

2009 LEGISLATION ALERTS

ESTATE PLANNING

ESTATE PLANNING / PROBATE

DISCHARGE FROM LIABILITY ON INHERITANCE TAX ORS CH 118

2009 OR LAWS CH 358 (HB 2308)

HB 2308 permits a personal representative or trustee to request a closing letter from the Oregon Department of Revenue (DOR). Within 18 months after the later of the time the application or the return is filed, the DOR will advise the fiduciary of the amount of tax due. If the fiduciary pays the tax, the fiduciary will be discharged of personal liability for any deficiency.

Effective date: September 28, 2009

The bill applies to applications for determination of and discharge from inheritance tax liability filed with the Department of Revenue on or after January 1, 2010.

TRUSTS & ESTATES

ORS 24.260, 36.250, 36.600,
60.001, 62.015, 63.001, 65.001,
67.005, 70.005, 84.004, 86.205,
87.700, 95.200, 98.302, 105.624,
130.010, 205.010, 520.005,
648.005

2009 OR LAWS CH 294 (HB 2313)

HB 2313 is intended to prevent misguided efforts to deed property to estates and trusts instead of to the personal representative or the trustee. It removes the phrases from the definitions of person found in various statutes

related to real estate, but, primarily because of state agency concerns, this change was not made to all statutory definitions related to business entities as legislative counsel had initially proposed.

Effective date: January 1, 2010

DISCLAIMERS ORS 105.633

2009 OR LAWS CH 17 (HB 2357)

HB 2357 makes some technical corrections to ORS 105.633, part of Oregon's version of the Uniform Disclaimer of Property Interests Act.

The bill amends ORS 105.633 to clarify who inherits if a person disclaims the right to inherit property passing by intestate succession. As a result of the amendment, the property will pass as if the "disclaimant" (the person disclaiming) died immediately before the death of the "transferor" (the previous owner). If the resulting recipient would have been the disclaimant's estate, the property passes to the disclaimant's surviving descendants or, if there are no descendants, to the surviving intestate heirs of the transferor. However, if the transferor's surviving spouse is living but is remarried, the property will bypass the spouse.

The bill adopts language from Section 2-1106 of the 1999 version of the Uniform Disclaimer of Property Interests Act.

Effective date: January 1, 2010

The amendments apply only to disclaimers made on or after the effective date.

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DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

ELECTIVE SHARE
ORS 114.105 – 114.165
2009 OR LAWS CH 574 (HB 3077)

Oregon's current elective share statute provides that a surviving spouse has the right to take a share of one-quarter of the probate estate of the decedent spouse, reduced by amounts going to the surviving spouse at the decedent's death. ORS 114.105. A spouse has been able to avoid the elective share simply by transferring assets into a revocable trust. HB 3077 includes more assets within the scope of the elective share and makes avoidance more difficult – but not impossible. Practitioners are urged to research this complicated area of the law.

Effective date: January 1, 2011

The bill applies only to the surviving spouses of decedents who die on or after the effective date. The rights of a surviving spouse of a decedent who dies before the effective date will continue to be governed by the law in effect immediately before the effective date.

SMALL ESTATE AFFIDAVIT
ORS 114.515
2009 OR LAWS CH 413 (SB 235)

SB 235 amends ORS 114.515 to provide that the heirs of a decedent can use a small estate affidavit to administer the estate if the total value of the estate is \$275,000 or less, increased from \$200,000. The personal property must be \$75,000 or less, and the real property must be \$200,000 or less.

Effective date: January 1, 2010

The amendments apply only to decedents who die on or after the effective date.

SPRINGING POWER OF ATTORNEY BILL
ORS 127.005 – 127.045
2009 OR LAWS CH 46 (SB 237)

SB 237 amends ORS 127.005 and 127.015 to expressly authorize springing powers of attorney, which become legally effective only when a condition occurs, such as the financial incapability of the person granting the power. This authorization brings Oregon in conformance with all or virtually all other states. It clears up the ambiguity in Oregon about the legitimacy of springing powers of attorney.

Section 2(2) permits the principal to designate who will determine whether the triggering event or condition has occurred. Section 2(3) provides that if the principal does not name a person to determine whether the principal has

become financially incapable (or if the named persons are unavailable), any physician may make the determination in writing.

Section 3 protects agents and third parties who act in good faith and without knowledge that the agent's authority has terminated. This is consistent with current law.

SB 237 also defines "agent" to include "attorney-in-fact" and otherwise discontinues the use of the term "attorney-in-fact" in ORS chapter 127.

Effective date: January 1, 2010

*The amendments apply to all powers of attorney, whether executed **before**, on, or after the effective date.*

LIMITED JUDGMENTS FOR FEES IN PROBATE
ORS 111.275, 125.030
2009 OR LAWS CH 50 (SB 370)

Oregon law has permitted the entry of orders for the payment of attorney fees and costs in probate matters, including estate administration and protective proceedings. An order does not secure a right to payment, however, so no remedy exists if the fees are not paid. SB 370 allows the court to enter a limited judgment for fees of a personal representative, a lawyer representing a personal representative, or a lawyer involved in a protective proceeding.

Effective date: January 1, 2010

GUARDIANSHIPS

**UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE
PROCEEDINGS JURISDICTION ACT**
ORS 125.015 – 125.215
2009 OR LAWS CH 179 (SB 238)

SB 238 enacts the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This uniform act provides rules for determining which state has jurisdiction when a conflict occurs so that petitions for guardianships or conservatorships will not proceed simultaneously in more than one state. The act also has rules that simplify the transfer of a guardianship or conservatorship from one state to another and includes rules governing the registration and recognition of orders from other states. The act should reduce costs for protected persons and their families, especially after the act is adopted in more states. Eight states, including Oregon and Washington, have adopted the act.

Effective date: January 1, 2010

*The bill applies to court proceedings begun on or after the effective date. Additionally, Article 1 (General Provisions), Article 3 (Transfer of Guardianship or Conservatorship), Article 4 (Registration and Recognition of Orders from Other States), and Article 5 (Miscellaneous Provisions) apply to court proceedings begun **before** the effective date, regardless of whether a guardianship, conservatorship, or protective order has been issued.*

UNIFORM TRUST CODE

SOCIAL SECURITY NUMBER ON TRUST NOTICES

ORS 130.355 – 130.860

2009 OR LAWS CH 363 (HB 2360)

HB 2360 provides that only the last four numbers of the settlor's social security number are now required in petitions under the Oregon Uniform Trust Code to determine the claims of creditors (ORS 130.355), notices to known claimants (ORS 130.370), and certifications of trust (ORS 130.860).

Effective date: January 1, 2010

The amendments apply only to petitions filed, notices given, and certifications of trust furnished on or after the effective date.

OREGON UNIFORM TRUST CODE REVISIONS

ORS CH 130

2009 OR LAWS CH 275 (SB 371)

SB 371 adopts a number of technical corrections to the Oregon Uniform Trust Code (OUTC). The more important changes are the following:

A settlor cannot waive the duty to provide reports containing information about termination of the trust to qualified beneficiaries and to any person designated to receive notice on behalf of the qualified beneficiaries.

The beneficiaries of a trust can, by unanimous written agreement, modify or terminate a trust without judicial oversight.

The circuit court has jurisdiction over trust matters, and the OUTC says that claims against a revocable trust belong in probate court.

A trustee need not provide a trustee's report or notice of the right to request a trustee's report to a qualified beneficiary until six months after a revocable trust becomes irrevocable, if the beneficiary's only interest in the trust is a distribution of a specific item of property or a specific amount of money. If the beneficiary receives the distribution within the six-month period, then no notice is necessary.

SB 371 adds to the OUTC a new provision permitting a settlor to appoint both a trustee and a separate adviser to handle specific tasks (usually investments). To take advantage of this section, the settlor must refer specifically to the new section. An old trust cannot take advantage of this provision, unless the trust is modified using one of the modification provisions.

Effective date: January 1, 2010

Section 2 applies only to reports made on or after the effective date. Section 18 applies only to revocable trusts that become irrevocable on or after the effective date.

MISCELLANEOUS

NOTICE TO OREGON HEALTH AUTHORITY

ORS 113.085, 113.145, 114.525

2009 OR LAWS CH 595 (HB 2009)

Section 76 of HB 2009 amends ORS 113.085 to put the Director of the newly created Oregon Health Authority (OHA) fifth in line in preference to be appointed personal representative if the decedent received medical assistance under ORS Chapter 414. Section 78 amends ORS 113.145 to require that a personal representative send the OHA the notice and information sent to heirs, plus a death certificate. This mailing is in addition to the one the personal representative sends to the Department of Human Services. Section 79 amends ORS 114.525 to require that a copy of a small estate affidavit be mailed to the OHA (and that the affidavit so state).

Effective June 26, 2009

NEW DEFINITION OF ABUSE FOR REQUIRED REPORTING

ORS 124.050, 430.735

2009 OR LAWS CH 837 (HB 2442)

HB 2442 adds "financial exploitation" to the definition of "abuse" in ORS 124.050 and ORS 430.735. Financial exploitation now includes, among other things, the failure to use money belonging to an elderly person or a person with a disability "effectively" for the support and maintenance of that person. The bill does not change reporting duties, but a lawyer representing a conservator should be concerned about "effective" use of the protected person's funds.

Effective date: July 28, 2009

These amendments become operative on January 1, 2010.

**FUNERAL EXPENSE INSURANCE POLICIES
ORS 743.027**

2009 OR LAWS CH 331 (HB 3184)

Although ORS 743.027 generally prohibits the purchase of insurance by individuals other than the insured, HB 3184 amends this section to permit the purchase of funeral expense insurance policies by a person who is closely related by law or blood or has a substantial interest in the insured engendered by love and affection *and* has a lawful and substantial interest in having the life, health, and bodily safety of the insured adult continue.

Effective date: January 1, 2010

**ADVANCE DIRECTIVES AND DEMENTIA
ORS 127.505, 127.535
2009 OR LAWS CH 381 (SB 16)**

SB 16 allows a health care representative to consent to hospitalization for dementia for a period not to exceed 18 days. The statute includes a definition of dementia.

Effective date: June 18, 2009

The amendments sunset on January 2, 2012.

**LOOK-BACK PERIOD FOR MEDICAID
ORS 411.650**

2009 OR LAWS CH 28 (SB 164)

SB 164 coordinates Oregon law with the federal rule on the look-back period for disqualifying transfers in connection with Medicaid qualification. The period is now five years.

Effective date: January 1, 2010

**DE NOVO REVIEW
ORS 2.570, 19.360, 19.415, 183.650,
419A200, 421.628, 545.579
2009 OR LAWS CH 231 (SB 262)**

SB 262 provides that de novo review in equity cases (other than parental rights termination proceedings) is now discretionary, rather than automatic.

Effective date: June 4, 2009

The amendments to ORS 19.415 apply only to appeals for which a notice of appeal is filed with the court of appeals under ORS 19.240(3) on or after the effective date.

**DISTRIBUTION OF WRONGFUL DEATH PROCEEDS
ORS 30.030**

2009 OR LAWS CH 51 (SB 403)

The beneficiaries of an estate can agree to a distribution of wrongful death proceeds that may differ from an intestate distribution.

Effective date: March 31, 2009

**TAX AMNESTY PROGRAM
2009 OR LAWS CH 710 (SB 880)**

A taxpayer with underreported taxes or who has failed to file a return for any period prior to January 1, 2008, can apply for tax amnesty, unless the taxpayer has already received a notice of delinquency or assessment from the Department of Revenue. To participate in the amnesty program, the taxpayer must have applied between October 1, 2009, and November 19, 2009. For taxpayers who applied, the Oregon Department of Revenue will waive one-half of the interest due and all penalties due. The tax due must be paid within 60 days after the end of the amnesty period or can be paid under an installment plan ending on or before May 31, 2011.

A penalty of 25% of the tax due will apply to a taxpayer who could but does not apply for the amnesty program. It appears that the penalty will apply even if the taxpayer was unaware of a deficiency (perhaps because the DOR disputed a valuation of assets in an estate after the taxpayer filed the return.)

Effective date: September 28, 2009

The tax amnesty program applies to tax years, reporting periods, and estates for which the Department of Revenue could issue a notice of deficiency under ORS 305.265 or 314.410, as amended and in effect on the day before the effective date.

*The Professional Liability Fund sincerely thanks
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