

# ESTATE PLANNING 101

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## Chapter 1 KEY TERMS

|   |   |
|---|---|
| <b>Beneficiary:</b>                                       | The person who receives something under a will or trust.  |
| <b>Decedent:</b>  | A person who has passed away.   |
| <b>Devisee:</b>   | Same as a beneficiary, but usually in the context of a will rather than a trust.  |
| <b>Disinherit:</b>  | A person is considered “disinherited” if they would have been an heir of an estate but the person owning the estate created a will giving the estate’s assets to someone else. Note that a spouse cannot be disinherited without his or her consent.  |
| <b>Executor:</b>  | See Personal Representative. Sometimes a female executor is referred to as an executrix. The term executor is modernly considered gender neutral.   |
| <b>Grantor:</b>   | A person who creates a trust, properly called a Settlor in Oregon.  |
| <b>Heir:</b>  | A person who is a family member of the person making a will who would receive all or part of the testator’s estate if there were no will. The persons who are heirs and their share of the estate are determined by state law. Through a will or trust, an heir can be disinherited.                              |
| <b>Intestate:</b>   | The term to describe an estate of a person who died without a will.   |
| <b>Intestate Succession:</b>                              | The gap filling statutory provisions that provide for who is to receive a decedent’s assets if the decedent dies without a will.  |
| <b>Personal Representative:</b>                           | The person who administers the estate of a decedent through probate.  |
| <b>Probate:</b>   | The court process by which the intent expressed in a person’s will is implemented. Probate is not just the implementation of one’s will. It is also the process by which a decedent’s assets pass if the decedent dies without a will. Under those circumstances, Oregon statutes control who is to receive what. |
| <b>Settlor</b>  | A person who creates a trust.   |
| <b>Small Estate or Small Estate Affidavit Proceeding:</b> | A simplified probate proceeding available to Oregonians who own real property valued at less than \$200,000 and personal property valued at less than \$75,000. These amounts may be less for people who died   |

years ago, because the statute in place at the time of death controls how much can pass under this type of probate.

**Testator:** A person who makes a will. Sometimes a female testator is referred to as a testatrix. The term testator is modernly considered gender neutral.

**Trustee:** A person who controls a trust for the benefit of him or herself and/or other beneficiaries.

**Trustor:** See Settlor.

**Will:** A written statement of one's intent for the disposition of his or her assets upon his or her death. In Oregon, a will must be signed in front of two witnesses, both of whom witness the testator sign, or acknowledge his or her signature on, the will.

## **Chapter 2**

### **SHOULD WE AVOID PROBATE?**

#### **What Probate Is, And Isn't**

Probate is the court process by which the written intentions in a will are implemented. If a decedent did not have a will, probate is the court process by which the decedent's assets are passed to his or her heirs under Oregon's intestate succession laws. Having a will does not avoid probate, to the contrary: having a will requires probate. Many of my clients come to me with the express intent of avoiding probate, but without a clear understanding of what it is or whether it should be avoided.

The probate process in Oregon is statutory, meaning that the steps for probating a will are dictated by the Oregon legislature. In the probate process, the court appoints a personal representative to administer the estate. This person is most commonly the person nominated in the will to serve in that capacity. Some people, such as disbarred attorneys, minor children, an incompetent person, a former attorney who resigned while under investigation for ethics violations, and licensed funeral service practitioners, are disqualified from serving as a personal representative.

The probate process is also the forum in which the court appoints a guardian for any minor children left by the decedent. Typically, the other surviving parent is named guardian. If there is no surviving parent, the court will look first to the intent of the decedent as stated in the will.

#### **Drawbacks of Probate**

There are three primary drawbacks of probate: (1) it is time-consuming; (2) it is relatively expensive; and (3) it is public.

The typical probate proceeding takes between 7 and 12 months to complete. That means that from the time the decedent dies through the completion and distribution of the estate, there could very realistically be a 12-month delay. That timeline can be significantly lengthened in a very complex estate. In some circumstances, the personal representative may choose to keep the estate open for well over a year in order to lengthen the time period for payment of federal and Oregon Inheritance Transfer Taxes. In other circumstances, simply marshaling the decedent's assets consumes significant periods of time.

Also, the very nature of the Oregon probate process leads to some time delays and expense. In Oregon, during the first 90 days after his or her appointment, a personal representative investigates the decedent's financial affairs. The personal representative must also file an inventory of all of the decedent's assets within 60 days of his or her appointment by the court. The personal representative must arrange for a notice to be published in a local newspaper of general circulation. The probate cannot be completed for at least four months from the date this notice is first published. The personal representative must give notice to heirs (even if they are disinherited) and

devisees as well as known creditors. Note that these deadlines can be extended with approval of the court.

Simply because a probate takes several months to complete does not mean that all the decedent's assets are tied up and unavailable for the support of his or her family. Quite to the contrary. There are statutory provisions that permit a court to set aside all or part of an estate for the support of the surviving spouse and children. However, all such expenditures from an estate must be approved in advance by the court. This process typically leads to some delay and expense.

The probate process is also relatively expensive. This is due, in part, to the relatively large amount of attorney fees associated with the administration of an estate. There is also a court filing fee (up to \$596), which the estate must pay. Another significant expense is the personal representative fee which is a percent of the estate determined as follows:

| <u>Percentage</u> | <u>Amount of Estate</u>   |
|-------------------|---|
| 7%                | First \$1,000   |
| 4%                | Next \$9,000  |
| 3%                | Next \$40,000   |
| 2%                | In excess of \$50,000   |
| 1%                | Of the property, exclusive of life insurance proceeds, not subject to the jurisdiction of the court but reportable for Oregon Estate Transfer Tax or Federal Death Tax purposes (for example IRAs). |

In addition, the court may order extra compensation for "any extraordinary and unusual services not ordinarily required of a personal representative." Frequently, but not always, if the personal representative is a family member or devisee of the decedent, he or she will waive the personal representative fee. This fee is taxable income to the personal representative.

It is not unusual for the costs of a fairly simple (one home, no other real property and no small business) moderate-sized estate (less than \$800,000) to be \$5,500 - \$8,000, which includes attorney fees and accountant fees, as well as other costs, but excludes personal representative fees. I have personally assisted with the administration of estates in which the fees and costs have been as little as \$2,200 or well in excess of \$80,000.

The third significant drawback of probate is that it is public. Anyone can go to the county courthouse and, for 25 cents per page, copy any portion of the probate file. As required by Oregon law, the probate file will include a list of all of the probate assets of the decedent, all of the creditors of the decedent, and names and addresses of all of the

heirs and devisees of the decedent. For some people, this disclosure of personal information alone is sufficiently intrusive to justify avoiding probate.

### **If Probate Is So Horrible, Should Everyone Avoid It?**

For some people, avoiding probate may be inappropriate. One of the most significant benefits of the probate process is that it has the effect of cutting off claims of unknown creditors. This means that an individual injured by the decedent has a short time in which to file his or her claim against the estate (even if the creditor is not yet aware of the claim or the injury) or lose the right to pursue the decedent. Any insurance the decedent had which would apply to the creditor would still be available, but to the extent the insurance is inadequate to fully compensate the injured person, the decedent's estate would be off limits.

This shortened timeline is measured from the time the first notice is published in the local newspaper. The notice must be published for three consecutive weeks. From the time it is first published, any creditors, whether they know they are creditors of the estate or not, have only four months in which to file a claim against the estate. After that four-month time period, claims against the estate are too late.

A similar four-month time period is available in the context of revocable living trusts as well. A trustee of a revocable living trust may petition the probate court to determine the claims of creditors of the settlor. To do so, the trustee must file a petition with the court very similar to a probate petition. Once that petition has been filed, the trustee must publish a notice in the newspaper very similar to the notice that is required in the probate context. As with the probate context, claims may be filed against the trust estate and may be allowed or disallowed. Claims of unknown creditors are disallowed four months after the date of the first publication of the notice in the newspaper. Once all of the claims have been settled in the context of the court proceeding for the trust administration, the trustee may petition the court to close the case. This procedure is so similar to a probate proceeding that it runs the risk of being too complicated. It also requires disclosure of all the trust assets.

This shortened statute of limitations is of particular importance to professionals such as attorneys, accountants, doctors, podiatrists, dentists, architects, general contractors, veterinarians, and the like. Only you know whether there could be such a potential claim against your estate. If there is, you need to discuss this matter with your attorney. If you believe your personal or business circumstances warrant utilizing this four month time period, I would recommend that you consider a limited probate rather than using the trust probate procedure. More on limited or controlled probates later.

For some estates, the very cumbersome nature of the probate proceeding is of great assistance. Under Oregon law, creditors, even known creditors, of the estate have a limited time period in which to file a claim against the estate to seek payment of the debt. If the creditor fails to timely file the claim, the debt can be disallowed by the personal representative.

If a creditor timely files a claim against an estate but the personal representative disallows the claim, the creditor must file suit or seek a summary determination of the debt within 30 days of the disallowance. If the creditor fails to jump through these procedural hoops, the personal representative has no obligation to pay the debt. This is particularly helpful in estates with large amounts of debt and support obligations, such as the financially struggling couple with young children. To maximize the remaining estate available for the surviving spouse and the children, the personal representative may choose to force all creditors to jump each probate hoop before being paid.

It is also possible in the context of a revocable living trust to maximize the estate assets while minimizing the chances of creditors to successfully pursue the estate for payment. Most typically, creditors of an estate in which there is a revocable living trust do not pursue the remedies they have available under Oregon law for claiming against a trust because the amount of the obligation is insufficient to justify the expense of pursuing it. In addition, from a creditor's perspective, once they have been advised that no probate will be filed, it is very difficult for them to determine whether the lack of a probate is driven by lack of assets or by some more sophisticated means of avoiding probate. Because creditors cannot be certain that there are assets available to pay the debt, they tend to be reluctant to pursue the trust estate for payment.

Because of the above reasons why one would want to avoid probate, and the countervailing reasons why some decedents should not avoid probate, I recommend that, if an estate should intentionally be subject to probate, we consider a limited or controlled probate. By creating an estate plan in which nearly all assets pass outside of probate, we can control the number and type of assets which pass through probate. This is useful to restrict the amount of information the personal representative is required to disclose and the amount of complexity involved in the estate. This also permits us to take advantage of the limitation on liability generated by the probate process while minimizing the negative attributes of that process.

### **Small Estate Proceeding**

A small estate affidavit proceeding is an alternative for some individuals in Oregon. For decedents dying after January 1, 2012, the small estate affidavit proceeding is available only to estates in which the decedent owned real property worth not more than \$200,000 and personal property worth not more than \$75,000. It does not have the added benefit of cutting off claims of unknown creditors because there is no requirement of a publication in the local newspaper, which would give the creditor legal notice of the timeline. Typically, a small estate affidavit proceeding costs between \$1,500 and \$3,500 in attorney fees, accounting fees, and filing fees. This is an estimate of what is typical and not a flat fee quote. The actual fees in an usual situation could exceed the high end of typical. The amounts that apply to decedents dying before January 1, 2012 are lower. Contact my office for additional information. It is the date of death that counts, not the date the probate is filed. These amounts are gross amounts – you do not get to subtract the amount of a lien, mortgage, land sale contract or trust deed on the real estate.

## **Chapter 3**

### **HOW TO AVOID PROBATE**

There are several different methods of avoiding probate. One is to give away all of one's assets during one's lifetime. This is not particularly helpful under most circumstances as the person who would be giving the assets away may come to need the assets during his or her lifetime. Giving away property has some significant capital gains tax implications for the recipient upon the sale of the real property, which can be eliminated if the property is held until death.

This is particularly true where the property has appreciated in the hands of the gift giver. That is because dying is a taxable event in this country. As a result, just like with other types of taxable events like selling an item, there is an adjustment in the basis of the item in the hands of the recipient through the death of the donor. When a donor gives away an appreciated asset during his or her lifetime, the recipient takes the asset with the donor's basis so the asset continues to be highly appreciated in the hands of the recipient when it would have had a fair market value on the date of the donor's death had the donor held the asset and passed it to the recipient on his or her death.

It is important to note that avoiding probate does not avoid death taxes, if death taxes would otherwise be owed.

As a variation of giving it all away, some people plan to avoid probate by adding beneficiaries' names to their assets during their lifetime. I strongly recommend against this practice. Adding a child's name to a parent's investment account or real property can, if done properly, have the desired effect of avoiding probate and passing the asset to the person whose name is added to the property prior to death. However, it does not assist in addressing the issue of what happens if the intended gift recipient happens to die first. It also creates a significant risk to the asset because it will be available to the creditors of the gift recipient should they obtain a judgment against the gift recipient. Even if the gift recipient has a stellar credit rating, he or she may inadvertently cause an injury to a third party, such as in a car accident. If the gift recipient has no or inadequate insurance, the person he or she injured will pursue his or her personal assets to satisfy the loss caused by the injury. This would subject the property at issue to risk of a claim by a personal injury creditor.

Another means of avoiding probate, at least for certain assets, is to designate the person who is to receive the asset upon the death of the owner with the company which currently controls the asset. This type of beneficial designation generally works for individual retirement accounts, bank accounts, life insurance, and the like.

My personal favorite way of avoiding probate is a revocable living trust. A revocable living trust is an agreement between the settlor (the person making the trust) and the trustee (the person in whose care the trust assets will be placed), who are usually, at least initially, the same person or persons. It is vaguely analogous to a

corporation in that the person in control of the trust can change with very little impact on the trust assets. In other words, the death of the settlor has very little impact on the day-to-day management and availability of the trust assets.

The trust agreement controls who will administer the assets as well as who will receive the assets. It permits the settlor to dictate how old the beneficiaries must be before they receive the assets. This is of particular importance when the beneficiaries are young, have credit difficulties, or struggle with an addiction or other personal issue that would cause the settlor to hesitate to give the assets to that beneficiary.

The trust is nearly always accompanied by a will. The will that is drafted along with a trust merely states that any asset left in the individual name of the settlor shall be transferred to the trustee of the settlor's revocable living trust. If any asset is left in the name of the settlor at the time the settlor dies, the estate will still be subject to probate, but the probate will be limited to the assets left outside of the trust. This type of will is called a "pourover will."

If any asset is inadvertently left outside of a trust, the estate faces the cost of a probate which would otherwise have been avoided; this is the financial worst case scenario. The cost of developing an estate plan with a revocable living trust, testamentary or simple will is discussed below. If assets are held outside the trust, thereby requiring probate, the settlor has invested the up-front cost of developing an estate plan to avoid probate but has failed to actually avoid probate. It is the settlor's responsibility to ensure that all of his or her assets are held in the name of his or her trust once it is established. Even if the settlor has decided to subject a portion of his or her estate to probate, I prefer to have all the assets inside the trust, but to empower the successor trustee to remove one asset and subject it to probate, if the trustee determines that to be appropriate at that time.

## **Chapter 4 KINDS OF TRUSTS**

### **Revocable Living Trust Versus Testamentary Trust**

If a trust is right for you, you must decide whether to have a revocable living trust or a testamentary trust. Each can work to meet all the tax and nearly all the non-tax reasons for having a trust. They cost about the same to create. However, there are significant differences.

A revocable living trust is active during the life of the settlor. The settlor is responsible for making sure that all of his or her assets are held by the trustee of the trust. This funding requirement can make the revocable living trust a bit of an administrative challenge. If the settlor fails to ensure that all the assets are held by the trust, the estate of the settlor (to the extent it is held outside the trust) must pass through probate to go into the trust. Upon the settlor's death, the trust becomes irrevocable. Whether it terminates quickly or continues for a lengthy time depends on the terms of the trust. It is not necessary to place your assets in a trust to avoid early receipt by children since the Oregon Legislature made an adjustment to Oregon statutes in 2001. Under earlier Oregon law, accounts held by a custodian under the Oregon Uniform Transfers to Minors Act could only be held until the minor owner of the account turned 21. Since the changes in 2001, the assets held in a custodial account under the Oregon Uniform Transfers to Minors Act can be held (so long as the document creating the account authorizes this) until the owner of the account attains the age of 25.

A testamentary trust is one that is contained within the settlor's will. As long as the settlor is living, the trust is not funded and there is no administrative component. Once the settlor dies, his or her will is admitted to probate. Upon completion of the probate proceeding, the estate assets are distributed to the trust and the probate is closed. Only then does the trust take on a life of its own. Thus, a testamentary trust requires probate, rather than avoiding it.

For purposes of the balance of this booklet, I will refer to trusts primarily as revocable living trusts, since most people who invest in an estate plan with a trust want to avoid probate and, therefore, select a revocable living trust, rather than a testamentary trust.

### **Joint Versus Separate Trusts**

A revocable living trust can be made by either a single person or by a married couple. A trust created by one married individual is a separate trust. Because joint wills are very rare, joint testamentary trusts are highly unusual. A trust made by two individuals as co-settlors, is a joint trust. Two people creating a single trust are almost exclusively legally married to each other.

Separate trusts work well for single individuals or married people who have not completely co-mingled their assets or who are comfortable dividing the assets between two separate trusts during their lifetimes. A joint trust works well for married couples who hold most, if not all, of their non-retirement assets jointly and/or who would be uncomfortable dividing the assets into two pieces, even for estate planning purposes.

## Chapter 5

### **NON-TAX REASONS FOR HAVING A TRUST**

Even if an estate is not taxable (as discussed in the next section), the owner of the estate may still desire to have a trust as part of his or her estate plan. It is true that one of the primary reasons for estate planning is to avoid death tax to the extent possible. However, there are other significant reasons as well.

One of the other primary reasons people place their assets in Trust or leave their assets to a Trust through a Will is to care for their minor children or other beneficiaries who are unable to care for themselves. Unless the estate plan dictates otherwise, the minor children of deceased parents will each receive an equal share of the decedent's estate on their eighteenth birthday. Many people wish to delay their children's receipt of significant sums of cash or other assets until the children are older.

This reasoning is just as true for grandparents who wish to benefit a grandchild. Stereotypically, husbands and wives with grown children wish to benefit each other first and their children second. If one of their children fails to survive them, but leaves living grandchildren, the grandparents typically want that deceased child's share of their estate to pass to that child's children. Again, a trust permits the grandparents to control how old the grandchildren must be before they are entitled to have complete control over the assets. A trust also permits the grandparent to control the uses to which the funds can be put.

A second significant reason why many people create estate plans which include Revocable Living Trusts is to avoid probate, which was discussed in detail in the prior section.

A third major reason many people create trusts is to allow whichever spouse dies first to control the distribution of about half of the assets upon the death of the second spouse to die. This is particularly important in a second-marriage situation. If one or the other, or both, spouses have children from a prior relationship, most typically that spouse wishes to support his or her current spouse and have his or her assets pass to his or her own children, rather than the children of his or her current spouse. A trust is just the document to control those events to the best satisfaction of all.

A fourth significant reason people create trusts is to control their finances and their personal care if they become incapacitated or incompetent. Typically, trust documents allow the Settlor to dictate who will control the funds when he or she is no longer able to, how the funds will be used, as well as providing some direction about the Settlor's personal care, should the Settlor be unable to make decisions about his or her own care.

## Chapter 6

# TAX REASONS FOR HAVING AN ESTATE PLAN

### Federal Tax Issues

Each resident of the United States and each U.S. citizen has a federal tax attribute traditionally called the “Unified Credit.” The Unified Credit is the amount of money or other assets each person can pass Federal Death Tax free upon his or her death. This credit is called “unified” because it applies to both death tax and gift tax (i.e. you only receive one credit). A discussion of gift tax exceeds the scope of this booklet. Because each individual holds a Unified Credit, a married couple can pass twice as much as an individual, so long as the Unified Credit of the first spouse to pass away is preserved.

Since 2011, the preservation of the first spouse to die’s Unified Credit is easier than it has ever been. This is due to the addition, in late 2010, to the Federal Death Tax rubric of the concept of “portability.” Portability means that the surviving spouse can preserve the deceased spouse’s Unified Credit without necessarily funding a trust in the deceased spouse’s name. In fact, the surviving spouse can simply elect for portability on the deceased spouse’s Federal Death Tax return.

For many years the Unified Credit was \$600,000. In recent years, that amount gradually increased to a high of \$5,450,000 (for 2016, it is adjusted for inflation annually). In 2010 the Federal Death Tax was in a lot of turmoil, almost none of which is relevant at this point – so I will not bore you with the details.

Typically regardless of the size of the estate, there is usually no death tax due on the death of the first spouse to die. This is because, again, typically, the deceased spouse leaves everything to the surviving spouse. Lifetime and testamentary transfers between spouses are entirely tax-free due to an unlimited marital deduction on such transfers. However, (assuming portability is not continued) if the surviving spouse owns all of the assets individually, the deceased spouse’s Unified Credit is lost and the surviving spouse can only pass his or her own Unified Credit on his or her death.

The Federal Death Tax laws will very likely change, so watch the news for developments.

Historically, to preserve the deceased spouse’s Unified Credit amount, the first spouse to die had to leave his or her “share” (presumably half) of the assets to someone other than the surviving spouse. This is typically not what the couple intends.

Enter the “by pass” or “credit shelter” trust. This is a revocable living or testamentary trust with a provision that requires that upon the death of the settlor, or one of them in the case of a joint trust, the trust assets are split into two trusts or “pots.” The first pot is designed to preserve, to the extent of the decedent’s assets, the decedent’s Unified Credit. The second pot is designed to qualify for the marital deduction. Thus, there is no death tax owed on the death of the first spouse: one part

of his or her assets (currently up to \$5,450,000) passes into a trust and preserves his or her Unified Credit; the other part of his or her assets pass in trust to his or her spouse and is shielded, at least for now, from death tax by the unlimited marital deduction.

Each of these trusts is usually controlled by and is for the benefit of the surviving spouse for his or her lifetime. The decedent can also control to whom any remaining assets in the "credit shelter" or "by pass" trust passes upon the death of the second spouse. This can be of particular importance in the second marriage situation, where the couple, or one of them, has children from a prior marriage to whom that person wishes the asset to pass after the death of the second spouse. So long as the surviving spouse is living, the surviving spouse can receive all of the income of the credit shelter trust. Depending on the intent of the settlor, the principal of the credit shelter trust assets may also be used by the surviving spouse. Upon the death of the second spouse to die, any remaining assets in the credit shelter trust pass to the children of the spouse who died first (or other beneficiary designated by that first spouse to die).

## Oregon State Inheritance Transfer Tax Issues

For Oregon residents, even if no Federal Death Tax is owed by a decedent, there may be an Oregon Inheritance Transfer Tax owed. Specifically, for decedents dying after 2002, the maximum amount of cash, assets, or other value that a decedent can pass without owing Oregon Inheritance Transfer Tax is \$1,000,000. The calculation of Oregon's Inheritance Transfer Tax does take into consideration assets held outside of Oregon by an Oregon residence. Please see a tax advisor for more details if this applies to you.

To give you an idea of what to expect, this is a list of the 2011 Oregon state inheritance tax amounts due on estates:

| <b>Column 1<br/>Taxable Estate<br/>Equal to of more<br/>than:</b> | <b>Taxable estate<br/>less than:</b> | <b>Tax on amount in<br/>Column 1</b> | <b>Tax rate on<br/>taxable estate<br/>amount more<br/>than the amount<br/>in Column 1<br/>(percent)</b> |
|---|--------------------------------------|--------------------------------------|---|
| <b>1,000,000</b>  | <b>1,500,000</b>                     | <b>Zero</b>                          | <b>10.0%</b>  |
| <b>1,500,000</b>  | <b>2,500,000</b>                     | <b>\$50,000</b>                      | <b>10.25%</b>   |
| <b>2,500,000</b>  | <b>3,500,000</b>                     | <b>\$152,500</b>                     | <b>10.5%</b>  |
| <b>3,500,000</b>  | <b>4,500,000</b>                     | <b>\$257,500</b>                     | <b>11.0%</b>  |
| <b>4,500,000</b>  | <b>5,500,000</b>                     | <b>\$367,500</b>                     | <b>11.5%</b>  |
| <b>5,500,000</b>  | <b>6,500,000</b>                     | <b>\$482,500</b>                     | <b>12.0%</b>  |
| <b>6,500,000</b>  | <b>7,500,000</b>                     | <b>\$602,500</b>                     | <b>13.0%</b>  |
| <b>7,500,000</b>  | <b>8,500,000</b>                     | <b>\$732,500</b>                     | <b>14.0%</b>  |
| <b>8,500,000</b>  | <b>9,500,000</b>                     | <b>\$872,500</b>                     | <b>15.0%</b>  |
| <b>9,500,000</b>  |                                      | <b>\$1,022,500</b>                   | <b>16.0%</b>  |

The amount of the estate in this table is the taxable estate, after debits and expenses of administration are subtracted.

## **Chapter 7**

### **WHO SHOULD SERVE AS YOUR FIDUCIARY**

Both your Trustee and your Personal Representative are fiduciaries. Your Trustee is the person who will administer your trust. Your Personal Representative (or Executor in some jurisdictions) is the person who administers your probate estate (if applicable).

Typically, in the context of Revocable Living Trusts, Settlers name themselves as the initial Trustees. Also, for married couples, very frequently, if either spouse becomes incapacitated, the other serves as the Trustee. It will be important for you to decide who will be your Successor Trustee should you and your spouse (if applicable) both become incapacitated. Most often, a married person creating a will names his or her spouse as the Personal Representative of his or her estate. I recommend that at least one alternative Personal Representative also be named.

The person you name as your Successor Trustee and/or Personal Representative should be someone you trust completely with your finances. I strongly recommend that fiduciaries be on solid financial ground and be known to you to be honest. Preferably, your fiduciary is someone you would be willing to share financial information with while you are still able, so that the transition to their control over your estate can be made as smoothly as possible.

In addition to family members and close friends, you should consider whether to appoint an institutional or professional fiduciary as your Successor Trustee. An institutional fiduciary or professional fiduciary charges a fee for its, hers or his services. That fee may be an hourly rate (often \$90 to \$135 per hour) or it may be based on a percent of the value of the estate. They generally do not become emotionally involved in the financial decisions they make. Asking someone you care about to serve as your fiduciary is asking them to take on a thankless, often emotionally wrought job for which they will feel guilty taking compensation.

There is a natural tension that exists between beneficiaries and fiduciaries. Beneficiaries frequently want more money than the fiduciary believes is necessary. Consider carefully the personal relationship between your intended beneficiaries and the people you are considering naming as your fiduciary. Is the fiduciary likely to be able to refuse unreasonable requests from the beneficiary? Will the fiduciary's control over the money damage his or her relationship with the beneficiary?

Your fiduciary is entitled to "reasonable compensation" for his or her services. A Personal Representative's compensation is set forth in the Oregon Probate Code. That amount is 7% of the first \$1,000 + 4% of the next \$9,000 + 3% of the next \$40,000 + 2% of the assets in excess of \$50,000. In addition, the Personal Representative is entitled to 1% of the value of the property, exclusive of life insurance proceeds, not subject to the jurisdiction of the court but reportable for Oregon inheritance tax or federal estate tax purposes. This one-percent category includes (but is not limited to) things like IRAs and other retirement accounts. A trustee is entitled to charge a reasonable fee as well,

which could be an hourly amount for his or her work or a percent of the value of the assets. Often banks charge between 1% and 2% of the value of the trust assets.

Often family members and friends who serve as a fiduciary waive these fees. That is not always the case. Sometimes personal relationships are damaged when the trustee takes a fee for his or her services. Most typically, this occurs when the settlor names one of his or her children to act as trustee. While the trust benefits all of the children equally, the trustee who is also a beneficiary gets the “added benefit” of the trustee fee. Consider whether this might apply to your situation.

An institutional trustee usually charges a fee based on a percent of the value of the assets. Sometimes it is a sliding scale, so that very large trusts are charged a smaller percent than smaller trusts. If the institutional trustee is required to do something unusual, such as preparing a beneficiary's income tax return or selling real estate, the institutional trustee is likely to charge an additional one-time fee for that service. Also, if the trust administration becomes very time consuming, the institutional trustee may request an hourly fee for the time spent or may be forced to withdraw.

I recommend that you consider naming an institutional Successor Trustee. Locally, Bank of the Cascades, US Bank National Association and Oregon Pacific Bank (out of Medford) have trust departments available.

Sometimes my clients want to name two people to serve as their co-fiduciaries. I strongly recommend against naming even numbers of people to serve in a fiduciary capacity. The most expensive estate administrations I have seen include those in which there are two co-equal fiduciaries who cannot agree of a course of action.

Although you may believe that your children (for example) will get along famously as co-trustees of your trust after your death, I cannot encourage you enough to either name one of them to serve alone, name one of them to make decisions if they are unable to agree, name someone else to make decisions if they are unable to agree or name a professional or institutional fiduciary instead. It recently came to my attention that at least one Oregon Circuit Court Probate Department shares my opinion in this regard. This is an excerpt from a letter issued by that court:

*“The court has learned from long experience that the appointment of co-personal representatives is a bad idea. In nearly every instance the co-personal representatives have cost the estate and the court much time and money because they cannot work in harmony.*

*The court realizes that there are cases, like this one, where the testator nominated co-personal representatives. The court will appoint the co-personal representatives at this time. However, the court will remove both (all) of them and appoint a third party professional in their place at the first sign of dysfunction.”*

Again, I encourage you to name a single person or entity to serve as your fiduciary. If you must name more than one person, I strongly encourage you to name odd numbers of fiduciaries who will make decisions by majority rule or take some other action to avoid deadlock among the fiduciaries of your estate.

## Chapter 8

### WHAT YOU SHOULD EXPECT TO PAY

Our office, as most local attorney firms, bills by the hour, not by the project. So all estimates of attorney fees are just that: estimates. The fees for any project are based on the time needed to do the job.

A simple will is usually around \$1,200-\$2,000 for each individual (reciprocal wills for a married couple tend to be slightly more together). A more complex will can easily exceed \$2,000. A non-tax implicated trust (testamentary or revocable living) is usually around \$1,900-\$3,500, which includes a pour-over will, an assignment of tangible personal property (like a deed, but transfers all of the settlor's personal property into the trust), a deed to transfer the primary residence into the trust (if applicable), etc. A tax implicated trust (testamentary or revocable living) for a married couple is usually \$3,000-\$4,500, which includes a pour-over will, an assignment of tangible personal property, and deeds transferring the settlor's Oregon real property into the trust (if applicable). Additional funding of a trust is usually done without much assistance from the attorney, but can lead to additional costs, if attorney assistance is needed or desired. These are not flat fee quotes. They are ranges of typical costs for estate planning based on my experience. The more prepared my clients are to make the decisions that need to be made, the less expensive their estate plans generally are.

Real property held outside of Oregon must be transferred into the trust with the assistance of an attorney from the state in which that real property is located. I can usually assist you in finding an attorney to do this. But I cannot vouch for that attorney's competence, as I rarely know out-of-state attorneys personally or professionally.

From my discussions with attorneys at other offices, I understand these fees are consistent with fees charged by other firms for similar work. This is one circumstance where you get what you pay for, and the investment in the right attorney is worth it.

If you call my office, I will spend up to 20 minutes talking on the phone with you to gather key information. After that discussion, I will give you a flat-fee quote for the cost of your estate plan. We will finalize the terms of the flat fee by email so that we are both on the same page about the cost and what is included in the cost.

Please understand that the cost of probate is very much in excess of the cost of even the most expensive estate plans. At this time, the filing fee for a probate with assets valued between \$50,000 and \$1,000,000 is \$531 to open the estate. There is an additional fee to close the estate that would be \$268. In addition, there is the cost of publication in the news paper of general circulation, which is a requirement of a full probate. The Bend Bulletin is currently the only newspaper of general circulation in Deschutes County. The cost of publication varies, but generally runs about \$460 per probate. These costs are in addition to the attorney fees to take an estate through probate. Attorney fees in an uncomplicated probate are often about \$5,200.

## **Chapter 9**

### **WHAT YOUR LAWYER NEEDS FROM YOU**

Your estate planning attorney will need quite a bit of information from you in order to draft a plan that fits all of your needs. Some of the more difficult decisions you will need to make can be:

1. Regardless of whether you intend to avoid probate, you will need to be prepared to name a personal representative as well as at least one successor personal representative should your first choice not be available. Usually these persons are also your trustee and alternate trustee.
2. Who will raise your children if you and the child's other parent die before they are grown? I suggest you name one person at a time, but line up at least two alternatives in case your first choice is unable or unwilling to serve.
3. Is there any reason why your estate should be subject to a probate?
4. Are you and your spouse citizens of the United States? Are you both residents of the United States?
5. If you want a trust, do you want revocable living trusts or testamentary trusts?
6. If you want a revocable living trust, do you want separate trusts or a joint trust?
7. Who will serve as your trustee, when you are no longer able or willing? I suggest you name one person or organization at a time, but have at least two named alternative successors.
8. If your devisees all pass away before you, whom or what entity would you like to receive your assets. Please ask yourself, "can this potential beneficiary die?" If the answer is "yes" then continue to name alternate potential beneficiaries until the answer to that question on the last one is "no." Many people ultimately select charities (whether religious or not) as beneficiaries.
9. Be sure to tell your attorney if there is anyone in your family you wish to disinherit and/or whom you expect may make the administration of your estate difficult for whatever reason or in any way.
10. Be sure to tell your attorney if any beneficiary has personal troubles like a rocky marriage, alcoholism, over-spending, disability of any kind, etc.
11. Your attorney will need to know the extent and make-up of your assets.

Chapter 10

**ADVANCE DIRECTIVE FORM**

## **ADVANCE DIRECTIVE**

### **FOR CLIENT**

#### **PART A: IMPORTANT INFORMATION ABOUT THIS ADVANCE DIRECTIVE**

This is an important legal document. It can control critical decisions about your health care. Before signing, consider these important facts:

##### Facts About Part B (Appointing a Health Care Representative)

You have the right to name a person to direct your health care when you cannot do so. This person is called your “health care representative.” You can do this by using Part B of this form. Your representative must accept on Part E of this form.

You can write in this document any restrictions you want on how your representative will make decisions for you. Your representative must follow your desires as stated in this document or otherwise made known. If your desires are unknown, your representative must try to act in your best interest. Your representative can resign at any time.

##### Facts About Part C (Giving Health Care Instructions)

You also have the right to give instructions for health care providers to follow if you become unable to direct your care. You can do this by using Part C of this form.

##### Facts About Completing This Form

This form is valid only if you sign it voluntarily and when you are of sound mind. If you do not want an advance directive, you do not have to sign this form.

Unless you have limited the duration of this advance directive, it will not expire. If you have set an expiration date, and you become unable to direct your health care before that date, this advance directive will not expire until you are able to make those decisions again.

You may revoke this document at any time. To do so, notify your representative and your health care provider of the revocation.

Despite this document, you have the right to decide your own health care as long as you are able to do so.

If there is anything in this document that you do not understand, ask a lawyer to explain it to you.

You may sign PART B, PART C, or both parts. You may cross out words that don't express your wishes or add words that better express your wishes. Witnesses must sign PART D.

Print your NAME, ADDRESS and BIRTH DATE here:

CLIENT  
124 MAIN STREET  
BEND OR 97701

Date of Birth: \_\_\_\_\_

Unless revoked or suspended, this Advance Directive will continue for:

INITIAL ONE:

\_\_\_\_ My entire life

\_\_\_\_ Other period ( \_\_Years)

**PART B: APPOINTMENT OF HEALTH CARE REPRESENTATIVE**

I appoint \_\_\_\_\_ as my health care representative. My representative's address is \_\_\_\_\_, \_\_\_\_\_, and telephone number is \_\_\_\_\_.

I appoint \_\_\_\_\_ as my alternate health care representative. My alternate's address is \_\_\_\_\_ and telephone number is \_\_\_\_\_.

I authorize my representative (or alternate) to direct my health care when I can't do so.

NOTE: You may not appoint your doctor, an employee of your doctor, or an owner, operator or employee of your health care facility, unless that person is related to you by blood, marriage or adoption or that person was appointed before your admission into the health care facility.

1. Limits.

Special Conditions or Instructions:

\_\_\_\_\_ INITIAL IF THIS APPLIES: I do not want my life to be artificially or forcibly prolonged unless there is some reasonable hope that my physical and mental health may be restored, and I do not want life sustaining treatment to be provided or continued if the burden of the treatment outweighs the expected benefits. Particularly, I do not want any life sustaining treatment if I am in a coma from which there is no significant possibility of my ever gaining consciousness or the higher functions of my brain. Also, I wish to terminate artificial feedings (including hydration) if I am in a persistent vegetative

state and if the feeding (including hydration) is futile and only prolongs my dying process.

INITIAL IF THIS APPLIES:

\_\_\_\_\_ I have executed a Health Care Instruction or Directive to Physicians. My representative is to honor it.

2. Life Support.

“Life support” refers to any medical means for maintaining life, including procedures, devices and medications. If you refuse life support, you will still get routine measures to keep you clean and comfortable.

INITIAL IF THIS APPLIES:

\_\_\_\_\_ My representative MAY decide about life support for me. (If you don't initial this space, then your representative MAY NOT decide about life support.)

3. Tube Feeding.

One sort of life support is food and water supplied artificially by medical device, known as tube feeding.

INITIAL IF THIS APPLIES:

\_\_\_\_\_ My representative MAY decide about tube feeding for me. (If you don't initial this space, then your representative MAY NOT decide about tube feeding.)

SIGN HERE TO APPOINT A HEALTH CARE REPRESENTATIVE

\_\_\_\_\_

Date: \_\_\_\_\_

## **PART C: HEALTH CARE INSTRUCTIONS**

NOTE: In filling out these instructions, keep the following in mind:

The term “as my physician recommends” means that you want your physician to try life support if your physician believes it could be helpful and then discontinue it if it is not helping your health condition or symptoms.

“Life support” and “tube feeding” are defined in Part B above.

If you refuse tube feeding, you should understand that malnutrition, dehydration and death will probably result.

You will get care for your comfort and cleanliness, no matter what choices you make.

You may either give specific instructions by filling out Items 1 to 4 below, or you may use the general instruction provided by Item 5.

Here are my desires about my health care if my doctor and another knowledgeable doctor confirm that I am in a medical condition described below:

1. Close to Death. If I am close to death and life support would only postpone the moment of my death:

A. INITIAL ONE:

\_\_\_ I want to receive tube feeding.

\_\_\_ I want tube feeding only as my physician recommends.

\_\_\_ I DO NOT WANT tube feeding.

B. INITIAL ONE:

\_\_\_ I want any other life support that may apply.

\_\_\_ I want life support only as my physician recommends.

\_\_\_ I want NO life support.

2. Permanently Unconscious. If I am unconscious and it is very unlikely that I will ever become conscious again:

A. INITIAL ONE:

\_\_\_ I want to receive tube feeding.

\_\_\_ I want tube feeding only as my physician recommends.

I DO NOT WANT tube feeding.

B. INITIAL ONE:

I want any other life support that may apply.

I want life support only as my physician recommends.

I want NO life support.

3. Advanced Progressive Illness. If I have a progressive illness that will be fatal and is in an advanced stage, and I am consistently and permanently unable to communicate by any means, swallow food and water safely, care for myself and recognize my family and other people, and it is very unlikely that my condition will substantially improve:

A. INITIAL ONE:

I want to receive tube feeding.

I want tube feeding only as my physician recommends.

I DO NOT WANT tube feeding.

B. INITIAL ONE:

I want any other life support that may apply.

I want life support only as my physician recommends.

I want NO life support.

4. Extraordinary Suffering. If life support would not help my medical condition and would make me suffer permanent and severe pain:

A. INITIAL ONE:

I want to receive tube feeding.

I want tube feeding only as my physician recommends.

I DO NOT WANT tube feeding.

B. INITIAL ONE:

I want any other life support that may apply.

I want life support only as my physician recommends.

I want NO life support.

5. General Instruction.

INITIAL IF THIS APPLIES:

\_\_\_\_\_ I do not want my life to be prolonged by life support. I also do not want tube feeding as life support. I want my doctors to allow me to die naturally if my doctor and another knowledgeable doctor confirm I am in any of the medical conditions listed in Items 1 to 4 above.

6. Additional Conditions or Instructions.

\_\_\_\_\_ I want my wishes as expressed in the attached document called "My Particular Wishes" (pages 10 and 11 of this document) to be followed.

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7. Other Documents. A "health care power of attorney" is any document you may have signed to appoint a representative to make health care decisions for you.

INITIAL ONE:

\_\_\_\_\_ I have previously signed a health care power of attorney. I want it to remain in effect unless I appointed a health care representative after signing the health care power of attorney.

\_\_\_\_\_ I have a health care power of attorney, and I REVOKE IT.

\_\_\_\_\_ I DO NOT have a health care power of attorney.

SIGN HERE TO GIVE INSTRUCTIONS

\_\_\_\_\_

Date: \_\_\_\_\_

**PART D: DECLARATION OF WITNESSES**

We declare that the person signing this advance directive:

(a) Is personally known to us or has provided proof of identity;

(b) Signed or acknowledged that person's signature on this advance directive in our presence;

(c) Appears to be of sound mind and not under duress, fraud or undue influence;

(d) Has not appointed either of us as health care representative or alternative representative; and

(e) Is not a patient for whom either of us is attending physician.

Witnessed By:

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_  
Signature of Witness/Date

\_\_\_\_\_  
Printed Name of Witness

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_  
Signature of Witness/Date

\_\_\_\_\_  
Printed Name of Witness

NOTE: One witness must not be a relative (by blood, marriage or adoption) of the person signing this advance directive. That witness must also not be entitled to any portion of the person's estate upon death. That witness must also not own, operate or be employed at a health care facility where the person is a patient or resident.

**PART E: ACCEPTANCE BY HEALTH CARE REPRESENTATIVE**

I accept this appointment and agree to serve as health care representative. I understand I must act consistently with the desires of the person I represent, as expressed in this advance directive or otherwise made known to me. If I do not know the desires of the person I represent, I have a duty to act in what I believe in good faith to be that person's best interest. I understand that this document allows me to decide about that person's health care only while that person cannot do so. I understand that the person who appointed me may revoke this appointment. If I learn that this document has been suspended or revoked, I will inform the person's current health care provider if known to me.

\_\_\_\_\_ Date: \_\_\_\_\_  
Health Care Representative

\_\_\_\_\_ Date: \_\_\_\_\_  
Alternate Health Care Representative

***My Particular Wishes***  
**For Therapies that Could Sustain Life**

In addition to the information on other Advance Directive forms I have completed, I wish to make my instructions known with respect to specific therapies that could save or prolong my life. This form is meant to inform my physician, nurse, or other care provider of my consent or refusal of certain specific therapies. It is also meant to guide my family or any other person I name to make health care decisions for me if I cannot make these decisions myself.

I understand it is impossible to know what a person would want in a particular circumstance, unless that person has previously stated his or her wishes. I hope this document helps those who must make difficult decisions to proceed with comfort and confidence. By following these instructions, they know they are acting in my best interests and are consenting or refusing certain therapies just as I would if I could hear, understand, and speak.

**Decisions While I am Capable**

So long as I am able to understand my condition, the nature of any proposed therapy and the consequences of accepting or refusing the therapy, I want to make these decisions myself. I will consult my doctor, family, and those close to me, spiritual advisors, and others as I choose. But the final decision is mine. If I am unable to make decisions only because I am being kept sedated, I would like the sedation lifted so I can rationally consider my situation and decide to accept or refuse a particular therapy.

**Comfort Care**

I want any and all therapies to maintain my comfort and dignity. If following my instructions in this document causes uncomfortable symptoms such as pain or breathlessness, I want those symptoms relieved. I desire vigorous treatment of my discomfort, even if the treatment unintentionally causes or hastens my death.

**Decisions for Specific Therapies**

If my mental or physical state has deteriorated, the prognosis is grave, and there is little chance that I will ever regain mental or physical function, I would like the following:

|   | Yes | Trial Period* | No |
|---|-----|---------------|----|
| 1. Antibiotics, if I develop a life-threatening infection of any kind.  |     |               |    |
| 2. Dialysis, if my kidneys cease to function, either temporarily or permanently.                                      |     |               |    |
| 3. Artificial ventilation, if I stop breathing.   |     |               |    |
| 4. Electroshock, if my heart stops beating.   |     |               |    |
| 5. Heart regulating drugs including electrolyte replacement, if my heartbeat becomes irregular.                       |     |               |    |
| 6. Cortisone or other steroid therapy, if tissue swelling threatens vital centers in my brain.                        |     |               |    |
| 7. Stimulants, diuretics, or other treatment for heart failure, if the strength and function of my heart is impaired. |     |               |    |
| 8. Blood, plasma, or replacement fluids, if I bleed or lose fluid circulating in my body.                             |     |               |    |

**\*This means doctors may see if the therapy quickly reverses my condition. If it does not, I want it discontinued.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## The Dementia Provision

If I am unconscious and it is unlikely that I will ever become conscious again, I would like my wishes regarding specific life-sustaining treatments, as indicated on the attached document entitled *My Particular Wishes* to be followed.

If I remain conscious but have a progressive illness that will be fatal, and the illness is in an advanced stage, and I am consistently and permanently unable to communicate, swallow food and water safely, care for myself and recognize my family and other people, and it is very unlikely that my condition will substantially improve, I would like my wishes regarding specific life-sustaining treatments, as indicated on the attached document entitled *My Particular Wishes*, to be followed.

If I am unable to feed myself while in this condition:

I do / do not (circle one) want to be fed.

I do / do not (circle one) want to be given fluids.

I hereby incorporate this provision into my durable power of attorney for health care, living will, and any other previously executed advance directive for health care decisions.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date