taxes due with preference under federal law – see IRM Part 5, Chapter 17, Section 13 for discussion of Federal Priority of Claims Statute 31 USC § 3713(a)(1)(A). Generally: court costs, fiduciary’s and fiduciary’s attorney’s compensation, expenses to collect and preserve assets.
- Last illness
- Taxes under state law while trust estate in possession of trustee
- Employee/labor w/in 90 days of death
- Child support
- Department of Human Services and the Oregon Health Authority
- All other claims against the trust estate.
- If the assets of the trust estate are insufficient to pay in full all expenses or claims of any one class specified in subsection (1) of this section, each expense or claim of that class shall be paid only in proportion to the amount thereof.
Protecting the Trustee

- More disclosure is better.
- Termination or partial termination of trust? Receipt and Release –ORS 130.730(3)
- Notice of Proposed Action ORS 130.733-Beneficiary has 45 days to object. Failure to object does not foreclose liability for:
  - Trustee compensation
  - Trustee report and settlement of accounts
  - Sale of trust property to trustee or trustee property to trust
  - Exchange of trust property for property of trustee
  - Grant an option for trustee to purchase trust property
  - Trustee claims against trust
  - Trust claims against trustee
  - Debt of trustee owed to trust

Statute of Limitations

- Statute of limitations against trustee 6 years from act or omission or discovery. ORS 130.820(1)
  - 6 years is usually from trust termination but can be earlier if trustee left office before trust termination or if specific beneficiary received final distribution before trust termination.
- Potential Claim Report – Trustee can send detailed notice fully disclosing potential claims to beneficiary, informing the beneficiary of the 1 year to commence proceeding. ORS 130.820(2)
- If neither 6 yr SOL or 1 yr after Potential Claim Report apply, 10 years from date of act or omission or 2 years from termination of fiduciary account, the later of the two. ORS 130.820(3) Intended to apply to trustees that do not prepare annual reports or inadequately disclose a specific claim in a Potential Claim Report.
- Maintain records, follow trust instrument, and always disclose in writing.
Retirement Benefits

- Trustee needs to be aware if any retirement benefits name the trustee as beneficiary.
- This obligates the trustee to determine if the trust qualifies as a “see-through” trust.
  - See-through? Then distributions of RMD are made based upon the life expectancy of the eldest beneficiary.
  - If not, did the Decedent die before or after Req’d Beginning Date? Usually, April 1 the year following Decedent’s attaining age 70 ½.
    - Death BEFORE RBD? – 5 year rule applies and account must be drained by 5th year following death.

Distributions to Minors or Incapacitated Beneficiaries

- Review trust agreement for provisions giving Trustee discretion to make distributions to 3rd party fiduciary instead.
- Absent provisions, conservatorship is required.
- Even if authorized to make distributions to parents or guardians, weigh the risk that the minor or incapacitated beneficiary will later contest.
  - Consider the value of seeking Court approval for the proposed action.
## CREDITOR CLAIMS DATES CHECKLIST - Trust Administration

<table>
<thead>
<tr>
<th>Trust:</th>
<th>WK Matter:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of Death (DOD):</td>
<td>Attorney:</td>
</tr>
<tr>
<td>Social Security No.:</td>
<td>Trust EIN:</td>
</tr>
<tr>
<td>Date of Trust Agreement:</td>
<td>Trust Amendments:</td>
</tr>
<tr>
<td>T'EE:</td>
<td>County:</td>
</tr>
<tr>
<td>Taxable Estate?</td>
<td>Yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>✓/n/a</th>
<th>ACTION</th>
<th>DATE DUE/TO BE FILED</th>
<th>DATE FILED</th>
</tr>
</thead>
<tbody>
<tr>
<td>File Petition to Determine Claims of Creditors of Settlor - Petition Requirements ORS 130.355(1)(a)-(e). Abbreviating Claims Process ORS 130.350(1)(2). These creditor cutoff dates will not affect any proceeding to enforce a mortgage, quiet title or limits of liability insurance. See ORS 130.435.</td>
<td>any time after DOD</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publication of Notice to Claimants - <strong>Claimants have 4 months to present (calendar this date)</strong> notice requirements ORS 130.365</td>
<td>w/in 4mos of Petition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mail Special Notice to Individual Claimants - <strong>Claimants have 30 days to present. If extension needed must file request with court before 3 months (calendar this date)</strong> mailing requirements ORS 130.370</td>
<td>w/in 3 months of Petition</td>
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<tr>
<td>Claim Presented - (T’ee must determine allowed claims within <strong>60 days</strong>, otherwise presumed allowed as presented) (list each claim separately - calendar date of each claim) Claim Req’s ORS 130.375</td>
<td><strong>LATER OF:</strong> 4 months- Date of First Pub of Notice or 30 days after notice mailed or delivered</td>
<td></td>
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</tr>
<tr>
<td>Notice of Disallowance of Claims - if no reply by Claimants, then claim barred. Claimant can request Summary Determination or File Separate Action. 60 days ORS 130.400(2) notice req’s ORS 130.400(3) claim can be barred 130.400(6)</td>
<td>* Date Claim Received: (calendar response within 60 days, calendar reminder to respond by 60 days, at 30 days before due date) 30 days ORS 130.380-395, 130.400(10)</td>
<td></td>
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</tr>
<tr>
<td>Notice of Disallowance of Claims from T’ee</td>
<td>Must be filed 60 days after Claim Presented</td>
<td></td>
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<tr>
<td>Request for Summary Determination of Claim - filed by claimant within <strong>30 days</strong> of mailing of Notice of Disallowance of Claims See ORS 130.400(4),(5),(8),Claimant pays filing fee (10)</td>
<td>30 days after Notice of Disallowance of Claims from T’ee</td>
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</tr>
<tr>
<td>Notice that Claimant Must File Separate Action - T’ee can file in response to Request for Summary Determination. (Must be filed within <strong>30 days</strong> after request for summary determination is served on T’ee) (Calendar 60 days from receipt by claimant for claimant to File Separate Action) notice req’s ORS 130.400(7), Summary Determination 130.400(8) - no appeal</td>
<td>30 days after Request for Summary Determination of Claims served by Claimant on T’ee</td>
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<td></td>
</tr>
<tr>
<td>Response to Notice for Separate Action - claimant has <strong>60 days</strong> from receipt to file. Failure to file Separate Action - claims barred. 60 day deadline 130.400(7)</td>
<td>60 days from Notice from T’ee re: Separate Action</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payment made on allowed claims - must be sent within <strong>6 months</strong> of 1st date of publication of notice, or claimant can apply to crt for order. 130.405</td>
<td>6 months from date of 1st publication of notice</td>
<td></td>
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</tr>
<tr>
<td>Petition to Close Case - <strong>Later of 4 mos after the date of publication or date all claims resolved.</strong> Court shall enter order closing the case - record date. Otherwise, dismissal for want of prosecution at 1 yr from Petition, claims will not be barred. Pet. Req’s 130.440, Dismissal 130.445</td>
<td>4 mos from Publication or Date all claims resolved or 1yr Dismissal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### 2017 Trustee Reporting Requirements

This summary only concerns mandatory affirmative duties. Please review rules if Trustee receives requests, as different rules may apply. Oregon UTC imposes affirmative duty on Trustees of express trusts. If Settlor of Rev. Trust is alive, only Settlor receives notice, information and reports. Where indicated a Settlor can waive some of these requirements. Waiver requirements are covered in ORS 130.020(3). If Surviving Spouse is beneficiary, check ORS 130.710(8) for reduced requirements.

<table>
<thead>
<tr>
<th>ACTION</th>
<th>TIME</th>
<th>PERSON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Acceptance of Trusteeship</td>
<td>Reasonable Time - 60 days unless circ. justify longer</td>
<td>Qualified Benes - unless Settlor waives or SS is only Perm. Distrib., financially capable and all QB are desc of SS.</td>
</tr>
<tr>
<td>(ORS 130.710(2)(b), 130.710(8), 130.020(2)(h))</td>
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</tr>
<tr>
<td>Notice of Creation or Existence of Irrevocable Trust—including ID</td>
<td>Reasonable Time - 60 days unless circ. justify longer</td>
<td>Qualified Benes - unless Settlor waives or SS is only Perm. Distrib., financially capable and all QB are desc of SS.</td>
</tr>
<tr>
<td>Settlor, Right to Request Copy of Trust Instrument, and Right to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trustee Report (ORS 130.710(2)(b), 130.710(8), 130.020(2)(h),130.020(3))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annual Reports (ORS 130.710(3)(a), 130.710(8) 130.020(3))</td>
<td>At least annually</td>
<td>Perm. Distrib. and requesting Qbs, unless Settlor waives or SS is only Perm. Distrib., financially capable and all QB are desc of SS.</td>
</tr>
<tr>
<td>Report on Term. of Trust (ORS 130.710(3)(a) and 130.020(4))</td>
<td>Upon Term. of Trust</td>
<td>All QB and any person Designated by Settlor to act in GF on QB behalf. This may not be waived by Settlor.</td>
</tr>
<tr>
<td>Notice of Change in T’ee Comp. (ORS 130.710(2)(d), 130.710(8) and</td>
<td>In advance</td>
<td>QB - unless Settlor waives or SS is only Perm. Distrib., financially capable and all QB are desc of SS.</td>
</tr>
<tr>
<td>130.020(3))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Notice of Transfer of Trust (ORS 130.022)</td>
<td>60 days before initiating transfer</td>
<td>QB - also, QB must have at least 60 days from notice to object.</td>
</tr>
<tr>
<td>Request for Copy of Trust (ORS 130.710(2)(a))</td>
<td>Promptly</td>
<td>QB - unless SS Perm. Distrib. And all QB desc of SS.</td>
</tr>
</tbody>
</table>
NOTICE TO CLAIMANTS

______________________ TRUST u/a/d ____________
Settlor(s): ___________________________

Notice is hereby given that [successor trustee] has been appointed as successor trustee of the above-referenced trust. All persons having claims against the trust estate are required to present them to the undersigned trustee in care of the undersigned attorney at: [attorney address] within four months after the date of first publication of this notice, as stated below, or such claims may be barred.

Notice is hereby given that claims against the above-referenced trust estate may be barred unless presented to the trustee at the address specified in this notice within four months after the date of the first publication of the notice.

Dated and first published: __________________________

[Successor trustee]
Successor Trustee

[ATTORNEY] (OSB #___________)
Address
City, OR Zip
Authorization to Obtain EIN

I, [TRUSTEE], am the trustee of the [TRUST NAME]. I hereby authorize my attorney, [ATTORNEY], or his/her staff to apply on my behalf for an Employer Identification Number (EIN) for the Trust, and to answer any questions about the application.

Dated: November 8, 2017.

_________________________________
TRUSTEE
CERTIFICATION OF TRUST
Given pursuant to ORS 130.860

1. The [name of trust] was established under agreement dated * (the “Trust”) under the laws of the State of Oregon. During the period of administration following the Trustor's date of death, the Trust may be referred to as the ______________ Administrative Trust u/a/d ______________.

2. The Trustor of the Trust is [client 1], who is now deceased.

3. The currently acting Trustees of the Trust are [client 1] and [client 2], whose mailing address is ________________________.

4. The trustee powers include at least all of those powers contained in the Oregon Uniform Trust Code set forth in ORS chapter 130.

5. The Trust is irrevocable and may not be modified or amended without court order.

6. The Trust’s taxpayer identification is ____________.

7. Trust assets should be taken in the name of [client 1] and [client 2], Trustees of the [name of trust] u/a/d *.

8. The Trust has not been revoked, modified, or amended in any manner that would cause the representations contained in this certification to be incorrect.

9. The signature of either Trustee named in paragraph 3 above shall be sufficient to exercise trust powers.

10. [this section is not mandatory - see 130.860(8)] [successor] is named as successor Trustee under the Trust, and shall become Trustee in the event of the death, resignation or incapacitation of both of the Trustees named in paragraph 3 above.

Dated: *

__________________________________________    _____________________________________________
[client 1], Trustee    [client 2], Trustee

STATE OF OREGON       )
) ss.
County of Multnomah   )

On *, personally appeared the above-named [client 1] and [client 2], Trustees, and each acknowledged the foregoing instrument to be his or her voluntary act and deed.

__________________________________________
Notary Public for Oregon
Chapter 2

Ethical Questions Raised by the Fifth Edition of the ACTEC Commentaries on the Model Rules of Professional Conduct

Professor Karen Boxx
University of Washington
Seattle, Washington

Philip Jones
Duffy Kekel LLP
Portland, Oregon

Contents

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The American College of Trust and Estate Counsel (ACTEC) has for many years offered Commentaries to the Model Rules of Professional Conduct that apply the rules to the estate planning, probate and guardianship practice. A Fifth Edition of the Commentaries has recently been completed and was approved by the ACTEC Board of Regents at its annual meeting in March, 2016. The Fifth Edition is available on the ACTEC public website, at http://www.actec.org/publications/commentaries/

In the course of revising the Commentaries, ACTEC’s Professional Responsibility Committee discussed a number of difficult issues raised in an estate planner’s practice. Discussions with other practitioners as the Fifth Edition was circulated have raised different perspectives on how to resolve these issues. These materials cover some of those issues and discuss the guidance offered by the Commentaries and the lingering questions. It should be noted that the primary goal of the Commentaries is to offer guidance to practitioners, ethics boards and the courts but not to declare what is or is not a violation of the rules. Resolution of the ethical issues discussed in these materials depends on the particular circumstances and on the specific rules in the controlling jurisdiction.

1. **Joint Representation and Separate Representation of Related Parties: Spouses.**

*Under what circumstances can an attorney represent both spouses for their estate planning? Can an attorney specify that the representation of each spouse is separate from representation of the other, so that confidential information from one would not be shared with the other? If the representation is joint, when must confidential information be shared?*

Representation of married couples was extremely controversial when the first version of the Commentaries was drafted. While many drafters held a strong belief that separate representation of spouses was inconsistent with the lawyer’s duty of loyalty to each client and therefore not appropriate (*see generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6*), there was a contingent of experienced estate planners who regularly represented married clients on that basis. In order to accommodate the practice of those lawyers, and in keeping with the goal of the Commentaries, separate representation was acknowledged as an ethical practice as long as precautions, such as informed consent, were taken. There was a form engagement letter included in the Engagement Letters Guide for Representation of Both Spouses Concurrently but Separately. In the Fifth Edition, however, separate representation is now strongly discouraged. The Commentary to Rule 1.7 now states that “such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide, impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing.” In the next edition of the Engagement Letters Guide, which is expected to be published and available on the website next year, there will no longer be a form letter for separate representation of spouses.
The discussion on sharing of confidential information among joint clients in the commentary on Rule 1.6 has been revised. The Commentaries strongly encourage the lawyer to obtain consent at the onset of representation for sharing of information. The lawyer is urged to ask the joint clients “at the outset of the representation to agree that information from either client may be shared with the other client if the lawyer considers such sharing of information necessary or beneficial to the representation.” This language recognizes that not all information has to be shared, and leaves it to the discretion of the lawyer to determine what should be shared rather than mandating in the consent that the lawyer share everything. If there is no such agreement, and the lawyer faces the issue of a communication from one joint client that the joint client does NOT want shared, the advice in the Commentaries remains the same from previous versions:

A lawyer who receives information from one joint client (the “communicating client”) that the client does not wish to be shared with the other joint client (the “other client”) is confronted with a situation that may threaten the lawyer’s ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, inter alia, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer’s ability to represent the other client effectively (e.g., “After she signs the trust agreement, I intend to leave her…” or “All of the insurance policies on my life that name her as beneficiary have lapsed”). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client’s economic interests or otherwise violate the lawyer’s duty of loyalty to the other client.

In order to minimize the risk of harm to the clients’ relationship and, possibly, to retain the lawyer’s ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the existence of an agreement at the outset of the representation that all information will be shared is particularly helpful. The lawyer may properly remind
the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer’s obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client’s suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Commentary to Rule 1.6. Example 1.7-1 has been revised to reflect the adjustments to the Commentaries:

Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W their estate planning goals and the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent a husband and wife as joint clients. The representation of a husband and wife as joint clients does not ordinarily require the informed consent of either or both of them. However, before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. See ACTEC Commentary to MR 1.6.

May a lawyer represent multiple generations of a family for their estate planning? If yes, can the representation be separate so that confidential information is not required to be shared?

The Commentary to Rules 1.6 and 1.7 addressing this issue have been revised and an example has been added. The Commentary to Rule 1.6 states:

Some estate planners represent a parent and child in related estate planning matters or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients in related matters should do so with great care because of the stress it necessarily places on the lawyer’s duties of impartiality and loyalty and the extent to which it may limit the lawyer’s ability to advise each of the clients adequately. For example, without disclosing a confidence of one estate planning client who is the parent of another estate planning client and whose estate plan differs from what the child is expecting, the lawyer may have difficulty adequately representing the child/client in his or her estate planning because of the conflict between the duty of confidentiality owed to the parent and the duty to communicate owed to the child. See Commentary to Rule 1.7, example 1.7.1a. Within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. Changed circumstances may, however, create an unwaivable conflict under MRPC 1.7 and require withdrawal even if the clients consented.

The new example in Commentary to Rule 1.7 states:

Example 1.7-1a. Lawyer (L) was asked to represent Father (F) and Son (S) in connection with estate planning matters. L had previously not represented either F or S. At the outset L should discuss with F and S their estate planning goals and the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. If the prospective clients have common estate planning objectives and coordination is important to them, and there do not appear to be any prohibitive conflicts, the best practice would be for the lawyer to undertake the representation of the two clients jointly with an agreement that information can be shared. Depending on the circumstances, however, a lawyer may be able to represent the father and son as separate clients between whom information communicated by one client will not be shared with the other. The parties may not come in together and ask for coordinated estate planning, for example, but instead may come in separately. Even then, the circumstances may be such that the lawyer knows or should know that their estate plans are interconnected. In that situation, separate representation seems appropriate, provided that there is no obvious conflict of interest between the clients. But even in this situation, the lawyer will need to make a conflict determination and may need to
obtain the informed consent of each client if there is a “significant risk” that the representation of one might be materially limited by the representation of the other. In such a case, each client must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

The lawyer can include language in the engagement letter that clarifies that confidences will not be shared, even if the information was relevant to the representation. In other words, the engagement letter could provide that the duty of confidentiality to one client (under rule 1.6) would trump the duty to communicate relevant information to the other client (under rule 1.4). If no such advance disclosure and agreement was obtained at the beginning of the representation, then if a confidence from one client was sufficiently related to the representation of the other that a duty to communicate would arise, the lawyer would have conflicting duties to the two clients. For example, if the parents decide to disinherit the child who is also a client, that information may be crucial to the child’s estate plan. The disclosure and agreement should be communicated to both clients, even if the one client (for example, the parents) has been a long time client of the lawyer.

3. **Disclosures to Client’s Agent.**

_A client is now incapacitated. The client’s attorney-in-fact (appointed under the durable power of attorney drafted by you) calls you and wants copies of the client’s estate planning documents so that the attorney-in-fact can manage the property consistent with the estate plan. May you send the documents to the attorney-in-fact?_

New language was added to the Commentary to Rule 1.6 addressing this issue.

_Disclosures to Client’s Agent._ If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client’s affairs, the attorney-in-fact often will ask the lawyer for copies of the client’s estate planning documents in order to manage the client’s assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney’s duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client’s preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request, based on specific circumstances and the specific information being requested by the attorney-in-fact, that indicate disclosure has been impliedly authorized to carry out the purpose of the representation of the client._
The lawyer could include language in the engagement letter giving the lawyer permission to give copies of the estate planning documents to the designated agent, once the issue is discussed with the client, so that the agent’s access to the documents is clarified.

4. **Fiduciaries and Beneficiaries.**

May an attorney represent the personal representative of an estate and also represent a different person who is a beneficiary of the same estate? Isn’t the attorney for the personal representative also the attorney for the beneficiaries?

The Commentaries point out that the duties owed to beneficiaries by the fiduciary’s lawyer varies from state to state and can vary depending on the nature of the fiduciary estate and the nature and extent of the representation. In the Commentary to Rule 1.2, the Commentaries state that the “beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.”

In Oregon, it is clear that an attorney for a personal representative does not represent the estate or any of the beneficiaries. Oregon Formal Opinion 2005-62; Oregon Formal Opinion 1991-119. The attorney represents the personal representative. In most situations, the attorney cannot also represent any of the beneficiaries, due to the inherent conflict between the personal representative and the beneficiaries. See Annotation, Estate Attorney Representing Heirs, 47 ALR2d 1104 (1956) (attorney for estate not permitted to represent a beneficiary in an action against the estate). It may be possible to represent a beneficiary on unrelated matters, such as the beneficiary’s personal estate planning, if consents are obtained.

5. **Fiduciary As Beneficiary.**

Is it possible for an attorney to have a conflict of interest when the attorney represents a trustee who is also a beneficiary of the trust? Is that situation similar to having two clients? What if the trustee is not only a beneficiary, but also a claimant against the trust? Since the trustee has three roles to play, is that situation similar to the attorney having three clients?

This has been one of the most controversial issues raised in the discussions about the Fifth Edition. A conservative position that a lawyer should avoid a conflict by not representing a fiduciary client in the client’s individual capacity was considered too restrictive, particularly in light of common practice of representing a surviving spouse who is both fiduciary and beneficiary of the deceased spouse’s estate. The Commentary to Rule 1.7 has added the following language:
Chapter 2—Ethical Questions Raised by the ACTEC Commentaries on the Model Rules

Representation of Fiduciary in Representative and Individual Capacities

Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be serving as executor while at the same time being a beneficiary of the estate, and may want the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client’s personal interest, such a “dual capacity representation” poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client’s personal interest in a way that is inconsistent with the client’s fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities. The idea that the client “as fiduciary” could give informed consent to the continuing representation of the client “as individual” or vice versa seems psychologically unacceptable.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer’s clients. MR 1.7(a)(2) notes that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to …a third person” then MR 1.7(b) must be complied with, including the duty to get informed consent found in MR 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MR 1.7(b)(4) only contemplates waivers from “affected client[s].” Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

Example 1.7.4 X dies leaving a will in which X left his entire estate in trust to his spouse A for life, remainder to daughter B, and appointed A as executor. A asked L to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented, including an informed agreement to forego any right to have the L advocate for A’s personal interest insofar as it conflicts with A’s duties as executor. L may properly represent A in both capacities.
However, $L$ should inform $B$ of the dual representation and indicate that $B$ may, at his or her own expense, retain independent counsel. In addition, $L$ should maintain separate records with respect to the individual representation of $A$, who should be charged a separate fee (payable by $A$ individually) for that representation. $L$ may properly counsel $A$ with respect to her interests as beneficiary. However, $L$ may not assert $A$’s individual rights on $A$’s behalf in a way that conflicts with $A$’s duties as personal representative. If a conflict develops that materially limits $L$’s ability to function as $A$’s lawyer in both capacities, $L$ should withdraw from representing $A$ in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

Example 1.7.5  

$X$ dies, leaving a will giving $X$’s estate equally to his three children. Child $A$ was appointed executor. $A$ engages $L$ to represent her as executor. $A$ engages $L$ to represent her as executor. A dispute arises among the three children over distribution of $X$’s tangible personal property, and $A$ asks $L$ to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, $L$ may need to advise $A$ to obtain independent counsel to represent her in the dispute. In addition, $L$ may need to advised $A$ to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.

In other words, the Commentaries take the position that representing a client as both fiduciary and beneficiary can be done but depending on the circumstances, there may be an insurmountable conflict. Cases consistent with this approach include:

Frank v. Estate of Frank, 1992 Conn. Super. LEXIS 3548
Smith v. Jordan, 77 Conn. 469 (1904)
In re Probate Appeals Daniel Kennedy, 2013 Conn. Super. LEXIS 1219

In *Smith v. Jordan*, the court noted that the lawyer representing the administrator in requesting construction of the Will also represented the administrator and the brother as claimants under the will, and stated that “sound policy forbids such a practice.” In *Frank*, the court disqualified a lawyer that represented a client both as fiduciary and beneficiary, finding that under the circumstances there was an actual conflict between her interests as beneficiary and her fiduciary duties. The court stated: “When an attorney represents two clients with adverse interests, it is the attorney’s duty to withdraw from the representation … As a reasonable extrapolation, this court finds that this rule of law, which applies to two clients with adverse interests, should also apply to one client represented in a dual capacity with adverse interests.” In *Kennedy*, the court held that the client’s positions as plaintiff suing his brother and as executor of his mother’s estate were not in conflict, so the lawyer could represent the client in both capacities.

There is a 2001 Washington disciplinary case, where the lawyer was disciplined for representing a client both as executor of an estate and in her individual capacity
claiming a bank account that was the major asset of the estate. The client claimed that she was added as owner to the bank account during her father’s life and the other beneficiaries contested her claim.  

In Oregon, the answer is that the attorney cannot have a conflict if he represents one client who has two or three roles; the attorney nevertheless has only one client. See Oregon Formal Opinions 1991-119 and 2005-119. If the client has three roles, the answer is the same. In each case, the duty of the attorney is to advise the one client how to balance the one client’s various interests. The client has conflicting interests, but the attorney does not have conflicting clients.

[Note that in 2005 and 2006, the OSB Ethics Committee re-wrote and re-published many of the prior Formal Ethics opinions. As a result, Opinions 1991-119 and 2005-119 are essentially the same opinions, but the latter opinion has citations to the more recent version of the rules.]

The fact that the trustee is also one of the beneficiaries does not require that person to retain two attorneys, one to represent the person as the trustee, and one to represent the person as a beneficiary. That one person needs only one attorney, and the attorney will not have a conflict of interest simply because the one client has a conflict of interest, or plays two conflicting roles. In Formal Opinion No. 2005-119, the Oregon State Bar ruled:

It follows that when Lawyer A represents Widow as an individual and Widow in her capacity as personal representative, Lawyer A has only one client. Alternatively stated, the fact that Widow may have multiple interests as an individual and as a fiduciary does not mean that Lawyer A has more than one client, even if Widow’s personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7, do not apply to Lawyer A’s situation. (Citations omitted)

The same result is reached by Formal Opinion No. 1991-119.

In Baker Manock & Jensen v. Salwasser, 175 Cal.App.4th 1414, 1424, 96 Cal.Rptr.3d 785 (2009), the California court allowed an attorney to represent a client in dual capacities after finding there was no conflict. It was an attorney disqualification case in which an executor named George was also a beneficiary of the estate. George was represented by one law firm, but his position in the litigation as executor was the same as his position as beneficiary. The court stated, “Thus, even if the law firm were viewed as representing ‘two Georges’ who at least in theory, could have conflicting interests …, in the case before us, there is no divergence of the interests of George as executor and George as beneficiary. Accordingly, there is no conflict of interest in representing both the executor and the beneficiary.”
Also in California, in Buoni, 2006 Cal. App. Unpub. Lexis 9368, (Cal. App. 10/20/2006, No. F048163), an attorney represented an executor who was also a creditor of the estate. When an opponent moved to disqualify the attorney due to an alleged conflict of interest, the court concluded that the client had a conflict, but the attorney did not. The court noted that under California probate statutes, claims submitted by an executor must be reviewed by the probate court, thus offering an additional layer of protection. The court held:

In applying the above standards here, the identity of the client must first be determined. Only one individual is involved, i.e., respondent. However, does respondent, as personal representative and creditor, become two clients for purposes of rule 3-310(C)?

The attorney for a personal representative represents the fiduciary alone, not the estate. An estate is neither a legal entity nor a natural or artificial person. Accordingly, respondent, as a personal representative and as a creditor, is only one client. As respondent's attorney, [the attorney] does not represent either the estate or appellant as a beneficiary.

Nevertheless, there still remains the question of whether the representation of one client in these two capacities violates rule 3-310(C). In other words, is [the attorney] disloyal to respondent as the personal representative by also representing respondent as a creditor of the estate and vice versa? The answer clearly is "no." Logically, where only one person is the client, the attorney is not dividing his or her loyalty between two or more clients. [The attorney] remains in a position to be loyal to respondent's interests alone. Thus, this case is distinguishable from the situation where an attorney for a corporation, who as corporate counsel represents the corporation's officers in their representative capacity, also attempts to represent a corporate officer personally. In that case, the attorney acquires a conflict of interest with the corporation, a separate legal entity to whom the attorney owes a separate duty of loyalty.

This is not to say that no conflict of loyalties may exist in this case. However, it is respondent who has the conflict, i.e., a personal interest in a claim against the estate that he is administering, not his attorneys. …

In fact, if it were concluded that [the attorney] was disqualified, respondent would be in the untenable position of having to employ two separate attorneys to avoid the identical situation.

In sum, in representing respondent, [the attorney] represents only one client. Further, the interests of the estate and the beneficiaries are protected by the section 9252 procedure. Accordingly, disqualification of [the attorney] is not required. (citations omitted.)
The North Carolina State Bar has issued a formal ethics opinion, RPC 22 (4/17/87), in which the Bar concluded that an attorney cannot, without the consent of the beneficiaries, represent an executor (who was the wife of the decedent) in her two roles as executor and individually, when the creditors had sued both the executor and the wife individually. The ruling noted that conflicts existed between the two roles. The ruling concluded that an attorney cannot represent clients with adverse interests.

Also in North Carolina, an appellate court affirmed a trial court ruling that an attorney should be disqualified from representing an executor in her capacity as executor and in her individual capacity, when the executor/individual was accused of removing assets from the estate. This was not an ethics disciplinary action; instead, it was a ruling on a motion to disqualify the attorney from continuing to represent the client in her two roles. The appellate court found that the granting of the disqualification motion was a discretionary act by the trial court, and that the trial court had not abused its discretion when it granted the disqualification motion. The appellate court did not necessarily conclude that the ethics rules had been violated, but the court did cite both the rules of professional conduct and the ethics opinion cited above. Williams v. Williams, 228 N.C. App. 753, 746 S.E. 2d 319 (2013).

In a New York attorney disqualification case (again, not an ethics disciplinary case), the court held that an attorney may represent an executor who is also a residuary beneficiary of the estate, and thus the attorney should not be disqualified from doing so. In that case, however, the executor was attempting to acquire assets for the estate, which would have increased the shares of all of the residuary beneficiaries, and thus a conflict was not created by the two roles. In dicta, the court commented that “it may be claimed” that an attorney represents conflicting interests if the attorney were to represent an executor who is also individually making a claim against the estate, but the opinion did not indicate what the court’s ruling would have been under those facts. Flasterstein’s Estate, 210 N.Y.S.2d 307, 27 Misc.2d 326 (N.Y. Sur. 1960).

Subsequently in New York, the Surrogate’s Court decided Birnbaum’s Estate, 460 N.Y.S.2d, 118 Misc.2d 267 (1983), which relied on Flasterstein to conclude that an attorney who represented a widow, who was both a co-executor and a beneficiary of the estate, would not be disqualified from representing the widow. In that case, the co-executor had made a loan from the estate to her son. A different co-executor brought suit to seek repayment of the loan. In addition, that other co-executor sought disqualification of the widow’s attorney, based on an alleged conflict of interest due to the two roles played by the widow. The court ruled against disqualification, stating that the pending dispute involved the widow in her fiduciary capacity, not in her individual capacity as beneficiary. The court also noted that three separate law firms were representing the three separate co-executors, that all of the children beneficiaries also had separate counsel, and that hiring separate counsel for the widow individually would be “unnecessary and wasteful.”

Also in New York, in Estate of Tenenbaum, 2006 N.Y. Misc. Lexis 9013; 235 N.Y.L.J. 1 (NY Surrog. 2006), an attorney represented a client who was serving as both claimant and co-executor. When an opposing party moved to disqualify the attorney due to an alleged conflict of interest, the court declined to disqualify the
attorney. The court noted that the client was pursuing her claim in her individual capacity as a claimant, and not as a co-executor. In addition, the three co-executors were opposing the claim, and all three were represented by counsel. Thus the interests of the estate were adequately protected. The court did note that if the claimant were the sole executor, then a conflict of interest “might conceivably” be present.

In Ray v. T.D., 2008 Tex. App. Lexis 986 (No. 03-060024-CV, 2008), an attorney filed a wrongful death action on behalf of three clients: the executor of the decedent’s estate, the decedent’s mother, and the mother of the decedent’s minor child. The first two clients were the same person. The court denied the attorney’s request for attorney fees, partly because the attorney had a conflict of interest with the minor child because of competing claims for the wrongful death proceeds. The court did not discuss whether the executor and the decedent’s mother, who were the same person, presented a conflict.

In an Ohio case, an attorney was suspended for six months after he stipulated to a conflict of interest caused by his simultaneous representation of an executor in her fiduciary capacity and in her individual capacity, when her siblings accused her of misappropriating estate assets. Because the matter was stipulated, the issue of the conflict was not contested or litigated. Cincinnati Bar Assoc. v. Robertson, Slip Opinion No. 2016-Ohio-654 (Ohio Supreme Court, 2/25/16).

In contrast to fiduciaries (see below), attorneys must studiously avoid conflicts of interest. In general, attorneys may not represent a fiduciary while simultaneously representing one or more beneficiaries (although, as noted above, in Oregon an attorney may represent a fiduciary who is also a beneficiary, because in that situation the attorney is representing only one person). Whenever communicating with beneficiaries, the trustee’s attorney must avoid giving a beneficiary the impression that the trustee’s attorney also represents the beneficiaries; for that reason, it would be helpful to frequently remind the beneficiaries that the trustee’s attorney represents only the trustee, and not any of the beneficiaries.

When representing a person who is both trustee and a beneficiary, it may be necessary or advisable to keep two sets of time entries, one reflecting time spent representing the trustee and one reflecting time spent representing the same person as beneficiary. The purpose of the two sets of time entries would be to charge the trustee for its representation (which would then be reimbursed by the trust), and to personally charge the same person for his or her personal representation as a beneficiary (which would not be reimbursed). In most situations, however, two sets of time records will not be necessary, since all of the time of the attorney will have been spent advising the trustee on how to treat all of the beneficiaries equally and fairly, and none of the time will have been spent advising the person on his or her personal interests. And if those personal interests coincide with the clear wording of the trust document, then the trustee is not advancing the personal interests of the trustee as beneficiary, but instead is merely carrying out the terms of the trust, which the trustee is obligated to do.
6. **Focus on FATF**

*What are a lawyer’s duties in monitoring clients for criminal or fraudulent activities? What are the lawyer’s duties if the lawyer suspects criminal or fraudulent activity?*

ACTEC has taken an active role in trying to help shape the United States response to the recommendations of the Financial Action Task Force (FATF). The 5th edition of the Commentaries would be amplified to address the impact of FATF on trust and estate practice. A comment to Rule 1.2 was added as follows:

*Duty to Avoid Assisting in Criminal or Fraudulent Activity.* Whether assisting clients in probating estates, establishing trusts, or engaging in other transactions, lawyers need to be ever watchful that the client is not seeking to enlist the lawyer’s services incriminal or fraudulent activity. Lawyers who assist clients in asset protection planning must be particularly careful, and lawyers must also be watchful when following clients’ directions regarding disbursement of funds held in trust accounts. See *In re Harwell, 2012 WL 3612356 (M.D. Fla. 2012)* (discussed below in the annotations). Today, the need for diligence has taken on international dimensions. As international crime and terrorism have grown in extent and sophistication, the role that lawyers may play in such illegal activities has become a focus of the Financial Action Task Force on Money Laundering (FATF). FATF is an intergovernmental body of the major industrialized nations formed in 1989 to coordinate efforts to prevent money laundering in both the international financial system and the domestic financial systems of the member entities. Estate planners are a potential instrumentality of money laundering activities because of their expertise in setting up trusts. Trusts present a financial vehicle that might be utilized by criminals to launder illegally obtained funds and estate planners need to guard against their services being used for this purpose. FATF has issued “risk based guidance” for legal professionals to assist them in avoiding assisting such illegal activity. The ABA, in turn, has issued its own “VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING” and reinforced this with a Formal Ethics Opinion 463 in 2013. More information on these documents is provided in the annotations below. In summary, lawyers need to exercise diligence and make a determination whether their clients present a risk of such illegal activities. If clients pose such a risk, lawyers should either decline to represent, or cease representing, them as permitted under MR 1.16, or engage in further inquiry to rule out the risk that the client is using the lawyer’s services for illegal activity.
7. **Elder Abuse.**

*If a lawyer suspects a client is the victim of elder abuse, under what circumstances can the lawyer report the abuse to third parties?*

Language was added to the commentary to Rule 1.14 to address the growing problem of elder abuse and the lawyer’s role in preventing and reporting such abuse.

*Reporting Elder Abuse.* Elder abuse has been labeled “the crime of the 21st century,” and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.*, Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana)(exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.*, Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), that allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer’s ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client’s living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. *See NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm).* In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer’s obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client’s affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.
Chapter 3
Planning for a Family Member with Special Needs

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1Much of this material has been adapted and updated from the 2010 CLE Drafting Special Needs Trusts by Michael Edgel and Melanie Marmion and the 2015 CLE on the same topic. Many thanks to Christopher Ray for his assistance in putting together these materials.
I. INTRODUCTION

Planning for individuals with disabilities is a multi-faceted endeavor comprising a wide range of issues and challenges. Proper planning involves much more than Special Needs Trusts (a.k.a. "Supplemental Needs Trusts"), which may or may not be necessary or appropriate for a particular disabled individual. However, in the appropriate circumstance, a Special Needs Trust can dramatically increase a disabled person’s quality of life.

Special Needs Trusts come in many shapes and sizes, influenced by a variety of factors. To begin with, every disabled person faces a different set of health challenges and care needs. Added to that natural variation is the complexity and ever-changing nature of the law relevant to special needs trusts, which includes federal and state statutes and administrative rules, Social Security regulations, and local court rules. Although special needs trusts comprise only one part of a disability planning practice, they are a world unto themselves.

These materials are not intended as an exhaustive guide to the full array of special needs trust issues, but rather as an introductory primer on the appropriate use of special needs trusts (hereafter, “SNTs”) in estate and elder law planning.

II. WHEN TO USE A SPECIAL NEEDS TRUST

The primary purpose of a special needs trust is to provide a fund for a disabled person that will enhance his or her quality of life, while simultaneously protecting the individual’s entitlement to certain government benefits. SNTs frequently have other purposes as well, such as providing financial management and oversight for individuals whose disabilities preclude self-management. However, what sets SNTs apart from other trusts is their ability to protect assets from being considered available for purposes of means-tested public benefits.

Means-tested public benefits are government programs that limit the pool of eligible recipients by imposing financial eligibility rules. Eligibility for means-tested benefits is determined after a review of the assets and income of the person applying for help. If assets and income are available to the person for basic needs, such as food and shelter, then generally the person is expected to use the available funds for those basic needs, thus reducing his or her need for government benefits.

Originally, SNTs were developed by lawyers who realized that if a trust, by its terms, makes the trust estate unavailable for basic needs such as food and shelter, the existence of the trust should not affect an individual’s eligibility for needs-based public benefits. Today, as these materials will explain, federal and state laws contain specific provisions governing special needs trusts, setting out criteria under which SNT assets will be treated as unavailable.

Because a primary function of a SNT is to preserve means-tested public benefits, and because not all disabled individuals receive means-tested benefits, SNTs are not always
necessary or appropriate. In order to properly plan for a disabled person, an attorney must have a basic understanding of the government benefit programs available, including the level of services provided and the eligibility rules applicable to each one. Only after determining that a particular disabled individual receives means-tested benefits, or is likely to receive them in the future, should a special needs trust be drafted.

A. The World of Government Benefits. The world of government benefits is vast, and a full description of the benefits available to disabled individuals is beyond the scope of these materials. Broadly speaking, however, government benefits for the disabled can be divided into two categories: “means-tested” or “needs-based” benefits, which impose strict financial eligibility limits, and “entitlement” benefits, which generally do not.

Following is an overview of some of the most common government benefits programs available to disabled individuals. Note that each of these programs has complex rules (well beyond what is included here), and that those rules should be closely analyzed in deciding whether and when to use a SNT. This overview is not intended to provide comprehensive details on eligibility rules for the various programs, but rather to identify their general characteristics for basic SNT planning purposes.

1. Means-Tested Benefits

a. Supplemental Security Income (“SSI”). Supplemental Security Income (“SSI”) is a federal program of cash assistance for aged, blind, or disabled individuals who have little income and few assets. Eligibility depends upon status (age, disability, etc.) and financial need, but is not related to an individual’s work history (i.e., an individual need not have “paid into the system” in order to qualify). The SSI program provides monthly checks from the federal government of up to $735 for an individual and up to $1103 for a married couple (in 2017). Typically, a person who is eligible for SSI benefits automatically qualifies for Medicaid benefits as well.

SSI is administered by the Social Security Administration (SSA), through local Social Security branch offices. To be eligible for SSI, a single individual cannot have “countable resources” worth more than $2,000, and a married couple cannot have countable resources worth more than $3,000 (in 2017). Additionally, a single individual cannot have “countable income” in a month of more than the federal benefit rate (“FBR”). The FBR for an individual is $735 and for a married couple is $1103 (in 2017).

The legal authority for the Supplemental Security Income program is contained in Title XVI of the Social Security Act, 42 USC §1381 et. seq. Regulations implementing the program are found at 20 CFR §416.101 et seq. Internal Social Security Administration policy guidelines are found in the Program Operations Manual System (POMS) SI 00500.000 et seq.
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**Practice Tip:** POMS provisions are written in plain English, making the POMS the easiest-to-understand source of legal authority on the SSI program. The POMS is available on SSA's website at:

https://secure.ssa.gov/apps10/poms.nsf/partlistOpenView

The SSI-specific provisions can be found at:

https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05

b. **Medicaid.** Medicaid is a joint federal-state program of medical assistance. Medicaid is not a single program, but rather, a group of programs, each of which has unique benefits, rules, and eligibility requirements. As with SSI, eligibility for Medicaid is based upon financial need (low income and assets). Unlike SSI, however, Medicaid does not provide cash benefits to beneficiaries. Rather, Medicaid pays for a variety of health care and long-term care services through its different programs, all of which are administered in Oregon by the Oregon Department of Human Services (“DHS”).

Among the most common of Oregon’s Medicaid programs is the Oregon Health Plan (OHP), which provides basic health insurance to certain disabled and low-income individuals. Under the broad umbrella of “Oregon Health Plan” are several sub-programs, including OHP Plus and the no-cost public assistance option of Oregon’s Healthy Kids Program (for children under age 19).

Another common Medicaid program is the Oregon Supplemental Income Program Medical (OSIPM), which provides both basic health insurance and, in some cases, assistance with long-term care costs. Disabled individuals who receive SSI are automatically eligible for OSIPM. OAR 461-135-0010(5)(a).

There are other Medicaid programs as well, all with varying eligibility rules. Income limits, in particular, vary dramatically from one Medicaid program to another. However, the asset limit applicable to OSIPM (the Medicaid program most often involved in SNT planning) is the same as in the SSI program. OAR 461-160-0015.

The legal authority for the Medicaid program is contained in Title XIX of the Social Security Act, 42 USC §1396 et seq. Oregon’s applicable statutes and rules appear in ORS Chapter 411 and OAR Chapters 410, 411, and 461. As a practical matter, the Oregon Administrative Rules governing Medicaid are the most important source of law in the SNT planning context, as they provide the specific income limits and other requirements for the various Medicaid programs.

**Practice Tip:** The Oregon Administrative Rules governing Medicaid programs change frequently, and should be reviewed often. Notices of changes to these rules can be obtained by visiting the DHS website and requesting e-mail notifications in advance of proposed rule changes. (http://www.dhs.state.or.us/policy/spd/notice.htm)

c. **K-Plan/Community First Choice Option.** The K-Plan originated as part of the Affordable Care act and was adopted by Oregon as a Medicaid State Plan...
to access more federal money and bring more services to eligible Oregonians. The K-Plan title refers to the 1915(k) section of the Social Security Act. The official title of the K-Plan is actually the Community first Choice Plan. The support services now available through the K-Plan are intended to help children and adults with intellectual/developmental disabilities enjoy a full life at home, work and in their community. In Oregon, eligibility is based on either an Intellectual Disability (ID) or Developmental Disability (DD) diagnosis confirmed through a medical or clinical evaluation by a qualified professional such as a medical doctor or psychologist.

It is important to note that a child can become eligible for Medical Services even if their family has a higher income level. When family income levels become a barrier to needed services, a child can be declared eligible for Medicaid Services by a specialized team at Oregon’s Department of Human Services called the Presumptive Medical Disability Determination Team (PMDDT). This team validates that the child’s disability meets Social Security disability criteria. It is at this time that the child can be deemed a “household of one” and only the child’s income will be used to determine eligibility.

Once a child is deemed eligible, K-Plan will develop a Child Needs Assessment to determine the services and/or equipment that will be paid for by the K-Plan. Such services and devices include: Assistive Devices; Assistive technology; Attendant Care; Behavior Support; Chore Services; Community Nursing Services; Community Transportation; Emergency Response Systems; Environmental Modifications; Home Delivered Meals; Relief Care; Skill Training; and Transition Services.

2. Entitlement Benefits

   a. Social Security Disability Insurance (“SSDI”). Social Security Disability Insurance (“SSDI”) is a federal insurance program that pays cash benefits to disabled workers under the age of 65. The monthly payment amount depends on an individual’s work record and the amount he or she paid into the Social Security system while working. Disabled individuals who receive SSDI for at least 24 months automatically qualify for Medicare benefits (see below).

   Like SSI, SSDI is administered by the Social Security Administration, through local Social Security branch offices. Unlike SSI, however, eligibility for SSDI does not depend on an individual’s assets or unearned income. Thus, a disabled individual can own any amount of resources without jeopardizing his or her eligibility for SSDI benefits.

   PRACTICE TIP: Recipients of SSDI frequently also receive SSI (if a recipient’s work record results in a monthly SSDI payment of less than the “FBR” discussed above, the individual often receives SSI to bring the total income up to the FBR). Attorneys should never assume that because an
individual receives SSDI, he or she is not also receiving SSI (or other means-tested benefits).

The legal authority for the Social Security Disability Insurance program is contained in Title II of the Social Security Act, 42 USC §423. Regulations implementing the program are found in 20 CFR §404.1 et seq. Internal Social Security Administration policy guidelines are found in the Program Operations Manual System (POMS) DI 00100.000 et seq.

**Practice Tip:** The SSDI-specific provisions of the POMS can be found at: https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=04.

b. **Medicare.** Medicare is a federal health insurance program providing basic coverage to individuals over age 65, as well as certain disabled individuals under age 65 who have received SSDI benefits for at least 24 months. (The 24-month “waiting period” for SSDI-linked Medicare eligibility is waived for individuals with end-stage renal disease or ALS, a.k.a. Lou Gehrig’s disease.)

Medicare consists four basic “parts,” A-D, which provide hospital insurance, medical insurance, and prescription drug coverage. Medicare recipients must pay monthly premiums, co-payments, and deductibles, which vary depending on the particular “parts” in which they are enrolled.

Medicare is administered federally by the Centers for Medicare and Medicaid Services (“CMS”). However, the Social Security Administration is responsible for determining Medicare eligibility and processing the monthly premium payments required of Medicare recipients.

Unlike Medicaid, Medicare is not means-tested. Accordingly, a disabled individual can qualify for (or retain) eligibility for Medicare regardless of asset and income levels. However, Medicare generally does not cover the full cost of a recipient’s health care, and most Medicare recipients require additional coverage. Often, this additional coverage takes the form of a Medicare supplement policy—a private insurance plan intended to cover the gaps in Medicare’s coverage. But in some cases, the gaps in coverage are filled by Medicaid. Medicare recipients who also receive Medicaid benefits are sometimes referred to as “dual-eligibles.”

**Practice Tip:** Attorneys should never assume that because an individual receives Medicare, he or she is not also receiving Medicaid (or other means-tested benefits).
B. The Benefits Direct the Process

1. **Obtaining Current Benefits Information.** Attorneys representing disabled individuals (or family members of disabled individuals) must always obtain a clear understanding of the individual’s benefits *as a first step* in every disability planning case. Before discussing or preparing an SNT, it is critical to answer the following questions:

   - Which public benefits (if any) is the disabled individual currently receiving?
   - Which public benefits might the disabled individual qualify for in the future?
   - Are any of the public benefits identified above “means-tested?”
   - Are the public benefits identified above critical to the support and care of the disabled individual, or does the individual have non-means-tested alternatives to meet basic support and care needs?

   The answers to the questions above are frequently difficult to obtain, for several reasons. Many public benefits programs have names that sound similar to each other (Medicare/Medicaid; SSDI/SSI), and clients routinely confuse them. Clients enrolled in the Oregon Health Plan may not realize that they are receiving Medicaid assistance. Finally, as mentioned above, many disabled individuals receive benefits from multiple programs simultaneously, and may not be aware of the distinct sources of those benefits.

   Because disabled individuals and their families are often confused about exactly which benefits they receive, attorneys must not rely solely on clients’ statements in identifying benefits. Instead, this information should be obtained by asking the client questions that will elicit “clues” as to the nature of the benefits received. For example, an attorney can ask about the amount of income received by the disabled person. If a client reports income of more than $750 (the maximum SSI payment in 2018), the attorney knows the person is not receiving SSI, but likely receives SSDI. Alternately, an attorney can ask about the disabled person’s resources. If the individual has assets (other than a home, a car, and certain other “exempt” assets) in excess of $2000, there is a strong possibility his or her benefits are not means-tested. The key point is that follow-up questions are required in every case, since clients are not always able to provide accurate information about the benefits being received.

   After informally soliciting additional information about the benefits received by the disabled individual, an attorney should always follow up and verify the information by communicating directly with the agencies providing the benefits. This generally requires a Release signed by the disabled individual or his or her legal representative. However, obtaining a Release and requesting confirmation of benefits from the relevant agencies is time well spent, as it can avoid costly errors.
PRACTICE TIP: Benefits information regarding SSDI, SSI and/or Medicare can be obtained from the Social Security Administration using the official "Consent for Release of Information" form, available at: http://www.ssa.gov/online/ssa-3288.pdf, and reprinted in these materials as Appendix A. Benefits information regarding the various Medicaid programs administered by Oregon DHS can usually be obtained using a general Release. One example of a general Release, used regularly by the authors, is attached as Appendix B.

2. Thinking Ahead about Future Need for Benefits. Although obtaining accurate information about current public benefits is critical, it should not end an attorney's analysis of whether a SNT is necessary or appropriate. In order to properly determine the advisability of a SNT, the disabled person's future care needs must be considered, as those needs can change dramatically over the course of a disabled person's life.

It is not uncommon to encounter disabled individuals who, though not currently receiving means-tested benefits, are likely to require them in the future. In those cases, preparation of a SNT may be advisable even though the most significant advantages of the trust may not be realized until later. For example, suppose an individual is receiving SSDI and Medicare (two entitlement benefits that are not means-tested) and is privately paying for a Medicare supplement policy using a combination of SSDI income and savings. Now suppose this individual has a progressive illness, such as Primary Progressive Multiple Sclerosis, and is expected to deteriorate to the point where independent living becomes impossible. A SNT might make sense for such an individual even if he is not currently receiving benefits, since there are foreseeable long-term care costs that could be financially devastating.

Thinking ahead can also be important in the case of minor children. Disabled children under the age of 18 often do not qualify for means-tested benefits because most public benefits programs “deem” the income and assets of the parents to be available to the children. However, upon reaching the age of 18, these children are often eligible for SSI, Medicaid, and/or other benefits. Parents, grandparents or other relatives and friends of disabled minors may want to consider including a SNT in their estate plan, even though the minor is not currently receiving means-tested benefits.

In some cases, planning needs to account for the possibility that a disabled individual may improve, and no longer require public benefits. If significant improvement is a possibility, attorneys should factor this into their advice regarding SNTs, and if a decision is made to create a SNT, attorney should consider allowing for early termination (see discussion of early termination provisions in the “Drafting Tips” section, below).
III. PRIMARY TYPES OF SPECIAL NEEDS TRUSTS

There are two primary types of Special Needs Trusts; “first-party” trusts, and “third-party” trusts. They share many common features, but they differ in important ways, as this section will explain. The most important distinction between first-party and third-party SNTs is the source of the funds comprising the trust estate: first-party trusts are funded with money that belongs to the beneficiary (i.e., the disabled person), and third-party trusts are funded with money that belongs to someone else, such as a parent or family member of the beneficiary. There are several varieties of each type of trust, but broadly speaking, all SNTs fall into one of these two categories.

The distinction between first-party and third-party SNTs is critical, because they are treated quite differently for purposes of means-tested government benefits. This section will discuss both types of trusts, highlighting their similarities and their differences. In addition, this section will discuss alternatives to SNTs, which may be more appropriate in certain situations. Finally, this section will provide a general description of some common varieties of both first-party and third-party SNTs.

A. Third Party Trusts. The most common of the two primary types of SNTs is the third-party trust. Parents, grandparents and other family members often want to set money aside for the benefit of a disabled individual. However, as explained above, a SNT is not always required, and the determination of whether a SNT is appropriate depends on whether the disabled person is receiving, or is expected to receive, means-tested government benefits. In some situations, the individual may not be receiving means-tested benefits, and may be physically disabled but otherwise able to manage his or her finances. In these cases, if the person’s health condition is stable and is not expected to worsen (thereby possibly triggering a need for needs-based public benefits such as assistance with long-term care), it may be appropriate to simply leave assets outright to the disabled person. More often, however, a trust—either a SNT or some other type of trust—is desirable.

1. Discretionary Support Trusts. Even in situations where a disabled individual is neither receiving nor expected to receive means-tested government benefits, a trust may necessary to provide management of funds for his or her benefit.\(^1\) In these cases, the limitations of a special needs trust (discussed in more detail below) may be unnecessarily restrictive, and may fail to meet the goals of the person creating the trust. If so, a discretionary support trust (“DST”) can sometimes be a good alternative to a traditional special needs trust.

A discretionary support trust gives the trustee the authority to expend funds for the disabled person’s benefit in whatever manner the trustee deems appropriate. In short, the distribution standard for a DST can be specifically tailored

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\(^1\) This is often the case when the disabled person is receiving SSDI and Medicare (entitlement benefits), and simply requires assistance managing financial affairs.
to the needs of the disabled person without worrying about the impact upon a
disabled person's (non means-tested) benefits.

An unresolved question in the area of DSTs is whether assets in these trusts
should be considered available to a disabled person who is receiving (or who is
planning to receive) means-tested public benefits. Arguably, if the beneficiary has
no right to compel a distribution from the trust, and the trustee exercises his
discretion by choosing not to make distributions for food and/or shelter, the trust
assets should not be considered to be available. However, the answer to this
question is different among the state Medicaid agencies around the country.

Oregon’s Department of Human Services take the position that a DST is an
available resource because the funds can be used to meet the beneficiary's basic
monthly needs. Accordingly, while DSTs have their place in the world of planning
for disabled individuals, an attorney would be wise to implement the more
restrictive terms of a special needs trust when the intended beneficiary is receiving,
or is expected to receive, means-tested government benefits.

2. Third Party Special Needs Trusts. Special needs trusts created and
funded by a third party for a disabled individual are distinguished from first-party
special needs trusts by the source of the assets comprising the trust estate. In a
third-party special needs trust, the source of the funding is someone other than the
disabled person. For this reason, the funds remaining in a third-party special needs
trust are not subject to recovery under payback rules at the disabled person’s
death. (See discussion of first-party trusts, below). Instead, assets remaining in
third-party SNTs may be distributed in whatever manner the settlor desires; e.g.
ono other family members.

a. Testamentary Special Needs Trusts. A testamentary third-
party special needs trust is a trust that is built into the settlor’s (e.g. parents)
estate planning documents, such as a Will. These types of SNTs are funded
upon the death of the testator or settlor.

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2 DHS views the assets of a discretionary support trust as an available resource under OAR 461-145-0540.
3 The general rule in Oregon is that income and resources are “available” to a Medicaid applicant only if he or she
has a legal right to compel distribution. (see ‘A’ below) This Oregon rule is mandated by federal law. (see ‘B’
below) In addition, Oregon regulations specifically provide that assets of an irrevocable or restricted trust are not
available if they cannot be used to meet the basic monthly needs of the beneficiary’s household (see ‘C’ below).
A. See ORS 414.025; 414.033- 414.041; OAR 461-140-0020(1) and (2); OAR 461-140-0040.
B. 42 USC § 1396a(a)(17)(B) (state may take into account only income and resources that are “available”
according to standards prescribed by federal regulations); see 20 CFR § 416.1201(a)(1) (resource is
unavailable for Social Security purposes if individual cannot liquidate it or convert it to cash); ORS
409.040 (federal Medicaid law supersedes contrary Oregon law).
C. OAR 461-140-0020(2)(3); OAR 461-145-540(2)(b).
4 OAR 461-135-832(13)
b. **Inter vivos (Lifetime) Special Needs Trusts.** An *inter vivos* special needs trust is a separate "stand-alone" trust that is usually funded during the settlor's lifetime, but may also receive assets after the settlor's death. In some cases, clients may want to fund a special needs trust for a disabled child, relative, or friend immediately, rather than waiting to fund a SNT on their death. For example, it may be that a number of relatives and friends want to leave money to benefit a disabled child. In anticipation of this, a "stand-alone" special needs trust may be established to collect and receive the gifts from the friends and family and eliminate the need for each donee to establish (and pay for) a separate SNT in their estate planning documents. Or, it may be that a wealthy client would prefer to make lifetime gifts to a disabled person for estate planning purposes, or fund a SNT with a life insurance policy with the intention that the proceeds will provide enough funds to care for the disabled child in the event of their death.\(^5\) In these situations, an inter vivos special needs trust may be established to accomplish these goals. Regardless of the variety (testamentary or inter-vivos), attorneys creating third-party SNTs should carefully consider how to draft the distribution standard for these instruments, taking into account the beneficiary's benefits situation.

c. **Long-term Care Issues.** Under current Medicaid rules, if the spouse who is not receiving Medicaid ("well spouse") dies before the spouse who is receiving Medicaid ("Medicaid spouse") and disinherit the Medicaid spouse, the Oregon Department of Human Services ("DHS") may require that the Medicaid spouse take their elective share against the will.\(^6\) Prior to 2011, one strategy to handle the elective share issue was for the well spouse to leave an inheritance intended for the Medicaid spouse in a special needs trust.\(^7\) However, significant changes to the elective share rules were codified in 2011. The new laws required that any trust for the benefit of a surviving spouse would *not* satisfy the elective share unless the trust required mandatory income to be paid to the surviving spouse.\(^8\) Any mandatory income feature would render the trust available to the Medicaid spouse for public benefits purposes. Hence, as of 2011, it is no longer possible to defeat the DHS elective share argument with a special needs trust. Because of this, it has become common to simply provide that an amount equal to the statutory elective share on the date of the well spouse’s death be left outright to the Medicaid spouse.

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\(^5\) A complete discussion of the income and transfer tax consequences that may be triggered by making gifts to an inter vivos SNT is beyond the scope of these materials. Attorneys should consult with practitioners familiar with estate and gift tax issues prior to drafting and funding an inter vivos SNT.

\(^6\) OAR 461-120-0330

\(^7\) ORS 114.600 – ORS 114.725

\(^8\) ORS 114.675(2)

   i. Distribution Standards Generally. What most distinguishes a special needs trust from other trusts is the distribution standard. The purpose of a special needs trust is to preserve the beneficiary’s eligibility for means-tested government benefits. However, while all SNTs have the same purpose, there is no single distribution standard that is appropriate for all SNTs. Rather, there is a continuum of options, and the drafting attorney should tailor the standard to best match the beneficiary’s circumstances. A rule of thumb is to incorporate the distribution standard that is the most likely to preserve the client’s eligibility now and in the future, without jeopardizing his or her quality of life. On the continuum, a discretionary distribution standard such as that described above in section III(A)(1) is the least safe. Although the Social Security Administration does not treat discretionary support trusts as countable assets if the beneficiary does not have the ability to compel distributions, the standard used in DSTs is not recommended to maintain eligibility for means-tested government benefits. The strict distribution standard is the safest choice on the continuum. There are other choices in between these two, and there are numerous factors to be considered in choosing the most appropriate standard.

   The most important consideration in determining the appropriate distribution standard is the type of public assistance the beneficiary is receiving (or is expected to receive). In some cases, the benefits require the use of a strict distribution standard, while other cases allow for a more flexible standard. The important thing to remember is that there is no “one size fits all” distribution standard in the SNT context, since each beneficiary receives a different mix of benefits.

   Assuming the benefits received by the beneficiary allow for a range of distribution standards, a threshold consideration is whether the client feels distributions for food and shelter will be important. If so, and if the amount of the trust corpus will make such distributions practical, something other than the strict distribution standard should be considered. (See subsection iii below).

   A last major consideration is whether the SNT is a third party or first party trust. A third party trust is a creature of common law, guided by the Oregon Uniform Trust Code, and is generally going to be interpreted in the courts by reference to the testator/settlor’s intent. If the intention to preserve eligibility for means-tested government

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9 POMS SI 01120.200
benefits is clearly stated and the beneficiary has no power to compel distributions, then generally a third party trust can utilize a more flexible standard, as described below. However, a first party trust is a creature of statute, further defined by administrative rules, and may be interpreted more narrowly. Caution: If drafting a first party trust, refer to both this section and section III(B) below regarding first party trusts.

ii. **Special Needs Only – Strict Distribution Standard.** A “special needs only” or “strict” distribution standard is the traditional standard for most SNTs (third-party and first-party). This standard restricts distributions to special needs and may expressly prohibit distributions for basic needs (i.e., food and shelter). The term *special needs* suggests needs particular to the person and his or her disability, such as medical equipment or rehabilitative treatment, and indeed, many SNTs include specifically tailored distribution guidelines. However, a trust limiting distributions to special needs can be drafted to allow distributions for *anything* other than food and shelter.

This “strict” distribution standard, despite the name, actually encompasses many things that are not related to a disability or medical treatment, and which may not even be properly classified as a “need.” For example, under a strict distribution standard, a trustee can make distributions for a cable television bill, internet services, or vacation expenses.10 In fact, when advising trustees on this distribution standard, it is generally more useful to focus on what is *not* considered a special need (i.e., what distributions are prohibited) than what is. In short, under the strict distribution standard, a special need is any distribution that is not cash11, and is not shelter12 or food.

A special needs trust with a strict distribution standard is the safest course of action to preserve public benefits now and in the future. The strict distribution standard provides clear guidelines that will not require significant analysis of public benefits law when distributions are made. Perhaps most importantly, since the strict distribution standard is a common standard, particularly in first party trusts.

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10 Further examples of special needs are as follows: clothing, telephone services and equipment, transportation (including automobile, auto maintenance and repair, gasoline, auto insurance, and/or bus pass), recreation, education, pet care, subscriptions, and computer equipment and services. For recent discussions of Special Needs Trust administration, see materials cited in footnote 1.

11 Cash includes any cash equivalents, gift cards that may be converted to cash, or gift cards/ pre-loaded debit cards that may be used for food and/or shelter.

12 Shelter includes rent, mortgage payments, property taxes, heating, gas and electric power, garbage, sewer, water, and hazard insurance (if required by the lender).
trusts, government agency workers reviewing the trust are more likely to recognize that the trust meets the criteria to qualify as a special needs trust. Thus, the strict distribution standard is the surest way to achieve the primary goal of a SNT—protecting means-tested public benefits.

iii. Hybrid Distribution Standard. In some situations, preserving the ability to make distributions for a beneficiary’s shelter and/or food may be a priority to the client. In such cases, a flexible standard may be appropriate. The “hybrid” distribution standard falls in the middle of the continuum between the discretionary support standard of a DST and the strict distribution standard of a traditional SNT. The hybrid standard does not change the purpose of a SNT (namely, protection of eligibility for means-tested government benefits), but it does allow the trustee the flexibility to make distributions that will reduce benefits, if doing so is in the beneficiary’s interest.

Depending on the benefits received, it may be possible in some cases to allow a trustee of a SNT to make distributions for a beneficiary’s food and shelter without permanently terminating the beneficiary’s eligibility for means-tested government benefits. This is due to a Social Security rule regarding “in-kind support and maintenance,” which essentially provides that if any third party (e.g., any friend, relative, or even a special needs trust) pays for the food and/or shelter of an SSI recipient, that individual’s SSI benefit will be reduced up to a maximum amount of value. 13 If the only impact of such a distribution is a reduction in benefits, and not a permanent termination of benefits, it may be worthwhile to allow it in the SNT.

For example, suppose Sally is disabled and has lived with her parents all her life. When her parents pass away, she will lack the wherewithal to pay her shelter costs. If she receives the a SSI payment of $750 per month (2018) and, upon losing her parents, is faced with living independently for the first time, she is highly unlikely to have sufficient SSI income to pay for a security deposit, or for the first and last month’s rent under the terms of a lease. Even if her parents have planned ahead and included a SNT in their estate plan, this individual may lack the means to pay for adequate housing if that SNT contains a strict distribution standard. In cases like this, something more flexible than the strict distribution standard might be appropriate.

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13 The technical mechanics of the in-kind support maintenance rules are beyond the scope of this presentation; 42 USC § 1382a(a)(2)(A); 20 CFR § 416.1102; 20 CFR § 416.1130; 20 CFR § 416.1131; 20 CFR § 416.1140
In the example above, if Sally's SNT had contained a flexible or “hybrid” distribution standard, the trustee could have paid for a security deposit, the first and last month’s rent, etc., and the only impact would have been a temporary reduction in the amount of Sally’s SSI payment (if this had happened in 2015, Sally’s SSI payment would have been reduced by $270.00). The temporary reduction would have been worth it, assuming the cost of the security deposit and rent payments exceed the reduction.

As another example, suppose Sally’s rent is $900 per month and the trustee pays the rent each month by mailing a check directly to the landlord. Sally would be receiving “in-kind support” of $900 per month. However, the reduction in her SSI each month would be limited to $270.00 (in 2018) and she would be receiving a value of $900 each month from the special needs trust.

Making distributions for shelter under a hybrid standard requires very careful planning, because it implicates multiple, highly technical public-benefits rules that are beyond the scope of these materials. It is not always appropriate, and in fact, can be dangerous in certain situations. Depending on the amount of SSI a disabled person receives, making a distribution for shelter can put the beneficiary at risk of having his or her SSI benefits terminated. Because SSI and Medicaid benefits are often tied together, a loss of SSI can entail a loss of Medicaid as well. Accordingly, attorneys should carefully analyze a beneficiary’s benefits situation before recommending distributions under a hybrid distribution standard. In the appropriate situation, however, such distributions can greatly enhance a beneficiary’s quality of life, while causing only a reduction in means-tested public benefits.

B. First-Party Trusts (a.k.a. “Payback Trusts”)

1. Background and General Requirements As discussed above, SNTs were originally developed informally, by lawyers, based on principles of general trust law. In the Omnibus Reconciliation Act of 1993 (“OBRA ’93”), however, Congress enacted new provisions specifically addressing the use of trusts designed to preserve (or establish) eligibility for certain means-tested public benefits (specifically, Medicaid). OBRA ’93 restricted the use of many types of trusts created by (or on behalf of) a Medicaid recipient using the recipient’s own funds—namely, first-party trusts.

14 POMS SI Section 00835.00 et seq.

15 See materials cited in footnote 1 for examples of how distributions for shelter from SNT can work to the beneficiary’s advantage in appropriate situations.
However, in that same Act, Congress specifically created a new type of trust that can be funded with a Medicaid recipient’s own funds, and in which the assets are not considered available for purposes of Medicaid eligibility. Under the provisions of OBRA ’93, in order for the assets in a first-party trust to be considered unavailable, the trust must:

- be created for the benefit of an individual who is disabled as defined by the Social Security Administration;
- be created for the benefit of an individual under the age of 65;
- contain the disabled person’s own assets;
- be established by a parent, grandparent, legal guardian (or Conservator in Oregon), or a court;
- provide that any State that has provided Medicaid assistance to the disabled person will receive all amounts remaining in the trust upon the disabled person’s death, up to the total amount of Medicaid assistance provided.

These requirements are codified in the Medicaid Act at 42 USC Sec 1396p(d)(4)(a), and many people now refer to first-party trusts as “(d)(4)(a) trusts,” because of this provision.

In the Foster Care Independence Act of 1999 (“FCIA ’99”), Congress enacted provisions similar to those of OBRA ’93, this time applying them to trusts intended to qualify an individual for SSI. With certain limited exceptions, neither OBRA ’93 nor FCIA ’99 affected trusts created and funded by third parties. Today, as a result of OBRA ’93 and FCIA ’99, federal law specifically allows the creation of first-party trusts by (or on behalf of) individuals receiving means-tested benefits such as SSI and Medicaid, provided they meet the criteria cited above. These trusts have many names, but the most common of them are first-party special needs trusts, payback trusts, and (d)(4)(a) trusts.

2. Applying the (d)(4)(A) Criteria. First-party SNTs are best understood by separately examining each of the statutory criteria listed above.

a. Disability Requirement. First-party SNTs must be established for an individual who is disabled as defined in the Social Security Act. If the beneficiary is receiving either SSDI or SSI benefits, this requirement is met. Sometimes, however, disabled individuals receive (or want to apply for) only Medicaid. In these cases, the State Medicaid caseworker must make an independent determination of disability.

b. Under Age 65. The beneficiary of a first-party SNT must be under 65 when the trust is created and funded. Public benefits agencies have made clear that first-party SNTs remain “exempted” for individuals over the age of 65 (i.e., a payback trust created for an individual at age 60 does not
suddenly become *available* to that individual when he or she reaches the age of 65). However, in order to be treated as unavailable, a first-party SNT must be initially created and funded prior to the beneficiary's 65th birthday. Once the beneficiary reaches the age of 65, he or she can no longer transfer assets into the SNT without jeopardizing means-tested benefits.

c. **Beneficiary's Assets.** The purpose of a first-party SNT is to protect assets belonging initially to the beneficiary. Most recipients of means-tested assistance do not have significant assets, given the strict financial eligibility rules applicable to means-tested government programs. However, the need for first-party SNTs commonly arises when a recipient of means-tested benefits comes into a sum of money, perhaps through an inheritance or the receipt of a personal injury settlement or judgment.

Receipt of inheritance or personal injury funds can result in termination of means-tested benefits if the disabled individual retains funds in excess of $2,000. However, if a payback trust is created, the individual can retain his or her benefits and enjoy the benefit of the SNT funds (subject to the strictures of the trust). In many cases, funds received via inheritance or personal injury settlement by recipients of public benefits are not sufficient to replace the benefits, so simply retaining the funds is not a viable option. There are alternatives to creation of a first-party SNT, such as purchasing “exempt assets” (a home, for instance) or creation of a first-party pooled trust.\(^{16}\) However, in many cases, a first-party SNT provides an ideal vehicle for holding a disabled individual’s own assets, when those assets might otherwise cause a loss of benefits.

d. **Created by Parent, Grandparent, Guardian/Conservator, or Court.** In years past the trust must be created by a parent, grandparent, legal guardian or court, but after the passing of the Special Needs Fairness Act by congress in late 2016, individuals with capacity can now establish their own first-party special needs trust under federal law. The term “legal guardian” is presumably intended to include a conservator in States like Oregon. ORS 125.440 specifically allows a conservator to create a trust, but only with prior court approval.

This aspect of the (d)(4)(a) criteria for first-party SNTs creates a number of planning issues. If the disabled person cannot create the trust him or herself, attorneys need to determine the most appropriate, cost-effective way to create the trust. If the disabled individual has a living parent or grandparent who is willing and able to act as the settlor, this is often a first choice because it avoids the need to seek probate court approval for creation of the trust, thereby reducing attorney fees, court costs, and complications.

\(^{16}\) See Section III (B)(5) of these materials for a discussion of pooled trusts.
**Practice Tip:** Even in cases where a parent or grandparent is available, court involvement is sometimes required. If the beneficiary is a minor, or lacks capacity and cannot consent to the transfer of his or her funds into the SNT, the probate court will have to authorize the transfer.

If the disabled individual lacks the capacity, and there is no parent or grandparent available to create a first-party SNT, a petition or motion must be filed with the probate court to establish, or authorize the establishment of, the trust. Such petitions can take several forms, depending on a number of factors. In some cases, a disabled person will already have a guardian or conservator, and that fiduciary may be able to file a motion under ORS 125.440 for authority to create the trust. In cases where there is no existing guardian or conservator, a petition can be filed, seeking both the appointment of the fiduciary and the authority to create the SNT.

Under the (d)(4)(a) criteria, it is possible to ask a court to create a first-party SNT directly and to appoint a trustee, without the separate appointment of a guardian or conservator. Oregon law provides a mechanism for this in ORS 125.650, which authorizes the court to issue a protective order conferring any of the powers of a guardian and conservator, without actually appointing one. This practice is not commonly allowed by Oregon courts, however (under ORS 125.650, courts have discretion on whether to issue such protective orders).

In cases where court approval must be obtained for the creation of a payback SNT, local court rules and practices must be considered. In some Oregon counties, the probate courts will appoint a conservator on a temporary basis, for the limited purpose of establishing and funding a payback SNT. This can be very advantageous to a client, as it avoids the costs and complications of an ongoing conservatorship, such as annual court accountings, etc. Alternatively, if the disabled person is in need of a guardian, some counties will appoint the proposed guardian and authorize him or her to create the payback SNT, also avoiding the complications of ongoing conservatorship.

Of course, in some cases, ongoing conservatorship is desirable (for example, in cases involving larger sums of money, or involving a professional fiduciary who wants the protection of court-approved annual accountings). Even if an ongoing conservatorship is not desired, however, it may be required in some counties and in some situations. Several Oregon courts have long interpreted ORS 125.440 as requiring ongoing conservatorships in cases where approval of a payback SNT is sought, because of language in the statute barring court approval of a trust that “has the effect of terminating a conservatorship.” Id.
The 2013 amendments to ORS 125.440(2) specifically lay out circumstances under which a court may approve a trust that “has the effect of terminating a conservatorship” (or, as applied here, which has the effect of avoiding an ongoing conservatorship). The amended statute provides that a court may approve such a trust if:

(a) The trust is created for the purpose of qualifying the protected person for needs-based government benefits or maintaining the eligibility of the protected person for needs-based government benefits;

(b) The value of the conservatorship estate, including the amount to be transferred to the trust, does not exceed $50,000;

(c) The purpose of establishing the conservatorship was to create the trust; or

(d) The conservator shows other good cause to the court.

The amended statute authorizes approval of payback trusts without an ongoing conservatorship, but only in the court’s discretion. Because of this discretion, the statute is not interpreted or applied the same way in every county. Attorneys should obtain a clear understanding of a given county’s procedure before requesting the creation of a payback SNT. However, if local court rules and practices allow the above-mentioned alternatives to ongoing conservatorship, and if the alternatives represent a benefit to the disabled individual, they should be considered.

e. Payback. The most salient feature of a first-party SNT is the payback requirement. All first-party SNTs must provide that upon the death of the beneficiary, any remaining trust assets will be distributed to the State(s) that have provided Medicaid assistance to the disabled person, up to the total amount of Medicaid assistance provided. When the individual has received Medicaid benefits in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State’s proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual’s behalf. FCIA '99 does not require payback of SSI, but does require the payback of Medicaid.

3. Distribution Standards for First-Party Special Needs Trusts. In general, distribution standards for first-party trusts are quite similar to those discussed above in the context of third-party trusts. A majority of first-party trusts contain the “strict” special needs standard, which prohibits distributions for food and shelter. However, as with some third-party trusts, there are occasions in which a flexible hybrid standard is appropriate for the disabled person.
Historically, hybrid distribution standards have been employed successfully in first-party trusts in Oregon, in those cases where the standard has made sense from a benefits standpoint. In recent years, however, Oregon DHS has frequently objected to the use of the hybrid standard in first-party trusts.

From a legal standpoint, it seems clear that the hybrid distribution standard is acceptable in first-party trusts. The Social Security POMS provision states as much. POMS SI 01120.203, "Exceptions to Counting Trusts Established on or after 1/1/00," outlines the exceptions to the general rule that trusts created with an individual's own funds are considered resources. Subsection (B)(1)(a), which deals specifically with special needs trusts, states: "Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust meeting [the (d)(4)(a) requirements] and does not have to be a strict special needs trust. Presumably, this means that DHS will not object to the use of a hybrid distribution standard in first-party trusts. However, as a practical matter DHS does object. Given the history of objections and the lack of written confirmation of a changed approach, attorneys using the hybrid distribution standard in first-party trusts should be prepared to defend it to Oregon DHS.

4. **Pooled Trusts.** One alternative to a special needs trust is a “pooled trust.” Pooled trusts, like payback trusts, are creatures of statute. OBRA '93 created pooled trusts, and set out the criteria under which assets can be transferred into them without affecting means-tested government benefits. Pooled trusts, as their name implies, provide a vehicle for multiple disabled beneficiaries to pool their funds for purposes of investment and management, while offering the same primary benefits as standard SNTs (namely, preservation of means-tested government benefits). The statute defining pooled trusts requires that they:

- be established and managed by a non-profit association;
- maintain separate accounts for each beneficiary of the trust;
- provide that each account in the trust be established for the sole benefit of a disabled person as defined by the SSI program;
- provide that each account in the trust be established by the disabled individual; a parent, grandparent, legal guardian (or conservator in Oregon), or a court; and
- provide that, to the extent amounts remaining in the beneficiary's account upon death are not retained by the trust, the State(s) will receive the remaining assets, up to the amount of Medicaid assistance provided to the beneficiary. 42 USC Sec 1396p(d)(4)(C).

There are several pooled trusts available to Oregon residents that meet all of these statutory criteria:

- The ARC of Oregon: http://www.thearcoregon.org
- The Good Shepherd Fund: http://goodshepherdfund.org/
• Secured Futures: http://www.securedfutures.org/

Pooled trusts can be a good option for public benefits recipients who receive modest amounts of assets from inheritances, personal injury settlements, and the like. Although pooled trusts charge management fees, those fees are often less than the cost of establishing an individual SNT, especially if the individual SNT would require ongoing conservatorship. Pooled trusts are also sometimes a good choice in situations where the disabled person does not have a suitable family member or trusted friend to serve as trustee of a SNT, and does not want to incur the expense of a professional trustee.

Although pooled trust sub-accounts are most often created by (or on behalf of) disabled individuals using first-party funds, pooled trusts routinely accept and manage third-party funds as well. If a family member of a disabled person wants to leave an inheritance without interrupting benefits, but cannot identify suitable trustee candidates and does not want to use a professional trustee, a pooled trust is a viable alternative.

IV. ABLE Act

The Achieving a Better Life Experience (ABLE) Act was signed into law by President Obama on December 19, 2014. ABLE was signed into law in Oregon August 13, 2015 under Senate Bill 777. The goal of the ABLE Act is to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life. The ABLE Act seeks to provide funding for the disability related expenses of beneficiaries to supplement but not replace means-tested benefits.

1. Federal. The federal guidelines for the ABLE accounts are as follows:

   a. Disability Requirement. ABLE accounts must be established for an individual who is disabled as defined in the Social Security Act. The individual must have developed the disability prior to the age of 26 years.

   b. Maximum Contribution. Anyone, including the disabled individual may contribute to the ABLE account. However, the aggregate maximum annual contribution cannot exceed the annual gift tax exemption, which is currently $14,000.

   c. Exempt Status. The first $100,000 in an ABLE account is not considered a countable resource for the purpose of means-tested benefits. Any amount in excess of $100,000 will be considered a countable resource and may affect benefits.
d. **Expenditures.** Funds in an ABLE account can be used for the cost of treating the disability and may be expended for the special needs of the individual.

e. **Spendthrift.** An individual’s interest in an ABLE account cannot be assigned as collateral for a purchase or loan.

f. **Payback.** Under the new Senate Bill 1027, there is no longer a payback to Oregon on any amounts held in an Oregon ABLE account at the beneficiary’s death.

A. **Implementation.** ABLE accounts are useful for disabled individuals who cannot save for a rainy day, accumulate funds to pay for college, purchase transportation, or even buy basic necessities not covered by insurance. The account can take the place of a payback trust for inheritances and gifts less than the annual contribution limit. However, for any amount greater than that limit, or for parents leaving funds to children, payback special needs trusts and third party special needs trusts are better choices respectively.
Planning For a Family Member with Special Needs

Basic Estate Planning and Administration—November 20, 2015
Emily Hogan, Fitzwater Meyer Hollis & Marmion, LLP

An Overview of Public Benefits
# How benefits work together

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<td>SSI</td>
<td>Medicaid</td>
</tr>
<tr>
<td>SSDI</td>
<td>Medicare</td>
</tr>
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## Financial Benefits

**Supplemental Security Income ("SSI")**

- **Disabled**
  - Medical condition that severely limits functioning, or prevents from finding gainful employment for the next 12 months

- **Means-Tested Benefit ("needs based")**
  - Low-Income
  - Assets < $2,000

- **Maximum monthly benefit is $750 (2018)**
  - Basic needs (food/shelter)
Financial Benefits

Social Security Disability Income ("SSDI")
- Disabled
- Not means-tested
- Based on work record
  - Your own work record
  - Parent’s work record
    - Childhood Disability Beneficiary ("CDB")
    - Disabled prior to age 22
- Amount of monthly check different depending on work record

Medical Benefits

Medicaid
- Joint federal/state program that provides medical assistance
  - Automatic eligibility for SSI recipients
  - Doctors visits, medication, other medically necessary services
  - Eligibility for long-term care services

Medicare
- Enrolled after 24 months of SSDI
- Less robust than Medicaid (co-pays, premiums, etc.)
Other Support Benefits

K-Plan/Community First Choice
- Program funded under the Affordable Health Care Act
- Minors qualify as a “family of one”
  - No deeming of parents assets
- Monthly budget to pay for support services, including
  - Adaptive technology
  - Relief care
  - Nursing services
  - Modifications to home to accommodate disability

Brokerage Services
- Supports adults with intellectual/developmental disabilities to live at home and engage in community activities
- Must be enrolled/eligible for Medicaid

Section 8 Housing Assistance/ SNAP
- Financial eligibility based on income
The Benefits Drive the Analysis

Figuring It All Out

- How to be a Public benefits Detective

General Terms

- “She gets social security”
- “He doesn’t pay for his doctors – he gets ‘Medicare’”

Beware the “Blend”

- Some individuals receive a blend of SSI/SSDI, Medicaid/Medicare
- Short work record so SSDI <$750 (federal benefit level)
  - Social security “tops off” with SSI
  - Medicaid automatic with SSI
  - Medicare automatic after 18 months SSDI
- Important to hybrid distribution potential
Special Needs Trusts (SNTs)

Key Concept:
Assets held in a properly drafted SNT are not considered an “available resource” for purpose of determine financial eligibility for means-tested public benefits.

There are multiple types of special needs trusts:
First-party trusts vs. third-party trusts
First-Party Special Needs Trusts

First-Party Trusts (AKA “Payback Trust”) (AKA “d(4)(a) trust”)
- Funded with assets belonging to the person receiving benefits
- Reactive planning (looking back and trying to fix things)
  - Ex: Beneficiary on retirement plan/life insurance
  - Ex: Personal injury settlement recipient

First-Party Special Needs Trusts (cont.)

- Specific Statutory Rules to Create
  - Funded while the person is under age 65
  - Created by: beneficiary (if capacity), parent, grandparent, conservator, or court
  - Must contain “payback” provisions
- Strict distribution rules (in Oregon)
Third-Party Special Needs Trusts

**Third-Party Trusts**
- Funded with assets owned by someone *other than* the person receiving benefits
  - Ex: parents, relatives, other third-parties
- Proactive planning (planning ahead to supplement public benefits)
- No Age Restrictions (Can be funded when the person is 18 or 88)
- Distribution Standards (strict or hybrid)

---

**Third-Party Special Needs Trusts (cont.)**

**Third-Party Trusts**
- No Payback to state
- Client determines where $ goes at death of beneficiary
- Can be testamentary or Inter vivos
- Ability to have trustee choose between SNT and discretionary support trust
Distribution standards for 3rd party SNT

Third-Party SNT Distribution Standards:

- **Strict standards**
  - Money used only for "special needs"
  - "Special needs" = expense that is not related to food/shelter

- **Hybrid Distribution**
  - Allow distribution for "special needs" and food/shelter
  - Requires careful analysis of benefits
    - Will reduce SSI dollar for dollar up to “presumed maximum value” (“PMV”)
    - PMV = 1/3 of federal benefit ($750 in 2018) + $20
    - Beware the blend!
      - Low SSI + hybrid distribution = loss of SSI = loss of Medicaid!

Implementing a Special Needs Trust
Implementing a Special Needs Trust (1)

**STEP 1** → Is the person receiving or expected to receive “means-tested” benefits?
- SSI
- Medicaid

Yes ➔ An SNT should be considered to protect eligibility
No ➔ An SNT is not necessary to protect eligibility, but... A “regular” support trust may still be desirable to manage assets

Implementing a Special Needs Trust (2)

**STEP 2** → Where is the money coming from?
- Money coming from a parent/friend/relative?
  - Proactive planning
  - Third-party SNT
- Money already owned/controlled by person receiving means-tested benefits?
  - Reactive planning
  - First-party SNT
Implementing a Special Needs Trust (3)

STEP 3 → What is the amount of funds?

- Ability to private pay for insurance (oregonhealthcare.gov) OR Desire for more flexible distribution forms?
  - Third-Party SNTs
- Other considerations
  - Expense of establish trust via court
  - Spend-down
  - Able account
  - Pooled trusts

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Implementing a Special Needs Trust (4)

STEP 4 → Remember your drafting rules

- Third-Party SNTs
  - No age restrictions
  - Hybrid distribution clause
- First-Party SNTs
  - Under age 65
  - Established by parent/grandparent/conservator/court
  - Payback provisions

22
Selected Planning Issues

- Do Children Inherit Equally?
  - Child with disabilities has greater needs
  - Life insurance
    - Direct to SNT for “extra” funding
    - Will/Trust can remain as “equal shares”
- Crummey Powers
  - Special needs child cannot hold withdrawal power

Selected Planning Issues

- Selecting a Trustee
  - Professional Fiduciary
    - Endangered species for SNTs
    - Must understand public benefits
  - Do not necessarily default to sibling
  - Beneficiary protector for trust reporting issues
- Guardianship
- Housing
Selected Planning Issues

Retirement plans & SNTs
- SNT cannot have conduit provisions
- Stuck with accumulation trust rules
  - Challenging drafting to get stretch-out
- Direct non-retirement assets to SNT
  - Is it possible to direct non-retirement assets to SNT and still have "fair" distribution between children?
  - Requires ongoing adjustment to beneficiary designation form

ABLE Accounts
ABLE Accounts

**Achieving a Better Life Experience ("ABLE")**
- Signed into federal law on December 19, 2014
- Adopted by Oregon on August 13, 2015
- Directed to Oregon 529 savings board to adopt Oregon rules
  - http://oregonablesavings.com/
- Private savings account to allow individuals with disabilities to save some money.

**Federal Guidelines**
- **Disability Requirement**
  - Must be “disabled” according to SSA
  - Disability onset prior to age 26
- **Maximum Contribution**
  - Anyone, including owner, may contribute
  - Aggregate annual contribution cannot exceed $14,000
- **Exempt Status**
  - First $100,000 in account is not considered a means-tested resource
ABLE Accounts

Federal Guidelines (continued)
- Expenditures
  - Tax-free if “qualified disability expense”
    - “Qualified disability expense” is a VERY broad definition. Food and shelter are qualified disability expenses
  - Taxable + 10% penalty if non-qualified
- Payback
  - BRAND NEW LAW: no payback to Oregon on any amounts held in an Oregon ABLE account at the beneficiary’s death.

Top Mistakes in Special Needs Planning
- Misunderstanding the benefits received by the beneficiary
- Leaving assets to a sibling instead of providing for a disabled child
- Substituting an ABLE account for proper special needs estate planning
- Forgetting to align beneficiary designations with the estate plan goals
- Defaulting to a sibling when naming a trustee
Chapter 4

Will Contests: Avoid Them When You Can, Stay Out of Trouble When You Can’t

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People may be unhappy with your work product when your client dies and the estate plan you prepared is implemented. The narcissistic child who is justly disinherited is the hero of her own story. The father who devises generously to his illegitimate child, to the shock and horror of the children of his marriage, kept secrets. The estranged child may be outraged at a large gift to the decedent’s longtime best friend.

In short, we serve clients. Those clients are human, with human frailties, and so are their families and other beneficiaries.

But whatever our clients’ flaws, we owe them – at a minimum – competent representation, and we should strive for better than that. In the context of estate planning, we submit that part of competent representation is not only drafting technically correct documents, but doing what we can to make those documents effectively control the disposition of our clients’ estates.

All of the following advice is based on the practical lessons learned by experienced litigators.

**TYPES OF WILL CONTESTS**

ORS 113.075(1) contemplates four different theories that may underlie a will contest:

(1) Any interested person may contest the probate of the will or the validity of the will or assert an interest in the estate for the reason that:

   (a) *The will alleged in the petition to be the will of the decedent is ineffective in whole or part;*

   (b) There exists a will that has not been alleged in the petition to be the will of the decedent; or

   (c) *The decedent agreed, promised or represented that the decedent would make or revoke a will or devise, or not revoke a will or devise, or die intestate.*

**CONTRACTS TO MAKE A WILL**

ORS 113.075(1)(c) refers, in common shorthand, to “contracts to make a will.” In practice, three types of these cases are frequently litigated. As to each scenario, there are simple common-sense practice tips that can help avoid an unnecessary fight.

- The first is true contracts to make a will. These most often crop up in cases where a husband and wife have mutual “I love you, if you survive everything to you, if you predecease everything to our children” wills, and where those wills, or the specific circumstances surrounding them, suggest that the spouses intended that those promises for the benefit of the joint children would be irrevocable after the death of the first spouse to die. True contracts like this are uncommon modernly, but when the surviving spouse remarries, and makes provision in a new will for the new spouse, the children of the first marriage are often much aggrieved. **Practice tip:**

---

1 Litigated cases under ORS 113.075(1)(b) are few and far between. Generally speaking, the last-executed will is entitled to be probated, and its nominated Personal Representative appointed.
review and inspect the previous wills, including those for any predeceased spouse, and document your conclusion that no effective contract exists (or if a contract exists, don’t contravene it). In the new will, acknowledge the children’s subjective expectations, their likely disappointment, and the testator’s resignation to that disappointment. Review with the client why he or she wants to make a new or different disposition, with particular focus on the happiness that the new spouse brings to the surviving parent, and document it.

• The second is where a caregiver (almost always family) alleges “I cared for dependent testator for the last XX years because she said I would get the house/the Merrill Lynch account/the whole estate when she dies.” From the litigator’s perspective, these cases are fairly easy to defend, because such agreements are always oral, rather than in writing. And those oral agreements fall apart in the face of two legal rules: care provided to a close family member is presumed to be provided out of love and affection, and oral contracts can only be made irrevocable through part performance where that performance is “unequivocally referable” to the alleged contract. **Practice tip:** inquire who, if anyone, is providing any care to your client (including subsidizing the client’s lifestyle through providing housing, etc.) and what that caregiver’s expectations are in exchange, and document the client’s responses. Then in any document you prepare, make it clear that any gift or benefit to the caregiving devisee is in part out of (non-contractual) gratitude for the services provided.

• The last is where the decedent had some obligation – almost always memorialized in a divorce judgment – to provide some benefit to the ex-spouse or children of the marriage in the event of death. Sometimes this is a promise to maintain life insurance. **See,** e.g., *Tupper v. Roan*, 349 Or 211, 243 P3d 50 (2010). Sometimes it is a promise to make a specific testamentary gift or devise. Sometimes it is a promise to make a gift in the event that the promised insurance benefit is not maintained. **Practice tip:** inspect any previous divorce judgment, particularly any that are in effect while a support obligation still exists. If there is an obligation, honor it: have the client buy the insurance. An unsatisfied insurance obligation may give rise to a claim against the estate that will effectively wipe out other devises.

**Preparing a plan that minimizes the chance of successful challenge**

ORS 113.075(1)(a) calls out three different theories to attack the validity of a will. The first two are the classics: undue influence and lack of capacity challenges to the testator’s ability to execute a valid document. The last – that the document is not a valid will because it was not executed with the signed-before-two-witnesses formalities of the Wills Act, ORS 112.235 – will likely become less important, as the 2015 Legislature enacted ORS 112.238, which permits probate of writings that were not executed with those formalities.
As to classic lack-of-capacity and undue influence challenges, the keys are to know the legal standards by which those cases are litigated, and to work your planning file in a way that will demonstrate that you considered those standards in making the plan. But just as importantly, estate planning practitioners must be prepared to turn down work if they conclude that they are being used. A lost half-day of billable time is a small price compared to a year or more of litigation over a challenged will, with the stress, potential reputational damage, and liability exposure that may accompany such a fight.

**Lack of Capacity**

To have testamentary capacity, a person must be either at least 18 years old or legally married, and of “sound mind.” In *Kastner v. Husband*, the Oregon Supreme Court defined *of sound mind* as follows:

1. the person must be able to understand the nature of the act in which he is engaged;
2. know the nature and extent of his property;
3. know, without prompting, the claims, if any, of those who are, should or might be, the natural objects of his bounty; and
4. be cognizant of the scope and reach of the provisions of the document.


Exploring these factors is simple. Does the client know why she is in your office? Does she know what a will does? Does she know what she owns that would be disposed of through the will, and what she owns that would not? (She need not know specific account numbers or bank balances, but does she know she owns accounts, and where?) And does she know not only who she intends to benefit, but who her intentions will antagonize?

It is fair to inquire about a client’s health, including acute and chronic conditions, and medications.

No case has held that it is part of the attorney’s standard of care to get a release and obtain a client’s medical records, or obtain a specific medical evaluation aimed at establishing the client’s general level of cognition. (In any event, capacity is measured at the moment of execution, so a doctor’s opinion that a client is “generally capable” is not dispositive. *Estate of Gentry*, 32 Or App 45, 573 P 2d 322, 325 (1978) (string-citing several cases to the effect that capacity is measured at the precise moment of execution).) That said, if you are confident of the results ahead of time, the report of a gerontologist or neuropsychologist can be powerful ammunition in defense against a capacity-based challenge to an estate plan.

Educate yourself about the ways in which people with declining cognition mask their defects. Make sure that your questions are open-ended, not leading or suggestive. At the same time, read up on confirmation bias and other cognitive heuristics that may affect your own view of your client and her situation. Many an estate planner has fell foul of the line when over the course of representation a client has declined.

**Undue Influence**

Undue influence cases are the litigator’s bread and butter. *In re Reddaway’s Estate*, 214 Or 410, 329 P2d 886 (1958), remains the lead case regarding undue influence. It holds that when a contestant establishes that the testator and the alleged influencer had a “confidential relationship” and that there is evidence of any of several
“suspicious circumstances,” an inference of undue influence arises that requires the alleged malfeasant to bring forward evidence that the challenged document was, in fact, not tainted by fraud.

Importantly, Reddaway’s holding is not “confidential relationship + suspicious circumstance = undue influence.” Instead, Reddaway – as the case’s plaintext explains – sets forth an evidentiary template into which courts may organize the diverse kinds of evidence that are routinely brought to bear in such cases. But the template is not the claim itself.

The gravamen of an undue influence claim is that the beneficiary of the challenged act imposed his own will, with a “want of conscience,” on the donee. Undue influence, as Reddaway makes clear, “a species of fraud.” 215 Or at 420. Proof of a “confidential relationship” is the heart of an undue influence case, which is why Reddaway and its progeny declare that even slight evidence of any of several “suspicious circumstances” gives rise to an inference of undue influence – but only so long as a “confidential relationship” is first proved.

And a “confidential relationship” as that term is used in Oregon law is not simply a fiduciary relationship, or trust. There must be dominance, the subjugation of one person’s desires and will for those of another. Cf. Weisensee v. Hoyt, 220 Or 159, 175, 347 P2d 609 (1959) (finding a confidential relationship of trust but finding no “dominance,” and rejecting claim of undue influence); Harris v. Jourdan, 218 Or App 470, 180 P3d 119, 131, rev den 344 Or 558, 187 P 3d 219 (2008) (finding undue influence where donee and donor had “confidential relationship,” but explicitly finding “dominance” was necessary). As the Supreme Court explained in Doneen v. Craven, ‘A confidential relationship * * * means a fiduciary relationship, either legal or technical, wherein there is a confidence reposed on one side with a resulting superiority and influence on the other. It may be a moral, social, domestic or merely a personal relationship.’ (Italics added.)

We agree with counsel for the contestant that the rule is not limited to fiduciaries in the commercial or business sense. But, before a person may have cast upon him the duty of proving innocence of wrongdoing, it must appear that that relationship is such as to indicate a position of dominance by the one in whom confidence is reposed over the other.

204 Or 513, 523, 284 P2d 758 (1955) (quoting In Re Estate of Day, 198 Or 518, 530, 257 P2d 609 (1953). Insulating your work product from undue influence challenges is as simple as displaying a healthy and skeptical curiosity about an estate plan that deviates from the norm, with “the norm” generally being thought of as an estate plan that substantively mirrors intestate disposition, with no family members being disinherited. Ask these questions:

- **Who benefits?** What is the relationship between your client and the person whose share is disproportionate? How long has that relationship existed?
- **What is the favored beneficiary’s role in getting the proposed will done?** Did the beneficiary call you? Set the initial meeting? Bring the client to your office? Expect to sit in on meetings?
• Are you asked to prepare a plan that is different from previous plans? Why? What has changed? If an attorney drafted previous plans, why is the client in your office, rather than her previous lawyer’s office?

• Does the plan that you are preparing dispose of all the client’s assets, or are there other assets that would pass outside of probate, through joint ownership, POD designation or the like? If there are such assets, why? How long have those designations been in force? Why are they held that way? If anyone holds accounts jointly with your client, is that an intended testamentary disposition, or is it for convenience in billpaying and the like?

• Are you asked to work quickly? What’s the rush?

• Are you able to meet privately with your client? Does she track your conversation through your meetings? In subsequent meetings does she recall previous ones?

• Does anything about your client’s physical or mental state make her dependent on others? For what? Does the proposed plan benefit those upon whom your client depends? Is the client otherwise in a physically or mentally weakened state?

The “letter from the grave”

Many experienced practitioners ask their clients to prepare a letter to the lawyer, explaining their desires and the reasons that their testamentary intentions may differ from what would-be beneficiaries may expect. To be effective, the client must prepare the letter alone, on the spot, and without prompting – for example, alone in the lawyer’s conference room for half an hour with a legal pad, with no “phone a friend” help available.

If the result is a powerful explanation of the client’s wishes, then you may ask the client if you can hold the letter in your file, and disclose it to anyone you deem advisable after the client’s death in order to forestall a challenge to the estate plan. (Such affirmative consent from the client means that the attorney can disclose it after death without court order, as it was not intended to be kept confidential under certain circumstances.) Such a “letter from the grave” may defuse a challenge before it starts. Conversely, this exercise may raise red flags for you that prompt more probing inquiry before you move forward, or may cause you to decline the work entirely.

WHAT TO DO WHEN THE CHALLENGE COMES ANYWAY

The attorney-client privilege created by OEC 503 (ORS 40.225) survives the death of a client, and may be claimed by the personal representative of a deceased client. OEC 503(3); Oregon Evidence, Kirkpatrick, Fifth Edition, 2007, 503.11 (“the [attorney-client] privilege survives the death of the client and may be claimed by the personal representative”). The privilege may also be asserted by the attorney for the client, and the attorney is expected to assert the privilege. OEC 503(3); see Kirkpatrick, supra.

Once a will contest is filed, no attorney-client privilege may attach to your planning file to protect it from discovery. ORS 40.225(4)(b) (setting forth the testamentary exception, that “there is no privilege under this section” in disputed claims over who is entitled to dead clients’ property). But that is an evidentiary rule, not a rule of substantive law.

In addition to the Oregon Evidence Code, other Oregon authority constrains an attorney from disclosing a client's confidences. ORS 9.460(3) requires an attorney to
“[m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.” Oregon Rule of Professional Conduct 1.6, in turn, prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent. Once your estate planning client is dead, your client cannot consent.

If you are served a subpoena, or if an attorney contacts you and informs you that your work product is being formally challenged, you should not disclose confidential communications absent a court order. In that light, you should immediately call the Professional Liability Fund ((503) 639-6911, www.osbplf.org). The Fund will often hire a private attorney to help you through the process of honoring your legal discovery obligations while also honoring your substantive obligations to your deceased client.

2 Of course, you may disclose information that your client affirmatively wanted to be disclosed. See “the letter from the grave,” supra.
Chapter 5

2017 Oregon Legislative Update

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1. INTRODUCTION

In preparing materials for this year’s Estate Planning and Administration Section legislative update I quickly realized two facts: (1) there has been relatively little legislation relating to our section this session; and (2) what significant legislation there is has already been briefed by other experts. As such, I determined to spend little time explaining the substance of the various bills, and instead to focus on how the Bar and our Section track and review relevant legislation, and how attorneys can use the Bar and Section website to follow legislation and participate in the legislative process. This subject also provides an opportunity to remind attorneys about the Section Newsletter, available via the Section website, and about the OSB CLE materials library, available via BarBooks on the Bar’s website.

2. HOW TO FIND THE SECTION’S LEGISLATIVE TRACKING PAGE

Start with the Estate Planning and Administration Section’s website. To get there log in to the Bar website, and find and hover over the “Sections” tab (shown below) and a menu will drop down, click on “Section Website” to go to a page linking to all OSB section websites (https://www.osbar.org/sections).

The list of OSB section websites will open as shown below. Note that there are two columns of section names: the column on the left links to the section’s page on the OSB website, which typically just lists section dues, executive committee members, and other basic information; the column on the right links to the section’s own website, which generally includes additional information. Scroll down and
click on the “Estate Planning and Administration Section” link (in the right column) (https://estateplanning.osbar.org/).

The Estate Planning and Administration Section website will open as shown below. Click on the “Links” tab (https://estateplanning.osbar.org/links/).

Clicking on the “Links” tab will open a new field in the middle of the page, under the title “Links,” scroll down in that field to find a link to “Public Affairs Legislative Tracking/Reports.”
Click on that link to open a list of bills within the OSB website’s Public Affairs area, below (http://www.osbar.org/pubaffairs/reports/BarGroupBillSummary.html?bargroupid=814).
Basic Estate Planning and Administration 2017

3. HOW THE LEGISLATIVE TRACKING WEBPAGE IS COMPILED AND MAINTAINED

The list of bills is provided by the Bar, in consultation with the Section executive committee. Each legislative session the committee works with our legislative liaison at the Bar, currently Amy Zubko (OSB Legislative Attorney), to come up with a list of bills that we believe may be of interest to Section members. For practical purposes we try to limit the list to matters directly relevant to our Section’s practice area. We will always overlap somewhat with other sections, particularly the Elder Law Section, but we try to minimize duplication. Note that the Elder Law Section provides its own list of bills, as do a number of other sections. The Bar has been of great help in identifying potentially interesting bills and providing up to date information early in the session.

The Section executive committee notifies members of the tracking list when updated each legislative session, via the newsletter and list serve. Interested Section members are encouraged to suggest bills for tracking, and members interested in assisting in the tracking process should contact the Section Chair or Chair-Elect for more information.

4. HOW TO TRACK A BILL USING THE LEGISLATIVE TRACKING WEBPAGE

The Bar’s legislative tracking page provides some basic information about each bill and its status. By clicking on the number of the bill, as shown below, you can directly access the Oregon State Legislature’s website for more detailed information.
Once in the Oregon Legislature’s site (here for example at https://olis.leg.state.or.us/LIZ/2017R1/Measures/Overview/HB2069), additional information is available. For example, you can see the text of the bill by clicking on the text link, as shown below.

The introduced bill text opens in another window (here for example at https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2069/Introduced).
You might also click on the Meeting Materials/Exhibits link to see a list of materials (here for example at https://olis.leg.state.or.us/liz/2017R1/Measures/Exhibits/HB2069).

Which materials include, for example, the hearing witness registration sheet. In general these pages provide an amazing level of detailed and timely material regarding each bill proceeding in the Oregon Legislature.
5. BILLS TRACKED IN 2017

The bills we’ve tracked during the 2017 legislative session might be summarized as follows (more detailed summaries of these bills are provided later in these materials):

- Estate tax bills (HB 2069, 2546, 2832, 3354; SB 137, 379, 870), failed: all seven of these bills reduced the Oregon Estate Tax in some way, and therefore presumably decreased state revenues and as a result all seven “died in committee” (all in the Revenue Committee).

- UTC clean-up bill (HB 2608), passed, regarding the effective date of certain prior UTC revisions. The effect of this bill is to clarify that certain provisions of the UTC effectively apply to all trusts, whether established before or after passage of the UTC.

- Probate modernization bill (HB 2986), passed, an ongoing project of the Oregon Law Commission, intended to update the probate code but not intended to make any substantial changes to the code.

- Financial transactions (HB 2622), passed, granting financial institutions greater leeway to refuse financial transactions where they may reasonably suspect financial exploitation of a vulnerable person.

- Trustee compensation allocation to income or principal (HB 2623), passed, allows allocation of trustee fees to principal or income depending on circumstances.

- Penalties for failure to pay or file (SB 32), passed, clarifies imposition of penalties in various cases, but does not appear to impose penalty for failure to file where no tax is due.

- Advance directive update (SB 494), failed.

6. ANALYSIS OF TRACKED BILLS

Below is additional detail on certain of the above bills. In addition, as mentioned above, two of the more significant bills have already been well briefed by other authors, particularly the probate modernization bill (HB 2986), which passed, and the advance directive bill (SB 494), which did not pass. Additional materials regarding those bills are provided following these summaries.

appointment of personal representative and notice requirements. Makes updates to process for administration of estates. Adds provisions specifying when a claim has been referred to a personal representative. Updates process for claims against estate. Defines "property subject to jurisdiction of court." Modifies language relating to method of compensation for personal representative. Makes conforming amendments.”

See additional materials on HB 2986 below following these summaries.

**SB 494 (advance directive)**. Although this bill did not pass, it is significant and controversial, and is likely to return in some form or other in the next legislative session (perhaps in the next few legislative sessions). If any bills are introduced that relate to advance directives, the Section will track them.

See additional materials on SB 494 below following these summaries.

**HB 2608 (UTC clean up)**. (from the Oregon Legislature staff measure summary) “The 2015 Legislative Session, House Bill 2331 updated the Oregon Uniform Trust Code. The Oregon Uniform Trust Code was originally adopted in 2005 after development of the Code by the National Conference of Commissioners on Uniform State Laws. HB 2331 made several updates and changes to Oregon's trust law. First, the measure codified the "early vesting rule," allowing the interest of the beneficiary to vest upon the death of the settlor. Second, the measure clarified the rules for dividing trusts into shares or portions and brought such rules in alignment with the federal tax code. Finally, the measure addressed the allocation of qualifying capital gains into the distributable net income of the trust. The changes to these statutes were effective on all trusts executed on or after January 1, 2016, but were not applied to new trust proceedings started after that date. HB 2608 corrects the application error in HB 2331 and makes the Uniform Trust Code modifications applicable to trust proceedings commenced on or after the effective date of HB 2608.”

**HB 2623 (trustee fees, principal and income)**. (from the Oregon Legislature staff measure summary) “In 2003, Oregon adopted the Uniform Principal and Income Act (UPIA). The following long session, the Oregon Legislature adopted the Oregon Uniform Trust Code (UTC). Both Acts were originally promulgated by the National Conference of Commissioners on Uniform State Laws. Within the UPIA, one half of trustee or other custodial service provider fees come from the principal of the trust and the other half from the interest earned from the trust assets. Within the UTC, Rule 802, codified in Oregon statutes as ORS 130.655, requires that trustees administer trusts solely in the interest of the beneficiaries of the trust, then goes on to identify areas in which transactions between trustees and beneficiaries are voidable. Oregon law currently allows a beneficiary to void a transaction between a trustee and a beneficiary that does not involve trust property but from which a trustee gains an advantage if the transaction occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary unless the trustee can establish that the transaction was fair to the beneficiary. HB 2623 does two main things. First, it allows a trustee to charge all of the compensation for the trustee's services, or the regular compensation for investment advice or custodial services, to the principal or the income of the trust in whole, based on the reasonable judgment of the trustee. Second, it modifies the rule for voiding non-trust property transactions to add an additional
element so that the rule applies to transactions that occur outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those offered by the trustee to similarly situated clients.”

**HB 2622 (bank rejection of transactions involving vulnerable persons).** (from the Oregon Legislature staff measure summary) “HB 2622-A allows financial institutions, including banks, credit unions and trust companies, to refuse transactions when they reasonably suspect financial exploitation or have received information from the Department or law enforcement that financial exploitation is suspected or has occurred. Financial institutions are not required to freeze transactions but, if they do so in good faith, they are given civil, administrative, and criminal immunity. Freezes may last up to 10 days for a transaction that involves the sale of securities, such as bonds, annuities, or real estate papers. For non-security related transactions, the freeze may last up to 15 days. Freezes may be terminated by a court order or upon satisfaction to the financial institution that financial exploitation is not occurring.”

**SB 32 (tax delinquency penalties).** (from the Oregon Legislature staff measure summary) “Provides for imposition of either penalty for failure to pay estate tax when due or penalty for initial failure to file estate tax return when due.”

### 7. ADDITIONAL MATERIALS ON PROBATE MODERNIZATION AND ADVANCE DIRECTIVES (SECTION NEWSLETTER AND OSB CLE MATERIALS)

The probate modernization bill (HB 2986) was briefed by Lane Shetterly in last June’s 2017 Advanced Estate Planning CLE seminar, materials available via BarBooks as shown below, and by Susan Gary in the March 2017, Section newsletter, also shown below. In addition, the 2015 probate modernization bill was briefed by Hilary Newcomb in the Section’s 2015 Basic Estate Planning and Administration CLE, also shown below.

The advanced directive bill (SB 494) was briefed by Hilary Newcomb in the 2017 Advanced Estate Planning CLE seminar (shown below), and its predecessor was also briefed by Hilary Newcomb in the Section’s 2015 Basic Estate Planning and Administration CLE, also shown below.

**a. OSB CLE MATERIALS**

The Bar has added certain OSB CLE materials to the BarBooks webpages. These materials include all of the Estate and Administration Section’s Advanced (generally Fall) and Basic (generally late Spring) CLEs, as far back as 2012 (for Advanced) and 2013 (for Basic).

The CLE materials are available via BarBooks, as shown below.
To find the CLE materials click on the “Explore” tab, as shown below.

And then click on the “OSB CLE Seminar Handbooks” tab, as shown below.
A list of CLE Handbooks will drop down, in alphabetical order. To find the above-referenced materials for HB 2986 and SB 494 scroll down the “Advanced Estate Planning (2017)”. Some CLE materials are available directly from the title link, some, like Advanced Estate Planning (2017), require a second click to download as a .pdf file. Upon clicking on the .pdf download icon the CLE materials, as published, will download to your computer as a .pdf file. By scrolling down you will find the table of contents listing the above-referenced articles for SB 494 and HB 2986.
To find the relevant materials you can scroll down through the .pdf file, or click on the title of the materials in the table of contents. The chapter covering advance directives, and SB 494, is as shown below.

Note that the materials for HB 2986 include the report of the probate modernization work group, as shown below.
Probate modernization (2015 version) and advance directives (prior proposed legislation) were also briefed in 2015 by Hilary Newcomb at the Section’s Basic Estate Planning and Administration CLE, as shown below.
Chapter 5—2017 Oregon Legislative Update

Basic Estate Planning and Administration (2015)

Acronyms: CLEBEP15
Pub / Rev Date: 11/2015
Supp Date: Type: New edition
Editors:

Descriptions:
This handbook was published by the Oregon State Bar CLE Seminars Department and sponsored by the Estate Planning and Administration Sections.

NOTE: Case citations have not been cite checked. Websites were not verified.

Download the PDF of this handbook using the icon above to access chapters not listed below, which contain PowerPoint slides, material, rules, statutes, ethics, and other documents.

1. Oregon Legislative Updates (2014-Fall 2015)
   a. Digital Assets: Who Will Take Care of Them When You Can't?
   b. Oregon Estate Tax and Natural Resource Property
   c. Trust Repairs and Termination
   d. Selecting a Trustee
   e. Planning for a Family Member with Special Needs

Basic Estate Planning and Administration, 2015

1. Oregon Legislative Updates (2014-Fall 2015)
   a. Case Law Update, 2015
   b. Beneficiary's Rights to Trust Financials Pre- vs. Post-Death of Settlor
   c. Case Law Update, 2014
   d. Conservatorship Accounting, Disclosure, and Final Orders
   e. Court Authority to Modify Trust Termin
   f. Best Interests of the Protected Person Tax Priority
   g. Beneficiary Designation with a Terminated Domestic Partnership, Not Dissolve
   h. Conservatorship Discharge and Finding Determination
   i. Required Estate Recovery
   j. Trustee's Attorney's Fees
   k. Legislative updates, 2015 Session
   l. Probate Modernization Work Group: SB 379
   m. Digital Assets Act: SB 393-4
   n. Uniform Fiduciary Uniform-Residence Changes: HB 2433
   p. Priorities for Health Care: Declaration for Mental Health Treatment: HB 2386
   q. Federal Rules Update
   r. Enrolled Senate Bill 379 (see PDF download)
b. SECTION NEWSLETTER

HB 2986 was also briefed by Susan Gary in the March 2017 edition of the Section Newsletter. The Section Newsletter is available on the Section’s website, under the “Newsletters” tab (note that there is also a drop down “test page” under Newsletters, which can be ignored).

Click on the “Newsletters” tab to access the Newsletters page, as shown below.
The Newsletters page (https://estateplanning.osbar.org/newsletters/) contains a list of Section Newsletter editions in chronological order (most recent on the top). A table of contents is provided for each Newsletter edition (currently only back through 2015, tables of contents for 2014 and earlier are in process). The names of articles appearing in each table of contents are not links, you must open the entire edition and scroll through to find the articles.

By clicking on the date of the relevant edition you will open the edition as a .pdf file (here for example at https://estateplanning.osbar.org/files/2017/04/Est_2017Mar.pdf) and you can scroll down to find the relevant article.
8. SCOPE OF SECTION’S LEGISLATIVE ACTIVITIES

The Bar and its sections take a limited role in Oregon legislative activity. This subject takes us to another area of the Bar’s Legislative Affairs webpages. By hovering over the “Bar Programs” tab on the OSB website, as shown below, a drop down menu will appear, click on the top link “Legislative Home” to reach the Bar’s Public Affairs web page (http://www.osbar.org/pubaffairs).

The Public Affairs page includes a variety of information and links related to legislative activity, including the “Bar Group Bill Tracking” page (shown below) which provides direct links to all bills being tracked by OSB section.

The Bar’s legislative role is spelled out as “The LSB Legislative Guideline Overview,” shown below, and in more detail in the Bar’s policy statement “The Political Process: Roles and Responsibilities,’ which may be access in full by clicking on the link on the Public Affairs page as shown below.
The Bar and Section leadership must be cognizant of the Bar’s policy statement, and the guidelines set forth in the Keller decision.

The following screen shots from “The Political Process: Roles and Responsibilities” (http://osbpublicaffairs.homestead.com/files/Political_Process.pdf) highlight the Bar’s policies regarding the Bar’s and Sections’ roles in legislative activities (including discussion of the “Keller standard”).
The Oregon State Bar and its Sections, together with the Oregon State Legislature, provide a great amount of timely and detailed information regarding Oregon legislation and the legislative process. Oregon attorneys who are interested in following or participating in the legislative process will find most of the necessary tools at their fingertips through the Bar website and the Oregon Legislature’s website.
Chapter 6
Oregon’s Elective Share for Surviving Spouses

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Chapter 6—Oregon’s Elective Share for Surviving Spouses

Oregon law allows a surviving spouse to make an election under ORS 114.600 through ORS 114.725 to take a portion of the deceased spouse’s estate rather than receiving the distribution provided for the surviving spouse in the deceased spouse's estate plan.

I. How and When to Make the Election

The election is only available if the decedent was domiciled in Oregon on the decedent's date of death. ORS 114.600(1). If the decedent owned property in Oregon but died while domiciled in another state, then the surviving spouse's right to take an elective share of the Oregon property is governed by the law of the state where the decedent was domiciled. ORS 114.600(3).

The election must be made within 9 months of the decedent's date of death. The election may be made by the surviving spouse or the surviving spouse's conservator, guardian, or an agent under the power of attorney on behalf of the surviving spouse. ORS 114.625. The election must be made before the surviving spouse dies. If the election was properly made, the personal representative of the estate of the surviving spouse may take the necessary steps to receive the payment of the elective share. ORS 114.600.

The surviving spouse may claim the elective share by filing a motion in the probate proceeding of the decedent's estate. ORS 114.610(2). A copy of the motion must be served on the personal representative, all persons entitled to receive information under ORS 113.145, and all persons who will or would receive any part of the augmented estate. If there is no probate, then the surviving spouse may file a petition for the appointment of a personal representative and a motion to exercise the election. ORS 114.610(1)(a).

The surviving spouse may also file a petition in circuit court for the exercise of the election if there is no probate proceeding. ORS 114.610(1). The venue for the proceeding is the same as the probate venue. ORS 114.720 and 113.015. The petition must be served on all persons who would be entitled to notice under ORS 113.145 and all persons who will or would receive any part of the augmented estate. ORS 114.720(1). The filing fee for the petition is based on the value of the nonprobate estate. ORS 114.720(1). A court must consolidate the probate proceeding and the exercise of the elective share claim. ORS 114.720(3). A spouse may withdraw the petition at any time before a judgment has been entered. ORS 114.720(2).

Spouses may waive their right to the elective share in a writing signed before or after the marriage. The language may use the phrase "all rights" or such other equivalent. It can also be waived in a "complete property settlement entered into after or in anticipation of separation or divorce[.]" ORS 114.620(1).

The court may deny the surviving spouse's right to the elective share or may reduce the amount if the decedent and the surviving spouse were "living apart" at the decedent's death. The court must consider if it was a first or subsequent marriage, the contribution of the surviving spouse of services or transfers to the decedent's property, the length and cause the separation, and any other relevant circumstances.
II. What is the Elective Share or "the Augmented Estate"

A. Elective Share. The elective share is an amount that is calculated by multiplying the augmented estate by the statutory percentage set forth in ORS 114.605 which is based on the number of years the parties were married. The court will determine the amount of the elective share. ORS 114.610(2). The schedule for ORS 114.605 is as follows:

<table>
<thead>
<tr>
<th>If the decedent and the spouse were married to each other:</th>
<th>The elective share percentage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 2 years</td>
<td>5% of the augmented estate</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>7% of the augmented estate</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>9% of the augmented estate</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>11% of the augmented estate</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>13% of the augmented estate</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>15% of the augmented estate</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>17% of the augmented estate</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>19% of the augmented estate</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>21% of the augmented estate</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>23% of the augmented estate</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>25% of the augmented estate</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>27% of the augmented estate</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>29% of the augmented estate</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>31% of the augmented estate</td>
</tr>
<tr>
<td>15 years or more</td>
<td>33% of the augmented estate</td>
</tr>
</tbody>
</table>

B. Augmented Estate. The augmented estate is based on three categories: (1) the decedent's probate estate; (2) the decedent's nonprobate estate; and (3) the surviving spouse's estate. The categories include all of such property, regardless of whether it is real or personal, movable or immovable, tangible or intangible, and where it is located. ORS 114.630(1). It also includes the value of any present or future interest and the present value of amounts that are payable from a trust, life insurance settlement option, annuity contract, pension, disability
compensation, death benefit, and retirement plan. ORS 114.630(3). The value of the property in the augmented estate is reduced by the amount of enforceable claims against the property and any encumbrances on the property. ORS 114.630(2). Any exemption or deduction that is allowed for the purpose of determining estate or inheritance taxes on the augmented estate and that is attributable to the parties’ marriage inures to the benefit of the surviving spouse as provided in ORS 116.343 (2). An item of property may only be included once in determining the value of the augmented estate. ORS 114.630(5). Property is valued based on the fair market value as determined for federal estate and gift taxes. ORS 114.630(4).

The augmented estate does not include any future enhanced earning capacity of either spouse; any property that was irrevocably transferred prior to the spouse's death; any property transfer on or after death with the written consent of the surviving spouse; any community property; or any property that is held by a spouse in a fiduciary capacity. ORS 114.635.

C. **Decedent's Probate Estate.** The decedent’s probate estate includes all of the decedent's property that is subject to probate and that is available for distribution after payment of claims and expenses of administration or property that could be administered under a small estate affidavit. ORS 114.650. The probate estate does not include any property that is a probate transfer to the surviving spouse. ORS 114.650

D. **Decedent's Nonprobate Estate.** The decedent’s nonprobate estate consists of the property that is not included in the decedent’s probate estate and that does not constitute a transfer to the decedent’s surviving spouse. ORS 114.660. The value of the decedent’s nonprobate estate is reduced by all debts and liabilities of the decedent that are not paid in probate, all of the administrative expenses for the nonprobate estate, and all of the costs incurred for the purpose of settling claims against the nonprobate estate. ORS 114.660. A decedent’s nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent and it does not include any property that passes to the surviving spouse under the federal Social Security Act. ORS 114.660(5) and 114.690(2). The nonprobate estate also includes the following assets:

1. Property owned by the decedent in a form of survivorship tenancy immediately before death; the value is the decedent's fractional interest to the extent the fractional interest passes by right of survivorship at the decedent’s death to a surviving tenant other than the decedent’s surviving spouse. ORS 114.665(1)

2. Property or accounts held immediately before death under a payable on death or transfer on death designation, including a transfer on death deed, or in co-ownership registration with a right of survivorship; the value is the decedent’s ownership interest, to the extent the decedent’s ownership interest passed at the decedent’s death to or for the benefit of any person other than the decedent’s estate or surviving spouse. ORS 114.665(2).

3. Property owned by the decedent immediately before death for which the decedent had the power to designate a beneficiary, but only to the extent that the decedent could have designated the decedent, or the spouse of the decedent, as the beneficiary. ORS 114.665(3).
4. Property that immediately before death the decedent could have acquired by the exercise of a revocation, without regard to whether the revocation was required to be made by the decedent alone or in conjunction with other persons. ORS 114.665(4).

E. Surviving Spouse's Estate.

1. The surviving spouse's estate includes:

   a. the decedent’s probate transfers to the spouse which includes all estate property that is subject to probate, that passes to the surviving spouse by testate or intestate succession, and that is available for distribution to the surviving spouse after payment of claims and expenses of administration; ORS 114.685

   b. the decedent’s nonprobate transfers to the spouse which includes all property that passed outside probate at the decedent’s death from the decedent to the surviving spouse by reason of the decedent to the surviving spouse by reason of the decedent’s death, including: (i) any fractional interest in property held in survivorship tenancy which passes to the surviving spouse as the surviving tenant; (ii) property or accounts held in co-ownership registration with the right of survivorship, to the extent that the decedent’s ownership interest passed to the surviving spouse as surviving co-owner; (iii) insurance proceeds payable to the surviving spouse by reason of the death of the decedent; and (iv) all other property that would have been included in the decedent’s nonprobate estate under ORS 114.660 and 114.665 had it passed to or for the benefit of a person other than the decedent’s spouse. ORS 114.690.

   c. all other property of the spouse, as determined on the date of the decedent’s death and any property that would have been included except for the exercise of a disclaimer by the spouse after the death of the decedent. ORS 114.675(1).

2. There are additional rules regarding what portion of a trust established by the decedent for the benefit of the surviving spouse will be included in the surviving spouse's estate. For an income only trust for the benefit of the surviving spouse, if all of the trust income must be distributed to or for the benefit of the surviving spouse during his or her lifetime, and there is no ability to distribute trust principal to anyone during the surviving spouse's lifetime, then 50% of the value of the trust will be included. ORS 114.675(c)(2). Any amounts that are distributed to the surviving spouse from a unitrust under ORS 129.225 are also income. ORS 114.675(2)(d). For a trust that provides for income and principal distributions, all of the trust is included in the value if all of the trust income must be distributed to the surviving spouse and (1) the spouse has a general power of appointment that only the spouse can exercise in favor of the spouse or the spouse's estate; or (2) the trustee may distribute principal for the surviving spouse's health, education, maintenance and support. ORS 114.675(2)(b).

III. Payment of the Elective Share.

A. Order. Once the elective share amount has been calculated, the court will look at the value of the decedent's probate estate, the nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the surviving spouse, and the decedent's nonprobate transfers to the surviving spouse. If the value of the surviving spouse's estate, the decedent's probate and nonprobate transfer do not satisfy the amount of the elective share, then the court will order that
the amount required to pay the full elective share be paid from the decedent's probate and nonprobate estate ORS 114.615.

B. Priority of Payment. The priority for the payment of the elective share is set forth in ORS 114.700. The court will first apply the surviving spouse's estate to the elective share. ORS 114.700(1). If there is still an amount owing, then the decedent's probate and nonprobate estate will be applied. ORS 114.700(2). If the decedent's will, trust or other instrument does not provide instructions, then the elective share will be paid from the probate and nonprobate estates in a manner that the probate and nonprobate estates bear proportionate liability for the amount that is needed to pay the elective share. ORS 114.700(3)(a). For amounts taken from the probate estate, the amount must be apportioned among all the recipients of the decedent's probate estate in a manner that ensures each recipient bears their share of the liability in proportion to the recipient's interest in the probate estate. ORS 114.700(3)(b). For amounts taken from the nonprobate estate, the amount must be apportioned among "all recipients of the decedent’s nonprobate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient’s interest in the decedent’s nonprobate estate." ORS 114.703(c).

C. Who is required to contribute? If the personal representative does not have possession of the property or has distributed the property, then the court "shall fix the liability" of any person who has an interest in or has possession of the property, "whether as trustee or otherwise". ORS 114.610(3). Only the "original recipient of all or part of the decedent’s nonprobate estate" and a person who received all or part of the decedent’s nonprobate estate for less than fair consideration from an original recipient of the property, to the extent the person has the property or proceeds of the property are required to make the contribution to the payment of the elective share. ORS 114.705(1). The recipient who is required to make the contribution may return the property or pay money equal to the value of the property. ORS 114.705(2).

D. Protective Order and Discharge. The surviving spouse or any person who has received the decedent's probate or nonprobate property, may request the court to issue a protective order to prohibit or impose conditions on the transfer of the property in the augmented estate. The order may be served on any person holding the decedent's property. ORS 114.710(1). Any person who received part of the decedent's estate and who is required to make a contribution toward the satisfaction of the elective share may file a motion or petition with the court requesting a determination of the amount of the person’s proportionate contribution toward the satisfaction of the elective share. When the court makes the determination, the person may deposit with the court the amount with the court in a bond or cash or other security and that will discharge the person from all other contribution claims. ORS 114.710(2).
# Chapter 7
## Bonding Basics for Probate Matters

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BONDING BASICS FOR PROBATE MATTERS

Section I: Overview - What is a Bond and How Does it Work?

I. Bonds – What are they?
   a. Financial Guarantee - made with support of a surety that a party will perform as agreed or required to a third party.
      i. Statutes provide the “call to bond” for Probates and Conservatorships through judgments and orders. There must be a judgment or a court order stating a bond is required and setting the amount.
   b. Pledge - from both the bonded party (known as the Principal) and bonding company (known as the Surety) made to a third party (known as the Obligee)
      i. Obligee for Probate matters: The State of Oregon and all interested persons or parties in the case.
   c. Indemnity Agreement – contract between the Principal and Surety supporting the bond transaction.
      i. Indemnity Agreement exists between the Principal and the Surety. Sometimes it is part of the application or it can be a separate document
         1. Signed by the Principal prior to filing the bond
         2. Principal agrees to:
            a. Remit premium when due regardless of the status of the case.
            b. Indemnify and hold the surety harmless against all liabilities, losses, and costs (including attorney fees) that the surety sustains by reason or consequence of the surety having bonded the matter.
            c. Principal agrees to secure release and discharge of the Surety from further liability under the bond.
            d. The principal agrees to reimburse the Surety for all expenses they may incur.
d. Bond Claims  
   i. Claims can only be pursued by the Obligee on the bond through a court ordered Surcharge.
      1. Prior to a matter getting to the point of a Surcharge Order, the Surety is likely been in contact with the Principal to remind them what their obligation is within the indemnity agreement.
      2. Should the Surety need to satisfy a surcharge, they will immediately seek to exercise their rights under the indemnity agreement.

II. Not to be confused with an Insurance Contract

a. Insurance policies are used as a method of sharing risk between an insurer and a policy holder. In exchange for consideration (a premium) an insurance company agrees to return an insured to a certain level of pre-loss condition subject to who and what is covered, usually less a deductible, subject to terms, conditions, exclusions, among other components of the policy. (Notice there is no “call to insure” versus the need to have a “call to bond” for surety)

b. When a covered claim takes place, the deductible (if any) is paid by the insured person or entity, the insurance company pays their part – the contract is fulfilled. There is no indemnity agreement for the insured to reimburse the insurance company.

c. Insurers KNOW and EXPECT to have claims – They underwrite and price insurance products accordingly. Surety companies underwrite to not have any losses.

Section 2: Applying for Probate Bonds & Underwriting

I. Application – Data Collection about the party to be bonded and the case.
   a. Occupation / DOB / SSN / Income / Net Worth / sometimes Financial Statement

   b. Attorney Information – Bond underwriting requires attorney representation as long as the case requires a bond

   c. Case Information
1. Decedent information: Date of death / is there a will / heirs or devisees/ relationship between the applicant and the deceased
2. Conservatorship: DOB of the protected person or minor / nature of the incapacity
3. Asset and other case information –
   a. Values for real property / personal property / bank & investment accounts/ income & sources /notes receivable/ interest in businesses
   b. Creditor information / notes payable
   c. Wills / estate plans
4. Is the applicant a creditor or debtor to the decedent or protected person?
5. Has the applicant ever filed bankruptcy or have they been convicted of a felony.

II. Underwriting - Bonds are a form of credit and are underwritten in a similar fashion. The surety is agreeing to financially back an applicant. If the bond is surcharged and the principal does not satisfy the surcharge, the surety will do so. At this point the surety will pursue exercising their rights under the indemnity agreement. Bond underwriting is structured to:

   a. Identify the potential for surcharge (aka: risk to the surety)
   b. Qualifications of the applicant –
      i. Does the applicant have the “life experience” to handle the matter at hand?
      ii. Does the applicant have the financial strengh & depth to fulfill their obligation under the indemnity agreement.

1. Credit Reports - Track report with lenders shows Underwriters what can be expected by the applicant. Do they stick to the terms of payment they agreed to with their lenders?
2. Income – Can show joint to household if the applicant is married (needs to be labeled as such)
3. Net Worth: what is **owned** – what is **owed** = Net Worth

III. Pre-Approval for bonding – Do it EARLY

   a. If you know a case needs to be bonded, it is best to find out very early if there are any challenges with your client qualifying for one and can they be bonded for the dollars needed by the case?
b. Pre-approval allows the ability to move forward with confidence that bonding will not be an issue – OR for strategizing on how best to proceed if there are any challenges.

c. Pre-approve for the high end of anticipated bond amount.

d. Underwriting changes as the amount of bond increases. Qualifications and underwriting is different for $50,000 bond versus $800,000.

e. There should be NO COST to have an applicant pre-approved for bond.

Section 3: The Bond Document & Transactions (Riders & Cancellations)

I. Bond Documents
   a. Bond document will state the name of the Surety, Bond Number, Bond Principal, and the Obligee; format will likely follow the case caption. Bond documents need to be:
      i. Dated
      ii. Signed by the Bond Principal
      iii. Signed by the Surety Corp Officer or Attorney-in-Fact
      iv. Sealed – raised or “crimp” seal, stamped, graphic seal, or “sticker” sealed

   b. Powers of Attorney and Attorneys-in-Fact
      i. Any signer for the Surety who is not a Corporate Officer must include a Power of Attorney evidencing their authority to sign on behalf of the Surety
      ii. POAs must:
         1. be from the same surety as listed the bond
         2. list the name of the Attorney-in-Fact who signed the bond for the surety
         3. POA Must be dated the same as the bond.
         4. The POA is outdated if the commission of the notary expired prior to the issue date of the bond.
         5. Deficiencies within the POA may cause the bond to be challenged as invalid.

II. Riders - Changes to the Bond
a. Once a bond has been issued and filed with the court, it can only be changed with a court order or judgment. The bond principals and their attorneys do not have the autonomy to independently change a bond that is on file with the court.

b. **A court order – without a rider does not change a bond.**

c. Large increases in bond amounts will likely require
   i. Motion
   ii. Signed copy of Inventory or the Asset Schedule supporting the increase

d. Effective date of the change will be the date the order is signed.

e. Riders also need to be signed by the principal and the surety or their Attorney-in-Fact with a Power of Attorney. Please refer prior information regarding signing of bonds and POAs.

III. Cancellation of a Bond

   a. Only the Court can release a surety from their obligation. E-signed General or Supplemental Judgments are required.
      i. Preferred language for a surety is to have the “bond exonerated”
      ii. All contingencies for release need to be completed before the bond can be filed. Common contingencies
         1. Paying fees and making distributions
         2. Filing Receipts

Section 4 – Common Bonding Situations

Bonds are very specific regarding all factors – county, case, persons, dollars, and purpose. The surety is only obligated to the extent the bond document indicates. Changes in situation will often require change to the bond.

I. **Formation of a Special Needs Trust - Rider to existing conservators bond or the issue of a separate bond – depending on the case.**

II. Death of a protected person in Conservatorship and a Probate is opened – This is a new case and requires a new bond.

III. Change of Venue
   a. Different County in Oregon – Needs a rider to the existing bond.
   b. Different State – Bond needs to be rewritten.

IV. Attorney withdrawal or release by the client – Notify the surety.
V. Bond for Minor when respondent becomes 18 and continues under protection of Conservatorship – bond needs to be rewritten.

More on Special Needs Trusts: When a Special or Supplemental Needs Trust is formed or is to be taken over by a successor trustee and included in a Conservators bond there are specific conditions that most surety companies need in place to accept the additional risk. The below has been honed over the years and is very functional for surety purposes. Variations in language have been accepted; however, it is recommended to get any significant changes approved by underwriting in advance.

SPECIAL OR SUPPLEMENTAL NEEDS TRUSTS - A conservatorship must exist in order for ORS 125 to apply to the matter with the same person as conservator and trustee. To bond a Special or Supplement Needs Trust in conjunction with a Conservators bond; please provide a copy of the trust and an order or judgement that specifically states:

a. The trust is to be bonded
b. The conservatorship will stay in place as long as there is a need to bond the trust.
c. Annual accountings will be made to the court per ORS 125 that will include all activity of the conservator/trustee.
d. Court approval for the Conservator/Trustee accounting will be sought - Accountings will not merely be filed)
e. Bond for the Conservator/Trustee will be exonerated when the conservatorship is closed. (A surety will not continue to bond just the trust without being able to rely on the accounting provisions and court oversite as required in ORS 125.
BOND OF FIDUCIARY

IN THE ☒ CIRCUIT COURT OF THE STATE OF OREGON

In and For The County of Multnomah Case No. 17XX000000

IN THE MATTER OF THE ☒ Estate ☒ Guardianship ☐ Conservatorship ☒ Trust

OF JANE DOE ☒ Deceased ☐ Minor ☐ Spendthrift

Know all men by these presents:

That we Mark Doe as Principal, and Hartford Fire Insurance Company, a corporation duly licensed to do business in the State of Oregon, as Surety, are held and firmly bound unto the State of Oregon and all interested persons in the above entitled case, in the sum of One Hundred Fifty Thousand and no/100*** ($150,000***) DOLLARS lawful money of the United States for the payment of which well and truly to be made we bind ourselves and our legal representative jointly and severally by these presents.

Dated this 23 day of October, 2017.

The condition of the above obligation is such, that whereas, the above Principal has been appointed Personal Representative of the said case by the aforesaid Court.

NOW, THEREFORE, if the said Principal shall faithfully perform his trust according to law, and shall account for and dispose of the proceeds of all sales of real property according to law, then this obligation to be void otherwise to remain in full force and effect.

(for Court Use)

Approved by: ____________________________

Date Approved: __________ / __________ / __________

Bond Issued by: COURT BONDS

By: ___________________________________

HARTFORD FIRE INSURANCE COMPANY

By: _______________________________

Mark Doe Principal

Jennifer Tuomi, Attorney-in-fact
INDEMNITY AGREEMENT

Issuing Company: _______________________________
Bond Number: _______________________________
Bond is in the matter of: _______________________________
Effective Date of Bond: _______________________________
Name of Bond Principal (Applicant): _______________________________
Applicant is bonded as:

☐ Guardian  ☐ Conservator  ☐ Trustee  ☐ Personal Representative
☐ Other / Description: ________________________________

In consideration of the execution by Name of Surety (hereinafter referred to as the Company) of the bond referenced above, I agree to pay a premium(s) when due regardless of the status of the case while such bond or any continuation thereof remains in force. I further agree to indemnify and save the Company harmless from and against all liability, claims, losses, costs, damages, suits, charges and expenses of whatsoever kind and nature, including reasonable attorney fees, which the Company shall at any time sustain or incur, for or by reason or in consequence of the Company having become surety on any such bond(s) or any modification, renewal or continuation there of, or new bond(s) substituted there for.

I agree to procure, at the request of the Company, the release and discharge of the Company from any further liability under said bond(s), and should the undersigned fail or refuse to do so, the Company shall have the right to proceed in any manner it may see fit to secure or attempt to secure its discharge, and the undersigned applicant (and indemnitor, if any) waive any and all claims against the Company for damages growing out of such proceedings and agree to reimburse the Company for all expenses, including reasonable attorneys fees, which the Company may incur.

Dated this day of , 20__

Witness: Applicant:

________________________________  ________________________________
Signature  Signature

________________________________  ________________________________
Print Name  Print Name

Bonding Agent: Court Bonds
A division of JD Fulwiler & Co Insurance
P.O. Box 69508
Portland, OR 97239

Contact: Jenny Tuomi (503)977-5624  jtuoimi@jdlfulwiler.com

Please have signed, witnessed, and returned to COURT BONDS – Thank you
POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS THAT:

☐ Hartford Fire Insurance Company, a corporation duly organized under the laws of the State of Connecticut
☐ Hartford Casualty Insurance Company, a corporation duly organized under the laws of the State of Indiana
☐ Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut
☐ Hartford Underwriters Insurance Company, a corporation duly organized under the laws of the State of Connecticut
☐ Twin City Fire Insurance Company, a corporation duly organized under the laws of the State of Indiana
☐ Hartford Insurance Company of Illinois, a corporation duly organized under the laws of the State of Illinois
☐ Hartford Insurance Company of the Midwest, a corporation duly organized under the laws of the State of Indiana
☐ Hartford Insurance Company of the Southeast, a corporation duly organized under the laws of the State of Florida

having their home office in Hartford, Connecticut, (hereinafter collectively referred to as the “Companies”) do hereby make, constitute and appoint, up to the amount of Unlimited:

David Crowe, Trisha Fulwiler, Peggy MacMillan, Susan Morell, Jan Oyala, Holly G. Pfister, Bari Smith, Jennifer Tuomi, Charlotte Yambao-Koss of PORTLAND, Oregon

their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign its name as surety(ies) only as delineated above by ☒ and to execute, seal and acknowledge any and all bonds, undertakings, contracts and other written instruments in the nature thereof, on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

In Witness Whereof, and as authorized by a Resolution of the Board of Directors of the Companies on May 6, 2015 the Companies have caused these presents to be signed by its Senior Vice President and its corporate seals to be hereto affixed, duly attested by its Assistant Secretary. Further, pursuant to Resolution of the Board of Directors of the Companies, the Companies hereby unambiguously affirm that they are and will be bound by any mechanically applied signatures applied to this Power of Attorney.

John Gray, Assistant Secretary

M. Ross Fisher, Senior Vice President

STATE OF CONNECTICUT

COUNTY OF HARTFORD

SS.

On this 11th day of January, 2016, before me personally came M. Ross Fisher, to me known, who being by me duly sworn, did depose and say: that he resides in the County of Hartford, State of Connecticut; that he is the Senior Vice President of the Companies, the corporations described in and which executed the above instrument; that he knows the seals of the said corporations; that the seals affixed to the said instrument are such corporate seals; that they were so affixed by authority of the Boards of Directors of said corporations and that he signed his name thereto by like authority.

Nora M. Stanko
Notary Public
My Commission Expires March 31, 2018

Kevin Heckman, Assistant Vice President

CERTIFICATE

I, the undersigned, Assistant Vice President of the Companies, DO HEREBY CERTIFY that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which is still in full force effective as of

Signed and sealed at the City of Hartford.
RIDER CHANGING AMOUNT OF BOND

“NAME OF SURETY COMPANY”,
as Surety, (hereinafter called the Surety) issued its Bond No. ______________________________
on behalf of ____________________________________________________________
in favor of ______________________________________________________________
regarding ________________________________________________________________
in the amount of _______________________________ Dollars $ __________ and $ __________

WHEREAS, it is the desire of the parties to said Bond that the amount thereof shall be as hereinafter provided;

NOW, THEREFORE, it is hereby stipulated and agreed that , with respect to any loss or losses sustained through acts or omissions occurring on or after ______________ the amount originally stated in said Bond (or the amount to which said original amount may have been subsequently changed by rider) is hereby to

______________________________ Dollars $ __________

Provided, however, (1) that the liability of the Surety for any loss sustained through acts or omissions occurring in any period during which the coverage shall have been in the same amount shall be limited to the amount of coverage in force at the time such acts or omissions occur; and provided further that the aggregate liability of the Surety for any and all losses sustained through acts or omissions occurring during the life of said bond, irrespective of the number of changes made in the amount thereof, shall not be cumulative as to periods during which the coverage was in different amounts, and shall not in any event exceed the largest amount of said bond at any one time; (2) if the attached bond contains a provision limiting the time for discovery of loss after the cancellation of the bond, and if this rider decreases the amount of said bond, the amount by which the coverage is decreased shall be considered as having been canceled as of the effective date of such decrease for the purpose of computing the period allowed for the discovery of loss.

Signed, Sealed and Dated: ______________________________

Principal

Approved by: ______________________________

By: ______________________________

, Attorney-in-fact

Judge
Date: _______ / _________ / __________

Issued by:
COURT BONDS
P.O. Box 69508
Portland OR 97239
(503) 977-5624

Basic Estate Planning and Administration 2017
Section 1: What is a Bond and How Does it Work?

I. Bonds: What are they?
   a. Financial Guarantee
   b. Pledge
   c. Indemnity Agreement
   d. Bond Claims

II. Not to be confused with an Insurance Contract
   a. Insurance - Sharing & Management of Risk
   b. No need to reimburse Insurance Company for covering a claim
   c. Claims Expected
Section 2: Applying for Probate Bonds & Underwriting

I. Application - Data Collection
   a. Applicant Information: all information requested is considered for underwriting purposes. Blanks or cryptic information will not help get a bond approved.
   b. Attorney Information: Underwriting requirement: An attorney must be retained by the fiduciary for the duration of the case as long as a bond is needed.
   c. Case Information: Be as complete as possible. It is understood some information may not be available in the early stages (such as all asset and creditor info)

II. Underwriting
   a. Identify Potential Risk to the Surety
   b. Qualifications of the Applicant
      i. “Life Experience”
      ii. Financial Strength & Depth
         1. Credit Reports
         2. Income
         3. Net Worth (RMV of what is OWNED less what is OWED = Net Worth)
Section 2: Applying for Probate Bonds & Underwriting

III. Pre-Approval for bonding - Do it EARLY
   a. Seek pre-approval for bonding before you petition
   b. Pre-approval identifies challenges early on and save everyone time & money.
   c. Ask for approval for the higher range of values.
   d. There should be NO COST to have an application pre-approved

Section 3: The Bond Document & Transactions

I. Bond Documents:
   a. Bond Documents need to be
      i. Dated
      ii. Signed by the Bond Principal
      iii. Signed by the Surety Attorney-in-Fact (most common) or by a Surety Corporate Officer (least common)
      iv. Carry the Surety Seal (Crimped or raised, stamped, graphic, or sticker)
Section 3: The Bond Document & Transactions

ii. Powers of Attorney (POA’s) must:
   1. Be from the Same Surety as listed on the bond
   2. List the name of the Attorney-in-Fact
   3. POA must be dated the same as the bond.
   4. The POA is outdated if the commission of the notary expired prior to the issue date of the bond.
   5. Deficiencies within the POA may cause the bond or rider to be challenged as invalid

Section 3: The Bond Document & Transactions

II. Riders - Changes to the Bond
   a. Court order or Judgment is needed to make any change
   b. A court order alone does not change a bond - a rider MUST be issued
   c. Large increases in dollar size of bond may also need:
      i. Copy of the Motion
      ii. Signed Inventory OR Asset Schedule
   d. Rider effective dates will be the date the order was signed provided it was submitted timely.
   e. Power of Attorney will also need to be included - same as what applies for new bonds.
Section 3:
The Bond Document & Transactions

III. Cancellations
   a. Court release needed to cancel - General or Supplemental Judgment.
      i. Preferred language: “Bond is Exonerated”
      ii. Any contingencies must be fulfilled.
         1. Paying Fees & Making Distributions
         2. Filing Receipts

Cancellation date will be the date the release is signed or the date the final contingency was met.

Section 4:
Common Bonding Situations

- Formation of a Special needs Trust
- Death of a Protected Person
- Change of Venue
- Attorney Withdrawal or Release by the Client
- Bond for Minor
Questions?
Chapter 8
Community Property in Estate Planning and Administration in Washington

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Chapter 8—Community Property in Estate Planning and Administration in Washington

I. WASHINGTON COMMUNITY PROPERTY LAW

A. INTRODUCTION

1. Community Property Jurisdictions. Oregon is bordered by the community property states of California, Idaho, Washington and Nevada. The law of community property controls the character and disposition of property in Arizona, California, Idaho, Louisiana, New Mexico, Wisconsin, Nevada, Texas and Washington. Alaska and Tennessee have an opt-in community property system. In addition, the Commonwealth of Puerto Rico has adopted a community property regime. Although the basic concepts associated with community property law are consistent from one community property state to another, there are significant differences in the application of community property laws from state to state. Therefore, in advising clients, the practitioner should research the applicable authority from the particular community property state in question.

2. Registered Domestic Partners and Committed Intimate Partners. Pursuant to RCW Chapter 26.60, Washington “registered domestic partners” have the same rights as married persons with respect to community property. For purposes of these materials, all references to the marital community and spouses shall include a state registered domestic partnership under RCW Chapter 26.60. In addition, individuals in a “committed intimate relationship” also have certain property rights. For further discussion of these issues refer to paragraphs I.E and I.F below.

B. CHARACTER OF PROPERTY IN A COMMUNITY PROPERTY REGIME

1. Introduction. In a community property state, a married person may hold assets as “community property” or “separate property.” However, there is a presumption that all assets held during marriage (in the names of both spouses or either spouse) are community property. Whether property constitutes community property or separate property refers to the “character” of the property. A legally recognized marital relationship or registered domestic partnership is a prerequisite for the creation of community property.

2. Separate Property Defined. Under the typical statutory scheme, separate property is defined as “property and pecuniary rights” acquired either prior to marriage, or by gift, devise, bequest or descent during marriage. Revised Code of Washington (“RCW”) 26.16.010 and 26.16.020. Separate property is acquired by means other than the efforts of a married person. Property acquired while spouses are living separate and apart may constitute separate property. RCW 26.16.140. However, typically, mere physical separation is not sufficient to overcome the presumption of community property. Rustad v. Rustad, 61 Wash. 2d 176, 177 P.2d 414 (1963).

3. Community Property Defined. Community property is defined as all property acquired during marriage except separate property. RCW 26.16.010 and 26.16.030. Community property is acquired by means of the efforts of one or both spouses.

4. The “Character” of Property. The community or separate “character” of the property is determined as of the time of acquisition. Character, once fixed, continues until changed by agreement of the spouses or by operation of law (e.g., death of one of the spouses).
In re Madson’s Estate, 48 Wash. 2d 675, 296 P.2d 518 (1956). Changes in the form of investment do not change the character of the property. This is referred to as the “source doctrine.” The presumptions regarding community or separate property are true presumptions, and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption. Once a presumption in favor of either community or separate property is established, the burden to overcome the presumption is by clear and convincing evidence. In re Estate of Borghi, 167 Wash.2d 480, 219 P.3d 932 (2009).

5. The Community Property Presumption.

a) All property acquired during marriage is presumed to be community property. Yesler v. Hochstettler, 4 Wash. 349, 30 P. 398 (1892). Unlike a common-law property state, it is irrelevant whether one or both spouses’ names appear on the title document. The source of acquiring the assets, rather than the name on the asset, is the determining factor. Therefore, real estate acquired in a community property state during marriage is presumed to be community property regardless of whether one or both spouses’ names appear on the deed. In re Parker’s Estate, 115 Wash. 57, 196 P. 632 (1921). Furthermore, a conveyance to both spouses (such as in joint tenancy) is presumed to be a conveyance in community property. RCW 64.28.040.

b) The Washington Supreme Court held that a Special Warranty Deed (in fulfillment of a real estate contract) transferring wife's separate real property to her and her husband as husband and wife did not give rise to a presumption that wife intended to change the character of the real property from separate to community. In re Estate of Borghi, 167 Wash.2d at 492, 219 P.3d 932 (2009). Therefore, in light of the lack of any writing evidencing wife's intent to transfer her property to the community or any evidence as to why husband's name was included on the deed, the evidence was insufficient to overcome the presumption that the property remained wife's separate property at the time of her death (disapproving of In re Marriage of Hurd, 69 Wash.App. 38, 848 P.2d 185 (1993), and In re Marriage of Olivares, 69 Wash.App. 324, 848 P.2d 1281(1993)). The Borghi court stated that even when a spouse's name is included on a deed or title at the direction of the separate property owner spouse; this does not evidence intent to convert separate property into community property, but merely intent to put both spouses' names on the deed or title. Further, the court confirmed that the name on a deed or title does not determine the separate or community character of the property. In addition, the court stated that where real property is at issue, an acknowledged writing is generally required to change character of a spouse's separate property to community property and that this could be accomplished through a properly executed community property agreement, or a quit claim deed or other real property transfer.

c) In In re Marriage of Erdman, 153 Wash. App. 1011, 2009 WL 3825850, (2009), Erdman & Motts (two unrelated individuals) purchased real property prior to their marriage. Motts quit claimed her interest to Erdman as his separate property. Two months after their marriage Erdman transferred the property to Erdman and Motts, as husband and wife. The consideration listed on the deed was “to establish community property.” The court stated that Borghi requires a writing evidencing the transferor’s intent to change the property’s character. The court found the quitclaim deed clearly stated that the wife was added to the deed.
to establish community property. The court noted that in *Hurd, Deschamps*, and *Borghi*, one or both of the spouses were deceased at the time of trial. In *Erdman*, both spouses were alive and testified to the intent behind the deed. The court held that the parties added the wife’s name to the deed with the intent to establish community property.

6. **Rents, Issues, Profits and Appreciation.** The rents, issues, and profits from separate property generally retain their separate property character. RCW 26.16.010 and 26.16.020. However, a spouse may acquire an interest in the appreciation that occurs during marriage in the other spouse’s separate property if the spouse can show direct and positive evidence that the increase is attributable to community funds or labors. *In re Marriage of Elam*, 97 Wash. 2d 811, 650 P.2d 213 (1982).

7. **Change in Character.** Separate property character can be easily lost. In order to retain the separate character of property during marriage, it is necessary to ensure that the property is clearly traceable to its separate property origin and is identifiable as separate property. Commingling of separate property funds with community property funds, or the use of separate property funds to benefit community property, will change the separate property into community property if there is no reasonable method of tracing the separate property funds back to their source. *In Re Witte’s Estate*, 21 Wash. 2d 112, 150 P.2d 595 (1944). In addition, spouses may change the character of property by gifting separate property to the community or by using property of one character to benefit property of the other character. RCW 26.16.050. The character of property may also be changed by agreement of the spouses. RCW 26.16.120.

8. **Specific Property Interests.** Community property law can become particularly difficult when applied to specific types of property interests.

a) **Income.** Salaries, bonuses, and other income and benefits from employment or efforts earned during the course of the marriage are community property. RCW 26.16.030. Therefore, assets acquired using such income take on the community property character of the earnings.

b) **Stock Options.** The character of stock options is complicated and depends on marital status at the time the options are granted, whether the options are vested or unvested, and whether the options are mature or unmatured. Of course, the funds used to acquire the stock at the time the option is matured will affect the character as well. *In Re Marriage of Short*, 125 Wash.2d 865, 890 P.2d 12 (1995).

c) **Life Insurance.**

(1) Life insurance is characterized as property and not a mere expectancy. Therefore, if community property funds are used to pay the premiums on a life insurance policy, the proceeds are subject to a community property claim of the surviving spouse regardless of the beneficiary designation. *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27 (1937). Whether term insurance is community property or separate property is based upon the character of the asset used to pay the premium immediately prior to the insured’s death. Permanent insurance (such as a whole life policy) can be both separate property and community property based upon the character of the assets used to pay the premiums.
(2) However, as described in further detail in paragraph I.B.8 (d) below, federal law will preempt state community property law. Therefore, an insurance policy issued pursuant to federal law or governed by ERISA will preempt a non-insured spouse’s community property interest in the policy. Metropolitan Life Insurance Co. v. Buechler, 19 Fed. Appx. 678 (9th Cir. 2001); Egelhoff v. Egelhoff, 532 U.S. 141, 149 L.Ed. 2d 264, 121 S.Ct. 1322 (2001) (court held that ERISA expressly pre-empted the Washington state statute that a beneficiary of a nonprobate asset is revoked upon divorce to the extent such statute applied to ERISA plans).

d) Retirement Plan Benefits.

(1) As stated above, assets acquired with community property funds (such as a spouse’s salary) are also community property and are subject to the right of a spouse to control the disposition of his/her interest in the community property at death. However, applicable federal law must also be considered. For example, a retirement plan subject to the Employee Retirement Income Security Act (“ERISA”) is not subject to the community property rights of the non-participant spouse. Boggs v. Boggs, 520 U.S. 833, 138 L. Ed. 2d 45, 117 S. Ct. 1754, reh’g denied, 521 U.S. 1138, 138 L. Ed. 2d 1043, 118 S. Ct. 9 (1997). Thus, while the non-participant spouse may have a community property interest in the participant spouse’s retirement plan based on community property law, the Boggs decision would seem to preclude the non-participant spouse from disposing of his or her interest of the plan except as provided under ERISA.

(2) Conversely, to the extent that the retirement account is not subject to ERISA (such as an Individual Retirement Account), the account may be community property and subject to the disposition rights of the decedent non-participant spouse. Therefore, the non-owner spouse of an Individual Retirement Account funded with community property will be disposed of in accordance with his or her will. RCW 6.15.020.

e) Business Interests. Generally, business interests retain their separate or community property character. For example, a non-partner spouse will own an undivided one-half (½) interest in his or her spouse’s partnership interest if acquired as community property. However, no management rights of the business are granted by virtue of the community property status. Goodwill may be community property even if the underlying business is separate property. In Re Marriage of Brooks, 51 Wash. App. 882, 756 P.2d 161 (1988).

f) Borrowing. The community property presumption applies to funds from extension of credit to a spouse. However, the presumption can be overcome if, for example, separate property is used as collateral for the loan. Both spouses involvement in the transaction is not conclusive in characterizing the borrowing as community property. Finley v. Finley, 47 Wash. 2d 307, 287 P.2d 475 (1955).

g) Installment Contract. The character of property purchased on an installment contract is determined as of the time of acquisition. If payments on the contract are made from property of a different character, a right of reimbursement may arise. Stokes v. Polley, 145 Wash.2d 341, 37 P.3d. 1211 (2001). For example, if real estate purchased on contract by
husband is his separate property and contract payments are made with community property funds, the marital community may have a right of reimbursement from his separate property.

9. Acquisition of Separate Property During Marriage. Property acquired by gift, devise, bequest or descent is separate property even if received during marriage. RCW 26.16.010 and 26.16.020. However, where both spouses are designated the recipients of the gift, devise or bequest, property is characterized as community property. In Re Salvini’s Estate, 65 Wash. 2d 442, 397 P.2d 811 (1964).

C. MANAGEMENT AND DISPOSITION OF COMMUNITY PROPERTY

1. During Lifetime.
   a) General. Each spouse owns an undivided one-half interest in all community property. Either spouse acting alone is entitled to manage and control the community property. RCW 26.16.030. However, the power to dispose of community property is limited in some circumstances. For example, both spouses must join in gifts of community property and in the conveyance of community real property. RCW 26.16.030. If both spouses fail to enter into the conveyance, it is ineffective.

   b) Gifts.
      (1) As with any other management aspect of separate property, a spouse may gift his or her separate property to anyone without the consent of the other spouse. RCW 26.16.010-020.

      (2) However, gifts of community property generally require the joinder of both spouses. In Washington, the joinder may be by express or implied consent of the other spouse. RCW 26.16.030.

      (3) Under IRC §2503(b), any person may make a gift to any other person of up to $14,000 per year (during 2017) without imposition of gift tax. A gift of one spouse’s separate property may be treated as though one-half was given by each spouse (referred to as “gift splitting”), thus allowing spouses to give up to $28,000 per person, per year. IRC §2513.

      (4) Spouses may gift property to each other creating community property from separate property or creating separate property of the donee from community property. RCW 26.16.050 and 26.16.120. Such gifts qualify for the marital deduction. IRC §2523.

   c) Debts. As with property acquired during marriage, debts incurred during marriage are presumed to be community debts. Obligations entered into by one spouse for the benefit of the community are community debts and the entire community is liable. Bellingham Motors v. Lindberg, 126 Wash. 684, 219 P. 19 (1923). Generally a creditor cannot levy upon community property for the separate debts of one of the spouses. RCW 26.16.200. However, if a tort judgment that is the separate liability of one of the spouses cannot be satisfied from the tortfeasor spouse’s separate property, his or her interest in the community property is
liable. *deElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980). Furthermore, torts which can properly be said to be done in the management of community business, or for the benefit of the community, are community torts with both the community property and the tortfeasor’s separate property liable to satisfy the injured party. *Clayton v. Wilson*, 168 Wash.2d 57, 227 P.3d 278 (2010) (marital community was liable for husband's sexual abuse of a child/employee committed while child/employee performed yard work for husband and wife.)

2. **Death of a Spouse.** At the time of death, the marital relationship ends and the community property character of the property changes to separate property. Each spouse is entitled to dispose of up to one-half of the (former) community property by will. RCW 26.16.030. A decedent spouse may transfer his or her entire interest in any separate property at the time of death without consent of the surviving spouse. However, the surviving spouse is entitled to be the personal representative of all the community property, even if another personal representative is named in the decedent’s will. RCW 11.28.030. In the absence of a valid will, the surviving spouse receives the deceased spouse’s community property as well as a portion (if not all) of any separate property of the decedent by intestate succession. RCW 11.04.015. Furthermore, the surviving spouse may petition the court for a family allowance which is payable from decedent spouse’s separate and community property. *See* RCW Chapter 11.54.

D. **THE MIGRATING COMMUNITY**

1. **Quasi-Community Property.**

   a) The purpose of the law of quasi-community property is to ensure that property brought into a community property state from a common-law state and that would have been characterized as community property had it been acquired in a community property state, is treated as community property for purposes of testamentary disposition. RCW 26.16.220 - 26.16.250.

   b) RCW 26.16.220 defines quasi-community property as all personal property wherever situated and all real property located in Washington, owned at the time of death that is not community property, but would have been community property if the parties had acquired it while living in a community property state. The statute only applies to property for purposes of disposition at death. RCW 26.16.250.

   c) Upon one spouse’s death, he or she may dispose of one-half of the quasi-community property as if it was community property. RCW 26.16.230. Thus, even though the property is not community property, the decedent cannot dispose of all the quasi-community property interest to the disadvantage of the surviving spouse.

   d) There is no authority in the Internal Revenue Code authorizing IRC §1014(b)(6) treatment of quasi-community property. *See* Section II.A. below. However, this ambiguity can be easily resolved with good planning when the couple moves to a community property state (e.g., execute a community property agreement).
E. REGISTERED DOMESTIC PARTNERSHIPS

1. Applicable Estate Planning and Administration Rights. Washington registered domestic partners have all the rights and benefits (including community property) that Washington state offers married couples (to the extent not in conflict with federal law). Washington registered domestic partners are not entitled to any rights available under federal law for married couples (i.e. social security, federal tax law, immigration rights for foreign partners of American citizens, military, qualified retirement plans). However, under Windsor and Obergefell, if domestic partners become legally married, they will have all the rights available under federal law. United States v. Windsor, 133 S. Ct. 2675 (2013); Obergefell v. Hodges, 135 S. Ct. 2584 (2015). See Section III regarding reporting community property below.

2. Eligibility. Pursuant to RCW 26.60.030, Washington couples with one individual over the age of sixty-two (62) are qualified to enter into a state-registered domestic partnership. Both individuals must be at least eighteen years of age and must share a common residence. Neither individual can be married or in a domestic partnership with another person. Further, both individuals must be capable of consenting to the partnership and cannot be closely related to each other. The couple may be same sex or different sex.

3. Registration and Dissolution. Pursuant to RCW 26.60.040, qualified individuals who desire to enter into a state-registered domestic partnership may register their domestic partnership by filing a declaration of state registered domestic partnership with the Washington Secretary of State and paying the filing fee. The declaration must be signed before a notary public. References to dissolution of marriage will apply equally to state-registered domestic partnerships that have been terminated, dissolved, or invalidated (to the extent not in conflict with federal law).

F. COMMITTED INTIMATE RELATIONSHIPS

1. General Overview. Washington courts also apply community property principles to the division of property acquired during a committed intimate (formerly “meretricious”) relationship. In re Estate of Langeland, 177 Wn. App. 315, 312 P.3d 657 (2013), review denied, 180 Wn.2d 1009 (2014). Under Washington law, a former committed intimate partner of a decedent has a community property interest in assets acquired during the relationship through the work and efforts of both parties. For a partner to have a community property interest, the person must first prove that a committed intimate relationship (“CIR”) exists. Second, if such relationship exists, then the court will evaluate the interest each party has in the property acquired during the relationship. Finally, the court will make a just and equitable division of the property.

2. Establishing a CIR. To determine the existence of a CIR, the court assesses the following five factors: (1) continuous cohabitation, (2) duration of the relationship, (3) purpose of the relationship, (4) pooling of resources and services for joint projects, and (5) the intent of the parties. Connell v. Francisco, 127 Wn.2d 339, 898 P.2d 831 (1995). The laws regarding community property are applied to establish rights that an intimate committed partner has with regard to jointly acquired property. Olver v. Fowler, 161 Wn.2d 655, 168 P.3d 348 (2007). Further, Olver extended the application of this principle such that it applies both upon
the termination of a committed intimate relationship during lifetime of both individuals and upon the death of one or both individuals.

3. **Evaluation of Property.** Once a relationship is established, the court determines the interest each party has in the property acquired during the relationship. The court presumes that all income and property acquired during the relationship is jointly-owned (community-like) and death does not change this presumption. *In re Estate of Langeland*, 177 Wn. App. 315, 312 P.3d 657 (2013), *review denied*, 180 Wn.2d 1009 (2014). Therefore, assets can be titled in the name of one party and be “jointly acquired” property.

4. **Division of Property.** After the court determines that a CIR exists and that there is jointly-owned property, then the court “justly and equitably” divides such property. A court is not required to divide jointly-owned property equally between the parties. The court uses RCW 26.09.080 as guidance when assessing the equitable division of property. RCW 26.09.080 requires consideration of the following four factors: (1) the nature and extent of the community property (2) the nature and extent of separate property of the parties, (3) the duration of the marriage, and (4) the economic circumstances of the parties at the time of the property division. *In re Marriage of Neumiller*, 183 Wn. App. 914, 335 P.3d 1019 (2014). After assessing such factors, the court will divide the community-like (joint) property but does not have jurisdiction to divide the property determined to be the separate property of a party. *In re Estate of Langeland*, 195 Wn. App. 74, 380 P.3d 573 (2016), *review denied sub nom.*, *Estate of Langeland*, 187 Wn.2d 1010, 388 P.3d 488 (2017).

G. **COMMUNITY PROPERTY AGREEMENTS**

1. **Introduction.** In Washington, spouses are authorized by law to enter into an agreement defining the status and disposition of their community property. RCW 26.16.050 and 26.16.120. A Community Property Agreement (“CPA”) is a contract between spouses and cannot be revoked or modified without the joinder of both spouses. *McKnight v. McDonald*, 34 Wash. 98, 74 P. 1060 (1904); *Estate of Bachmeier*, 147 Wash.2d 60, 52 P.3d 22 (2002). See also Washington Community Property Deskbook (Washington State Bar Assn. 3rd ed. 2003).

2. **Changing the Character of Property.**

   a) A CPA may be drafted to convert existing separate property into community property. A CPA may also specify that future acquisitions of separate property will be deemed to be community property. However, the after-acquired property provision must be used sparingly and with full disclosure to the client because it will have the effect of converting separate property gifts and inheritances into community property.

   b) To convert separate real property into community property, the formalities of the Statute of Frauds must be satisfied. Converting separate real property into community property is commonly accomplished by a community property agreement.

   c) Either spouse may convert community property into separate property of the other spouse by giving the other a deed to such property. RCW 26.16.050. Personal property may be converted by oral agreement, but the better practice is to utilize a written agreement.
3. Transfer of Property at Death.

   a) In Washington, a CPA may be drafted to transfer all or any part of the community property to the surviving spouse upon the death of one spouse. RCW 26.16.120. A CPA containing such a provision supersedes the decedent’s Will to the extent of the community property and will thereby avoid probate as to such community property. If real property is subject to the CPA, the CPA should be recorded to provide evidence of the CPA’s existence and to establish the chain of record title. In Re Brown’s Estate, 29 Wash. 2d 20, 1857 P.2d 125 (1947). Note that if the surviving spouse decides to take under the decedent’s will, rather than under the CPA, the courts may view this as an election not to take under the CPA or as a disclaimer of the CPA under RCW Chapter 11.86.

   b) The mere fact that the property is community property or is titled as husband and wife is not sufficient to pass title to the surviving spouse at the time of the deceased spouse’s death. This is true because each spouse has the right to direct the disposition of one-half (½) of the community property. In the absence of a CPA (or unless the property otherwise passes by operation of law), a probate may be necessary to pass title to the new owners following death, whether it is to the surviving spouse or another party.

4. Formalities in Drafting a Community Property Agreement. For a CPA to be valid, RCW 26.16.120 requires the execution of a written instrument that is sealed, witnessed, acknowledged, and certified in the same manner as deeds to real estate. Since 1929, RCW 64.04.020 has only required that deeds be written, signed by the grantor, and acknowledged by the grantor before an authorized person. Thus, the CPA need not be witnessed nor sealed to be valid.

5. Time When Agreement Converts Property. A CPA may convert separate property into community property either upon the execution of the CPA or upon the death of either spouse. Merriman v. Curl, 8 Wash. App. 894, 509 P.2d 765 (1973). If the conversion is deemed effective upon execution of the community property agreement, and the agreement includes an after-acquired property clause, all existing separate property then becomes community property and all future acquisitions of separate property will be deemed community property when acquired. Note that such a conversion may benefit a creditor who has a judgment against one spouse and the marital community. It also may have the unintended effect of converting separate property (e.g., gifts or inheritances) to community property.

6. Disadvantages of Community Property Agreements. Community property agreements are not appropriate in all cases. In Washington, where the spouses’ wills provide for disposition of some or all property to a non-spouse (for example, children from a prior marriage), a dispositive CPA would be inappropriate since it would override the provisions of the decedent’s will. Similarly, the use of a CPA with dispositive provisions would be inappropriate where the spouses’ wills include credit shelter and marital transfers or trusts. Finally, community property agreements will need special provisions where spouses intend to maintain separate property interests, and/or where they anticipate the receipt of gifts or inheritances.

7. Termination of a Community Property Agreement. RCW 26.16.120 does not specify how a CPA may be terminated; since a CPA is a contract, termination is controlled...
by contract law. Rescission can only occur when there is mutual consent to rescind, or a demand to rescind by one side with acquiescence by the other. *Woodruff v. McClellan*, 95 Wash. 2d 394, 622 P.2d 1268 (1980). Absent mutuality of parties, the execution of wills that are inconsistent with the CPA will not terminate the CPA. A CPA will prevail over an inconsistent will, *Estate of Lyman*, 82 Wash. 2d 693, 512 P.2d 1093 (1973), and is not revoked by a subsequently executed will. *Estate of Brown*, 29 Wash.2d 20, 185 P.2d 125 (1947).

H. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS.

1. Washington law recognizes both prenuptial and postnuptial agreements. To determine the enforceability of a marital agreement, the court uses a two-prong analysis. First, the court will determine whether the agreement is substantively fair (i.e., whether it makes a reasonable provision for the spouse who is claiming the agreement should not be enforced). If the court determines the agreement is fair and reasonable, the agreement is enforceable and the analysis ends.

2. However, if the agreement is substantively unfair, the court proceeds to the second prong to determine whether the agreement is procedurally fair. Under the second prong, the court will review two issues: first, whether the spouses made a full disclosure of the amount, character, and value of the property involved and second, whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights. If the court determines the second prong is satisfied, then the agreement is enforceable. *In re Marriage of Matson*, 107 Wash.2d 479, 482-83, 730 P.2d 668 (1986), *In re Marriage of Bernard*, 165 Wash.2d 895, 204 P.3d 907 (2009) and the Washington Community Property Deskbook, (Wash. State Bar Assn. 4ed. 2014), Chapter Five.

I. EFFECT OF MARRIAGE AND DIVORCE ON WILL AND NONPROBATE DISPOSITION

1. An “omitted spouse” (or domestic partner) is generally entitled to an intestate share of the deceased spouse’s estate notwithstanding the terms of the decedent’s will. Therefore, a surviving spouse or domestic partner who is not named or provided for under the decedent spouse’s or domestic partner’s Will is entitled to all of the couples’ community property and one-half (½) of the separate property of the decedent. RCW Chapter 11.04 and RCW 11.12.095. However, the court may decrease the intestate share if there is evidence in the Will or with other clear and convincing evidence that the omission was intentional. A surviving spouse or domestic partner has the right to serve as personal representative of the marital community, notwithstanding the provisions of the will. RCW 11.28.030.

2. The dissolution of a marriage has the effect of terminating any provision of a decedent’s Will in favor of the former spouse or domestic partner unless the Will specifically provides otherwise. The court will interpret any provision in the Will for the benefit of a former spouse or domestic partner as though the former spouse or domestic partner had predeceased the testator. RCW 11.12.051.

3. Effective as of the date of termination of the marriage by dissolution or other invalidation, RCW 11.07.010 revokes any nonprobate asset designation in favor of the
former spouse or domestic partner. RCW 11.07.010 does not apply to any nonprobate asset where the intent of the decedent clearly indicates a desire to retain the designation for the benefit of the former spouse or domestic partner, or where the decree of dissolution requires the decedent to continue to maintain the ownership or designation in favor of the former spouse or domestic partner. The statute is intended to cover all nonprobate assets including life insurance, annuities, employee benefit plans and Individual Retirement Accounts; trusts; joint tenancies with right of survivorship; and payable upon death accounts. However, in *Egelhoff*, *supra*, the United State Supreme Court ruled that RCW 11.07.010, as it pertains to employee benefit plans, is preempted under ERISA. Consequently, designation of an employee benefit plan naming a former spouse or domestic partner as beneficiary will not be deemed revoked under RCW Chapter 11.07.

II. COMMUNITY PROPERTY PLANNING OPPORTUNITIES AND PITFALLS

A. INCOME TAX “STEP-UP” IN BASIS

1. The rule for “step-up” in income tax basis of property provides a significant income tax benefit to the recipient of property from a decedent. This rule has even greater impact for married couples or registered domestic partners residing in Washington State or for married couples who move to or from Washington State.

2. The step-up (adjustment) in basis rule is an income tax provision of the Internal Revenue Code that affects property at the time of death. The decedent’s interest in appreciated property “steps-up” from its “basis” (original cost, plus cost of improvements, less depreciation) to its date-of-death fair market value. The reverse is also true; an asset may “step-down” to a new basis if the date-of-death value is less than its basis in the hands of the decedent. If the recipient (or the estate) then sells the property for its date-of-death value, there will be no capital gain and the sale will not be subject to capital gains tax. Of course, if the recipient sells the property for more or less than its date-of-death value, a capital gain or loss, respectively, will result. IRC §1014.

3. Since all community property is subject to probate and the claims of estate creditors when one spouse dies, the result is a “step-up” in basis in both spouses’ interests in the community property to its fair market value as of the date of death (or alternate valuation date if such valuation date is elected). IRC §1014(b)(6); IRC §2032. The entire community property asset is re-valued, not merely the decedent’s one-half interest. The “step-up” rule does not apply to any contract or retirement account assets.

B. NON-PRO RATA ALLOCATIONS

1. After the death of a spouse, all of the community property owned by both spouses (or by their revocable living trust) is subject to probate. Therefore, the personal representative (or trustee) may “pick and choose” which property will be allocated to the deceased spouse’s estate and which property will be allocated to the surviving spouse’s estate, so long as equal value is allocated to each estate.

2. In many cases, non-pro rata distributions may not be important because the estate of deceased spouse will be distributed to the surviving spouse.
3. However, in estates that are estate tax sensitive, basic estate tax planning may include funding of the credit shelter trust with assets owned by the decedent in order to protect the decedent’s exemption amount from state estate taxes and achieve the couple’s tax-planning goals. At the time of the surviving spouse’s death, the trust estate passes to the decedent’s beneficiaries free of estate taxes, regardless of value. Thus, the selection of assets to fund credit shelter or marital trusts may be very important. Washington State law specifically authorizes a trustee (and personal representative) to make non-pro rata allocations and distributions. RCW 11.98.070 (15).

4. In a common-law state the credit shelter trust can only be funded with assets owned by the decedent. Thus, assets with little or no appreciation potential may have to be used to fund the credit shelter trust. Conversely, the estate in a community property state may “pick and choose” the assets to be used to fund the credit shelter trust. For example, depending on the value of the couple’s estate, the estate may elect to fund the credit shelter trust with both spouses’ interests in appreciating assets and allocate income producing assets of equivalent value to the surviving spouse. Furthermore, post-2012 planning requires that projected income tax on capital gains be taken into account when making non-pro rata allocation decisions.

C. CREDIT SHELTER TRUST FUNDING UTILIZING AN INDIVIDUAL RETIREMENT ACCOUNT AND NON-PRO RATA DISTRIBUTION STRATEGY

1. Two Private Letter Rulings issued in 1999 approved a highly beneficial non-pro rata allocation strategy. The rulings allowed the named beneficiary of the Individual Retirement Account, the trustee of a joint revocable trust, to allocate the Individual Retirement Account and the non-Individual Retirement Account assets so that the Individual Retirement Account was allocated to the surviving spouse’s revocable share of the trust (subsequently distributed outright to the surviving spouse) and non-Individual Retirement Account assets of equal value were allocated to the decedent’s irrevocable portion of the trust (i.e., credit shelter trust). This non-pro rata allocation and rollover of the Individual Retirement Account were approved without causing acceleration of income. PLR 199925033 and PLR 199912040.

2. State law and governing instrument language allowing non-pro rata allocation (and outright distribution to the surviving spouse) was crucial to achieving the tax-free result. Both rulings involve a joint revocable trust that was the named beneficiary of an Individual Retirement Account. It appears that the same results will be achieved if the Individual Retirement Account beneficiary designation provides for distribution to the trust in the event of disclaimer by the surviving spouse. Also, the same rationale should apply in the Will context (if the Will provides for non-pro rata allocation and distribution to the surviving spouse).

3. The non-participant spouse has a community property interest in the Individual Retirement Account of the participant spouse and such interest still exists at the death of the non-participant spouse. Farver v. Department of Retirement Systems, 97 Wash. 2d 344, 644 P. 2d 1149 (1982); In re Estate of MacDonald, 51 Cal.3d 262, 794 P.2d 911 (1990); RCW 6.15.020(6).
4. The non-pro rata strategy approved in PLRs 199925033 and 199912040 should be applicable if the non-participant spouse dies first.

5. In Boggs v. Boggs, supra, the U.S. Supreme Court held that a non-participant’s community property rights in a retirement plan that is subject to ERISA are preempted by federal law. However, Individual Retirement Accounts are not subject to ERISA.

D. IRREVOCABLE TRUSTS BENEFITTING A SURVIVING SPOUSE

1. Irrevocable life insurance and other trusts often provide for the benefit of the Trustor’s spouse inter vivos for life and then make distribution to or for the benefit of other persons or entities upon the spouse’s death.

2. If community property assets are contributed to the trust IRC §2036(a) will apply and up to one-half (½) of the trust assets (such as the life insurance proceeds) will be included in the spouse’s gross estate. Therefore, it is essential that any contributions to a trust providing lifetime benefits for the non-insured spouse be made from the insured spouse’s separate property. Separate property may be created by agreement. Madsen’s Estate v. Comm’r, 97 Wash.2d 792, 650 P.2d 196 (1982). In creating separate property, caution should be exercised to avoid attack based on a “step transaction” analysis.

E. DISPOSITION OF REAL PROPERTY HELD AS “HUSBAND AND WIFE”

In Washington, real property held as “husband and wife” is community property. Washington does not recognize tenancy by the entirety. Therefore, a deceased spouse’s interest in such real property does not automatically pass to the surviving spouse. The deceased spouse’s community property agreement, will, living trust or law of intestate succession will govern the administration and distribution of the deceased spouse’s community property interest in the real property. RCW 26.16.030. A title company may insure a transfer of property titled as husband and wife to the surviving spouse without a requiring a probate by the use of a Lack of Probate Affidavit. WAC 458-61A-303.

F. FAVORABLE WASHINGTON STATE LAWS RELATING TO TAX ISSUES IN THE ESTATE ADMINISTRATION CONTEXT

Washington State does not impose an income tax on the income of its residents. Since a person may be a resident of more than one state an issue can arise as to whether a person is also a resident of a state that does have an income tax. Furthermore, persons moving to Washington must take substantial steps to establish domicile.

G. PORTABILITY

If a decedent dies after 2011 leaving a surviving spouse, the surviving spouse can transfer the decedent’s unused exclusion amount to the surviving spouse. The surviving spouse may add this “deceased spousal unused exclusion amount” (“DSUEA”) to his or her own applicable exclusion amount in making transfers—either during lifetime or after death. In order to take advantage of “portability,” a federal estate tax return (Form 706) must be filed for the deceased spouse or a timely filed estate tax return, even if a return would not otherwise be
required. Portability allows the surviving spouse to use the decedent’s unused exemption amount without requiring the use of a credit shelter trust. Portability is only available for purposes of the federal estate tax and does not apply to the Washington estate tax.

H. MARITAL DEDUCTION PLANNING OPPORTUNITIES

1. At the death of a spouse, transfers to the surviving spouse will qualify for the marital deduction if certain requirements are met. IRC §2056, IRC §2056A. For the marital deduction to apply, the transfer must be outright to the spouse or to a trust for the benefit of the surviving spouse that qualifies for the marital deduction, most notably, a “qualified terminable interest property” or “QTIP” trust. If the requirements of a QTIP trust are met then the surviving spouse will not have to pay tax at the death of the first spouse. However, the assets in the QTIP trust are included in the surviving spouse’s federal gross estate for estate tax purposes. IRC §2044.

2. Similarly, transfers to a spouse or registered domestic partner are eligible for the Washington estate tax marital deduction, either outright or in a trust that qualifies as a QTIP trust under IRC 2056(b)(7), referred to as the “Washington QTIP election.” RCW 83.100.047. It is not necessary to make a Washington QTIP election merely because a federal QTIP election is made, and vice versa. See Section 458-57-115 of the Washington Administrative Code (“WAC”). Making inconsistent federal and state of Washington QTIP elections can be important in funding a credit shelter trust with assets having a value in excess of the Washington applicable exclusion amount.

3. In cases involving community estates of less than twice the federal applicable exclusion amount ($10,980,000 in 2017), it may be desirable to fund the credit shelter trust with assets equal to one-half of the community estate. However, unless a federal QTIP election is made over the assets of the credit shelter trust, the assets of the credit shelter trust will not receive a step-up in basis at the surviving spouse’s death. The IRS has confirmed that a QTIP election will be valid even if it is made solely to receive an income tax step-up in basis on trust assets. Rev. Prov. 2016-49; 2016-42 IRB 462.

a) However, RCW 83.100.020(15) defines the Washington taxable estate to include any assets subject to IRC 2044 (a QTIP trust), even if no Washington QTIP election is made. Therefore, making a federal QTIP election over the credit shelter trust assets in order to obtain a step-up in basis at the surviving spouse’s death will cause the credit shelter trust assets to be included in Washington taxable estate, thereby undermining the Washington estate tax benefit of the credit shelter trust, even though no federal estate tax may be due.

b) It is possible to preserve the decedent spouse’s Washington applicable exclusion amount and obtain an income tax step-up in basis on the assets of the credit shelter trust. If a state QTIP election is made over a small portion (say, 1%) of the credit shelter trust, only the portion of the estate over-which the Washington QTIP election is made will be includable in the surviving spouse’s Washington taxable estate. RCW 83.100.047(3); WAC 458-57-115(c)(iii). The fiduciary elects a federal-only QTIP treatment over the remaining portion of the credit shelter trust. As a consequence, the portion of the credit shelter trust subject to the federal only QTIP election is excluded from the Washington taxable estate but is
includable in the surviving spouse’s federal taxable estate and, therefore, IRC 1014 applies to the assets of the trust subject to the federal QTIP election.

c) Assuming that the value of the assets subject to the federal QTIP election, when combined with the other assets comprising the surviving spouse’s federal gross estate, does not exceed the sum of the surviving spouse’s federal applicable exclusion amount and the DSUEA, the surviving spouse’s estate will not be subject to federal estate tax. The Washington estate is increased only by the value of the assets over which the Washington QTIP election was made and, if valued at less than the Washington applicable credit amount, no Washington estate tax will be payable.

III. REPORTING COMMUNITY PROPERTY ON TRANSFER TAX RETURNS

A. ESTATE TAX RETURNS

1. Estates are subject to state or federal estate taxation if the value of the decedent’s gross estate exceeds the applicable exclusion amount. IRC §6018. For taxable estates, an estate tax return (Form 706) must report all separate property owned by the decedent, plus his/her one-half ownership interest in the community property.

2. One-half of the value of assets in which the spouses have a present possessory right, such as real estate, bank accounts, automobiles, and household possessions, will be included. In addition, assets in which the spouses do not have a present possessory right will also be included. As referenced above, the deceased spouse’s interest in the surviving spouse’s life insurance is included in the gross estate even though the insurance policy is on the surviving spouse’s life and will not be paid until death. The same rule applies to the deceased spouse’s community property interest in the surviving spouse’s retirement accounts.

3. Since one-half of the value of an asset is part of the decedent’s taxable estate, only one-half of many deductions are allowable if the expense or debt is a community property debt or expense.

4. A Washington Estate Tax Return must be filed for decedents who have assets with a value in excess of the Washington estate tax applicable exclusion amount ($2,129,000 for 2017), and the decedent was a resident of the state of Washington, or the decedent was a non-resident of the state of Washington and owned real property and/or tangible personal property located within the state of Washington.

5. Practical Pointers in Preparation of Estate Tax Returns.

a) Determine if Decedent and Surviving Spouse ever executed a Community Property Agreement. Did it convert all assets owned at the time of signing to community property? Did it convert all assets that would be acquired in the future to community property? This document may eliminate the need for tracing to determine what assets are the community property of the decedent and surviving spouse, and what assets are the decedent’s separate property.
b) Report the total value of both spouses’ interest in all community
property on the estate tax return, and then subtract the surviving spouse’s one-half (½) interest. This may be done after each individual asset as it is listed on the schedules attached to the estate
tax return or it may be one subtraction at the end of each schedule.

c) Schedule A (Real Property):

(1) Real property held as “Husband and Wife” is community
property, but is not joint tenancy with right of survivorship, so it should be listed on Schedule A
(not Schedule E).

(2) A discount for lack of marketability and non-controlling
interest may be appropriate in determining the value of the decedent’s one-half interest in the
real property.

(3) Depending on the community property state, rental income
from separate property may be classified as community property (Texas) or separate property
(Washington).

d) Schedule B (Stocks and Bonds):

(1) List all assets, even if held in name of Surviving Spouse, if
the asset is determined to be community property.

e) Schedule C (Cash and Receivables):

(1) Again, determine character of each and every asset without
regard to the titling of the asset. Bank personnel will sometimes neglect to report the accounts
held only in the Surviving Spouse’s name when date-of-death account information is requested.

(2) Remember to list Wages Receivable by Surviving Spouse
through date of death. After date of death, compensation will be the separate property of the
Surviving Spouse.

f) Schedule F (Miscellaneous Property):

(1) List the decedent’s community property interest in life
insurance in which the Surviving Spouse is the insured. Obtain Form 712 on this policy as well.

(2) List the decedent’s community property interest In the
Surviving Spouse’s Individual Retirement Account or other retirement accounts.

g) Schedule G (Transfers During Life):

(1) Determine if any gift tax paid by either Decedent or
Surviving Spouse is attributable to gifts made during the three years prior to date of death. If so,
the gift tax should be included on Line A.
(2) Determine if any community property interests were transferred during lifetime by either spouse that needs to be included in the gross estate of the decedent.

h) Schedule I (Annuities):

(1) Remember to include pension plans and/or annuities that are payable to Surviving Spouse if they were community property.

i) Schedule J (Funeral and Administrative Expenses):

(1) Under IRC §2053(a)(1), funeral expenses that are allowed by state law are deductible from the gross estate for determining the estate tax liability. Funeral expenses have been recognized as a “primary community obligation” in Washington. *Lang’s Estate v. Comm’r*, 97 F.2d 867 (9th Cir. 1938); therefore, only one-half of funeral expenses are deductible on Schedule J if there is a Surviving Spouse.

(2) In general, administrative expenses (legal, accounting, and appraisal fees) are community expenses and only one-half is deductible on the Estate Tax Return. The other one-half is deductible by the Surviving Spouse on his/her individual income tax return. If certain expenses are related strictly to the decedent’s estate, then 100% of such expenses may be deducted on Estate Tax Return.

(3) If the estate is comprised of both community and separate property, then an appropriate percentage of the administration expenses may be deducted.

j) Schedule K (Debts):

(1) One-half of community debts are deductible, and 100% of separate debts are deductible.

k) Schedule M (Marital Deduction):

(1) The Decedent’s one-half of an asset is deductible on Schedule M if the decedent’s interest will pass to the Surviving Spouse.

(2) Remember to account for one-half of debts and expenses in determining the amount distributable to Surviving Spouse. For example, real property with a mortgage will be listed at net value on Schedule M, rather than its full value reported on Schedule A.

(3) Washington state law provides that a Personal Representative who has nonintervention powers may allocate assets between the Decedent and the Surviving Spouse. RCW 11.68.090 and RCW 11.98.070(15). This allows for a “pick and choose” methodology as to which assets will be distributed from the Decedent’s estate and which assets will be owned by the Surviving Spouse. A schedule may be attached to the estate tax return showing the chosen allocation, the distribution of assets, and the funding of the marital devise or trust.
B. GIFT TAX RETURNS

1. The first determination to be made in preparing a federal gift tax return (Form 709) is whether the gifted property is characterized as community property or separate property. Note that Washington does not impose a gift tax so there is no corresponding Washington return to the Form 709.

2. If community property was the subject of the gift, then each spouse’s gift tax return will report one-half the value of the asset, i.e., neither return will report 100% of the gift with a subtraction for the other spouse’s 50% interest.
IV. APPENDIX 1: WASHINGTON ESTATE AND TRUST ADMINISTRATION RESOURCES


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Chapter 9

Hot Topics in Estate Planning and Administration

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Chapter 9—Hot Topics in Estate Planning and Administration

Leaving a Vacation Home to the Next Generation

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Leaving a vacation home to the next generation presents many problems for the estate planning attorney. Two problems will be discussed here concerning the issues presented when the first generation wants to leave their vacation home to several members (or all) of the second generation.

Leaving the home to common ownership by the second generation (the children) is a common problem. Frequently the parents have a sentimental attachment to the home, but the children might not all share that same attachment. Oftentimes the home has been in the family for a long time, and the parents cannot imagine that the home might be sold, or that some of the children might not want to own it in common with their siblings.

But the siblings don’t always get along. And many times the siblings have different needs, desires, and economic situations. One child might be well off and can afford to maintain an expensive vacation home. Another sibling might not be able to afford such an extravagance. One child might live a long distance from the vacation home and have no desire to use it. One child might have a large family and wants her children to use the home without fear of damage, while another child might want to place expensive artwork in the home. These conflicting goals will usually result in friction, and might even result in litigation after the parents die.

Despite the fact that the parents might want to leave the vacation home to all of the children with the expectation (or, even worse, the requirement) that the home will not be sold and that all of the children will continue town the home together indefinitely, oftentimes the attorney should make an effort to talk the parents out of that expectation or requirement.

In many cases, the best result is to seek a compromise that will leave the vacation home to all of the children, with sufficient flexibility to allow future changes in ownership by the children. Here are some suggested provisions:

Leave the vacation home to all of the children, with a provision that the personal representative may convey the home to only some of the children, with the consent of all of the children. Those electing to not receive an interest in the home should receive other assets in order to equalize the shares.

Leave the home in a trust (or an LLC) that permits any one beneficiary to elect to require a sale of the home at any time, at fair market value, without any discounts. If one beneficiary exercises this option, the other beneficiaries may either permit the sale, or decide to purchase the interest of the exercising beneficiary. If a price cannot be agreed upon, the sale will take place based on an appraisal for fair market value, without any discounts.

Leave the house in a trust (or an LLC) that permits any one beneficiary (or more than one) to make a flippable offer to buy the interest(s) of the other beneficiaries. A flippable offer is one where the beneficiary who receives the offer can elect to either be the seller or the buyer, but in either event the price will be the offered price, without any discounts. By requiring that the offer must be flippable, the offering beneficiary will have a strong incentive to offer a fair price.
A second problem that occasionally surfaces is the black sheep beneficiary. Occasionally, one child is the odd man out, a child who constantly fights with her siblings, even to the point of being litigious. In those situations, the parents want to leave the home to the children who do get along. The simplest situation is to leave the home to the children who get along, and leave other equalizing assets to the black sheep. Another approach is to make certain that the will or trust includes nonprorata language that allows the personal representative or trustee to distribute some assets to some beneficiaries, and other assets to other beneficiaries. In either event, the black sheep beneficiary should not be nominated as a fiduciary, and the will or trust should be very clear that the fiduciaries have the ability to prevent an interest in the home from passing to the black sheep, as long as the black sheep receives other assets of equal value. The intent of the parents should be stated very clearly.

**Review or Rewrite?**

*What to Do with Existing Estate Planning Documents*

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Clients commonly ask an estate planning lawyer to review and comment on their existing estate planning documents. Perhaps the client has moved to Oregon from another state, or perhaps the prior lawyer has retired and the client is looking to establish a new attorney-client relationship. Whatever the reason, the new lawyer is faced with a dilemma: review and “bless”/modify the existing documents, or start over with new ones?

The most conservative approach is to follow a firm policy of refusing to work with the existing documents, and starting over in every case. Proponents of this approach cite the risk of overlooking an error in the existing documents, for which the reviewing lawyer may be held liable by reason of having failed to catch and correct it. This risk is most significant with documents that are drafted in an unfamiliar format, that are drafted under the laws of another state, or that include complex provisions.

For many clients, however, the conservative approach will result in unnecessary fees, and dissatisfaction with the new attorney. A middle ground is to evaluate several factors to determine the potential risk and benefit of agreeing to review and approve or modify existing documents:

First, determine whether the client wants to make changes to the existing documents, or whether a change in residence requires updates to certain provisions (e.g., fiduciary powers, governing law, situs/principal place of administration). For clients moving from out of state with an estate over $1 million, consider whether the documents should be amended to provide for Oregon estate tax. If any such modifications are required, this may argue in favor of starting over with new documents, since the lawyer will need to draft a codicil or trust amendment in any event, and may be able to prepare a replacement document instead without significantly increasing the cost or complexity of the project.
Second, note the length and complexity of the existing documents. Does the client have an 80-page trust document that simply gives his or her entire trust estate outright to the children in equal shares? If so, it makes little sense for the new attorney to spend hours carefully reviewing an overly complex document when it could be succinctly restated instead. If, on the other hand, the dispositive provisions are complex and the situation does not call for simplification, it may be more efficient to carefully review the existing document and supplement it with a codicil or amendment, if needed, than to reinvent the wheel with a new and equally complex will or trust. Likewise, if the client has a three-page will and simple needs, it may be easy to review the document and reassure the client that it will work as intended.

Third, review the number of existing documents. Is there a trust with multiple amendments, or a will with multiple codicils? If so, the client may welcome an opportunity to consolidate them into a restated trust agreement or new will, as the case may be.

Finally, gauge your comfort level with the project. If you don’t understand the document you are reading, do not offer an opinion as to its validity or suitability, and do not prepare an amendment or codicil and risk being held responsible for its terms. Don’t be afraid to say “no” to an insistent client.

If you do agree to review a client’s existing documents, use a checklist to identify important issues such as:

1) Does the document satisfy the requirements for testamentary formalities?
2) Is an appropriate personal representative/trustee and at least one alternate named?
3) Is bond waived? Is there any reason it shouldn’t be?
4) Are the personal representative/trustee powers provisions generally consistent with Oregon law?
5) Are the beneficiaries clearly identified, and is provision made for disposition of the share of a beneficiary who does not survive? Do these provisions align with the client’s stated wishes?
6) Is adequate provision made to deal with the shares of minor or incapacitated beneficiaries, or beneficiaries who may receive means-tested public benefits?
7) Is adequate provision made for Oregon estate tax, including apportionment?
8) Will choice of law and situs provisions benefit from amendment?

Fiduciary Selection Issues

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Most clients do not understand the importance of selecting the right fiduciary. In large part clients do not have a solid understanding of the duties involved in serving as a Personal Representative or Trustee.
Many clients will default to naming their surviving spouse first and then their children in chronological order. Naming the surviving spouse can work smoothly when the spouse is also the parent of all the deceased’s children. Naming the eldest child first can work well when he or she is the most responsible child. However, clients often name these individuals because they don’t want them to be slighted when they pick someone else to serve instead of them. The following are some issues that are worth discussing with your client when they are deciding who they will name as personal representative or trustee in his or her estate plan.

I. Serving as the PR or Trustee is not an Honorary Position

II. a. Explain the fiduciary obligations of these positions and the time and effort involved:
   i. Managing assets
   ii. Paying creditors
   iii. Making claims
      1. Wrongful death
      2. Elder abuse
      3. Collecting on a debt
      4. Enforcing the terms of a contract
   iv. Settling disputes
   v. Filing tax returns
   vi. Making distributions to the beneficiaries according to the terms of the instrument while maintaining neutrality

b. Which individuals are suited to the position?
   i. Does the proposed fiduciary have a positive relationship with the beneficiaries?
   ii. Is there any potential for a conflict of interest between the proposed fiduciary and the beneficiaries?
      1. Second spouse
      2. Unequal distributions
      3. Sibling rivalries
      4. Possible purchase of assets from trust or estate
   iii. Who has the skills to do the job?
      1. Responsible
      2. Organized
      3. Knows when to consult with a professional
      4. Won’t be incapacitated by grief
      5. Has the time
      6. Can say no
      7. Will maintain appropriate lines of communication
      8. Will be able to qualify for a bond
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a. Will – The client can choose to waive the bond requirement in a probate situation if specifically stated in the terms of the document

b. Trust – A bond is actually not required under ORS 130.605 unless:
   i. Required by terms of the trust
   ii. A court finds that a bond is needed

c. But, if you do waive it, does that individual have assets to cover possible losses if they mismanage the assets?

9. Under the Banking Rules – An individual can’t serve as a personal representative or trustee in the “ordinary course of business” without being appointed by a court and obtaining a bond. ORS 709.030(4)

c. Sometimes a professional fiduciary is the best option.
   i. But the client will raise the following concerns:
      1. Expense
      2. A non-family member will not know the beneficiaries enough to determine what distributions should be made
   ii. Should point out the benefits:
      1. Can prevent bad feelings from developing between the beneficiaries
      2. Can use a Trust Protector to advise on distributions
      3. Neutrality
      4. Experience
      5. Investment management
      6. Proper record keeping
      7. Timely tax filings
      8. Cost isn’t that high when you consider fiduciaries are entitled to reasonable compensation and they will need to rely more heavily on other professionals to properly fulfill their duties
   9. Trust companies in Oregon must be approved by the Director of the Department of Consumer and Business Services
   10. Perpetual existence

   iii. Finding the right professional fiduciary
      1. Larger banks and trust companies:
         a. Usually have highly experienced trustees
         b. Often will not manage smaller trusts
         c. Often will not manage trusts with assets that are difficult to manage or have liability issues such as real property
         d. May use 1-800 numbers for smaller accounts
         e. May be more turnover in staff
2. Smaller banks and trust companies  
   a. Often have experienced trustees who previously worked for large banks or trust companies  
   b. Usually have lower minimums and accept more complicated assets such as real property  
   c. Often provide personal service to beneficiaries  
   d. May have less turnover in staff  
3. Individual (i.e., not an employee of a bank/trust company - Confirm they can qualify to obtain a bond  
   a. Under the Banking Rules - ORS 709.030(4)(g), an individual performing fiduciary services for non-family members in the regular course of their business may serve as a personal representative or trustee if they are appointed by a court and the court requires the person to post a bond suitable to the size of the estate/trust.  
4. Interview more than one  

III. Drafting Issues for Trusts Where the Trustee is Also a Beneficiary of the Trust  
   a. Avoid provisions that can have gift tax consequences for the trustee:  
      i. Make sure that distributions to other beneficiaries are limited by an ascertainable standard.  
      ii. Think carefully about including a special power of appointment if the trustee is a beneficiary entitled to mandatory distributions of income.  
   b. Avoid provisions that can cause inclusion of the trust assets in the non-grantor trustee’s estate:  
      i. Power to make distributions that satisfy his or her legal obligation of support (to the extent that the income is so applied)  
      ii. Ability to make distributions to themselves that are not:  
         1. Limited by an ascertainable standard; or  
         2. Required to be exercised in conjunction with a party with a substantial adverse interest  
      iii. A general power of appointment - Power to appoint or direct property to the trustee, the trustee’s estate, creditors of the trustee or creditors of the trustee’s estate  

IV. Other Drafting Issues in Trusts  
   a. Trustee Succession  
      i. Consider giving the last-named successor trustee the power to name his or her successor
ii. Should the majority of the beneficiaries be able to name a successor?
   1. Exactly which beneficiaries?
      a. Income only?
      b. All living beneficiaries?
   2. Limit them to selecting a professional fiduciary or adverse party?

b. Trust Protectors – Can give a broad or narrow range of powers:
   i. Can help direct distributions to beneficiaries
   ii. Can remove a trustee
   iii. Can appoint a successor trustee
   iv. Can amend trust to amend provisions that have adverse tax consequences
   v. Other powers
   vi. Should beneficiary become a trust protector at age 25?
      1. Power to remove trustee?
      2. Power to appoint successor trustees?
      3. Distributions only by ascertainable standard

c. Clear Distribution Guidelines
   i. Who is the intended primary beneficiary of the trust assets?
   ii. Can the trust be exhausted for their benefit?
      1. In a credit shelter trust this can help protect a spouse if they need the assets
      2. But, can result in exhaustion of trust which may not be in interests of residuary beneficiaries such as children of a prior marriage
   iii. Direction to consider other resources
      1. To what extent?
         a. Maintain current standard of living
         b. Maintain a standard of living that is appropriate given the resources in the trust even if that standard of living is higher than current standard of living
      2. If professional fiduciary, they will take this provision seriously even if qualified “may consider other assets”
   iv. Direction to limit or discontinue distributions if beneficiary (caution these can be tricky to draft and administer and you may not find a professional fiduciary willing to administer such terms):
      1. Doesn’t complete higher education
         a. What if traditional higher education is inappropriate for the beneficiary?
         b. What if they do just the minimum to graduate?
      2. Doesn’t maintain steady employment
         a. What type of “employment?”
         b. Definition of “steady?”
         c. What if they become disabled?
3. Uses drugs
   a. How will this be determined?
   b. Which drugs?
   c. What about prescriptions?

   v. Direction in credit shelter trust to spend down marital trust assets first

   d. Clear approval to hold on to specific assets even if to do so would be a failure to diversify
      i. Kodak case
      ii. Is this really a good idea?

   e. Avoid giving a trustee/beneficiary power to make distributions to themselves if they have creditor issues.

Trust and Estate Administrations – Issues Grab Bag: Part I.

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Audit issues:

- Debts
  o Review any notes carefully. Check the interest rates (AFR), due date, acceleration triggers. Confirm debts are enforceable.
  o Treat related party debts like valid debts.

- Lifetime gifting
  o Review gift tax returns for any issues.
  o If gifting was done pursuant to a power of attorney, confirm that the gifting was allowed under the terms of the power of attorney.
  o Review gifting with the estate planning attorney to confirm which assets decedent owned at death (important for basis).

- Appraisals
  o Review appraisals, including underlying asset appraisals, to make sure they make sense. EX: commercial property should be appraised as commercial property, not residential property.
Potential litigation issues:

• Gain an understanding of the family dynamic.

• Assess the risk of challenges to the will or trust and to the administration itself. Decide whether to flush out potential challenges with notices.

• Understand who the client is, and protect attorney-client privilege and work product. Consult with a litigator.

• Understand which law applies. EX: decedent had a CA trust, moved to OR six months prior to death, has an OR trustee, CA and OR beneficiaries.

• Make sure the beneficiaries understand you represent the trustee/PR, and communicate with their lawyers.

Miscellaneous:


• Review titling of assets. Assist with determining basis. EX: did residence receive step-up at predeceased spouse’s death?

• Section 2013 (Schedule Q). Find out if inherited assets are included in the estate. You might be able to take advantage of the credit for federal estate taxes paid within a certain number of years of decedent’s death: ten years prior or two years after.

• IRD deduction for estate taxes paid (works only if federal estate tax was paid). EX: Decedent had a large IRA that was subject to the federal estate tax. Beneficiary can deduct the estate tax on his/her income tax return.

• Disclaimers. Determine where assets go if a beneficiary disclaims. Remember who your client is. Write letters to beneficiaries reminding them to consult with their advisors regarding disclaimers.

• Communicate with the CPA. Make sure it is written out who is responsible for what. EX: CPA will handle income tax returns, entity elections (754 elections, etc.) and review estate tax return.

• Know your beneficiaries. If they are minors, incapacitated, in bankruptcy, in prison, or missing, their shares might have to be handled differently.
Trust and Estate Administrations – Issues Grab Bag: Part II.

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What happens if an Estate Plan provides one thing but the title on an account dictates another?
Quite frequently, a child who is helping a parent is named on financial accounts. This is usually done for convenience since the child is also named as agent under a power of attorney or trustee. Sometimes the child is listed as a signor on the account but most of the time the child is listed as a co-owner. When one owner dies, the survivor becomes the owner of the account. Usually, the deceased parent does not want the child to get the entire account, but instead expects the proceeds of the account to be distributed consistently with the Will, Trust, or other dispositive instructions. After the parent’s death, the child will ask how to get the account distributed to the other beneficiaries without making taxable gifts. The parent did not intend to give the account to the child, but instead wanted the child to distribute the funds to the heirs consistent with the dispositive direction. The child, though on title owns the account, in reality is the trustee of an implied trust – resulting trust. Since it is a trust, the child can distribute the funds without worrying about gift taxes.

What if the only asset is a car? Must you go through probate or a small estate procedure?
Though Oregon statutes do not provide guidance, the Oregon DMV does have a mechanism that allows the legal heirs of a decedent to file an affidavit of heirship and transfer title to the vehicle.

Beneficiary Concerns.

What to do if a beneficiary cannot be located?
Depending on the value of the beneficiary’s interest, you may consider hiring an investigator to locate them. If the value of the interest does not justify the expense of hiring someone, then take all reasonable steps. At the time of distributing the funds, you will need to submit the distribution to the Oregon Department of State Lands to be held on behalf of the missing person unless the court directs otherwise.

What if a beneficiary is a minor?
This is where the language in the document controls. If the document states that it is to be distributed to a custodian under the Uniform Transfers to Minors Act, then you can distribute to the custodian for the minor’s behalf. If the document says to distribute to a trustee, then distribute to the trustee. If the document is silent in regards to the UTMA/Trustee, then if it is less than $10,000.00, you can give it to the guardian of the minor. If it is greater than $10,000.00, a representative on behalf of the guardian will need to proceed with a conservatorship or ask the court for instruction.
What if a beneficiary lacks capacity or there is a question about capacity?
Like with the minor discussion, if there is a question as to capacity, you may need to have someone look into whether a conservatorship or special needs trust is appropriate. If you are unable to get an answer this way, you may need to petition the court for instructions on how to handle the distribution.

What is the order of preference for a Personal Representative being appointed?

(a) The executor named in the will.
(b) The surviving spouse of the decedent or the nominee of the surviving spouse of the decedent.
(c) The nearest of kin of the decedent or the nominee of the nearest of kin of the decedent.
(d) The Director of Human Services or the Director of the Oregon Health Authority, or an attorney approved under ORS 113.086, if the decedent received public assistance as defined in ORS 411.010, received medical assistance as defined in ORS 414.025 or received care at an institution described in ORS 179.321 (1) and it appears that the assistance or the cost of care may be recovered from the estate of the decedent.
(e) The Department of Veterans’ Affairs, if the decedent was a protected person under ORS 406.050 (10), and the department has joined in the petition for such appointment.
(f) Any other person.

What if the Personal Representative is no longer able to perform their duties?
When a personal representative dies, is removed by the court, or resigns and the resignation is accepted by the court, the court may appoint, and, if the personal representative was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in place of the personal representative. ORS 113.215(1).

If there is no Power of Attorney then what is the priority of persons to act as a fiduciary?

Fiduciary in general:
The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to the specific circumstances of the respondent, any stated desire of the respondent, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment. ORS 125.200.

Guardian:
A guardian’s authority is centered on the personal welfare of the protected person. The court will look to ORS 125.200 in consideration of preferences in the appointment of a guardian. The person nominated as guardian must be “both qualified and suitable, and… willing to serve.” ORS 125.305(c).

Conservator:
A conservator has authority to handle the financial and business affairs of a protected person. A court may appoint a conservator upon the filing of a petition seeking the appointment of a conservator. ORS 125.400. The court and the conservator should take into account any...
known estate plan of the protected person. ORS 125.460. Typically, a parent, child, or other close relative who has a financial background serves as conservator. If no family or friends want to be conservator or there is a fight about who should be conservator, a professional conservator can be appointed instead.