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ESTATE PLANNING PRIMER

WHAT IS PROBATE? Probate is the legal procedure by which property of a deceased person is passed to others. If the decedent left a will, the will determines who will take the property at death. If the decedent died without a will, Oregon law determines how assets are distributed.

When a death occurs, the personal representative named in the decedent's Will has the following obligations to the Court and the estate beneficiaries:

- Discover and value all assets of the decedent;
- Notify all interested persons of the personal representative's appointment and commencement of administration of the estate;
- Pay all obligations and taxes of the decedent and the estate;
- Properly account to the court and to those persons interested in the estate for all funds and property received and disbursed by the personal representative; and,
- After obtaining court approval, distribute the estate assets to those entitled to the property and close the estate.

WHAT ARE THE DISADVANTAGES OF PROBATE? The criticism of the probate process is that it is expensive and time consuming.

Cost and Fees. Currently, probate costs consist of: (1) administration expenses, such as court filing fees and publication costs; (2) the fees for the personal representative, who has legal responsibility and personal liability for the payment of all tax returns and distribution of the estate; and (3) the fee for the attorney who represents the personal representative and assists that person or entity in carrying out those tasks.

The statutory fee of the personal representative is approximately 2% of the value of the estate. In addition, the court may allow extraordinary fees for unusual services performed by the personal representative. NOTE: Since the fee is taxable income when paid to the personal representative, it is occasionally advantageous to waive this fee, especially if the personal representative is a spouse or other family member who will receive an inheritance from the estate.

Attorney fees are not set by a formula but are based on the following factors: the attorney's experience in probate matters; the skill displayed; the time invested; the



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amount of responsibility assumed by counsel considering the total value of the estate; and customary fees in the community for like services. We generally estimate our fees will be comparable to the fee earned by the personal representative.

Neither the personal representative's fee nor the attorney's fee may be paid until approved by the court at the time the estate is ready for distribution. Court oversight ensures that the decedent's assets are properly identified, valued and accounted for, that creditors are notified and paid and that the estate is properly distributed.

Timeframe to Administer an Estate. The probate process generally takes a minimum of nine months and frequently longer in large estates. Because the personal representative has personal liability for payment of federal and state estate taxes from the estate assets, distribution of the estate (or some portion of estate assets) may be delayed until the IRS and the Oregon Department of Revenue approves the tax returns as filed. This review process may take considerable additional time, typically 18-24 months following the filing of the federal estate tax return and/or the Oregon estate tax returns, which returns, if required, are due nine months from the date of the decedent's death. Frequently, the personal representative will secure court approval of a partial distribution of estate assets, holding in reserve sufficient funds to cover any taxes imposed on audit and final fees and expenses.

CAN PROBATE BE AVOIDED? There are a number of ways in which probate can be avoided.

- Assets held jointly by a decedent and another person with right of survivorship are generally not be subject to probate because the surviving owner automatically inherits all of the survivorship property.
- Some financial institutions allows owners to designate accounts as "payable on death" to designated beneficiaries.
- Life insurance, annuities and retirement accounts can be made payable on death to designated beneficiaries, separate from the probate process.
- Effective January 1, 2012, Oregon law allows the owner of real property to execute a "transfer on death" deed that names a beneficiary who will succeed to ownership of the property at the owner's death. Because the TOD Deed creates no rights in the beneficiary until the owner dies, the owner can change his or her mind during life, and the beneficiary's creditors cannot attach the beneficiary's interest in the property during the owner's life. The recordation of the TOD Deed also does not create a completed gift for gift tax purposes because no transfer of ownership takes place until the owner dies.

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- Probate is not required for small estates. Under Oregon law, a small estate is one in which personal property is valued at not more than \$75,000 and real property is valued at not more than \$200,000. These estates can be handled by filing an affidavit with the court.
- A revocable living trust, if properly funded, is an effective “will substitute” and an alternative to probate.

WHAT IS A REVOCABLE TRUST? A revocable trust (also called a “living trust”) is a legal device established during a person’s lifetime to handle and manage assets. Title and possession of a person’s assets are transferred to a trustee to manage during lifetime and to distribute after death. Since all assets are held in the name of the trustee, there are no assets owned by the decedent that require a probate administration, which will save time and costs, including attorney fees, to transfer assets at death. A revocable trust has the additional advantage of providing for an individual’s incapacity by the trustor’s designation of a successor trustee, who would step in and manage the affairs of the trustor in that event.

ARE THERE ANY DISADVANTAGES IN USING A REVOCABLE TRUST? A revocable trust is somewhat more complicated than a will. Assets must be retitled into the name of the trustee of the revocable trust at the time the trust is created. These asset transfers can result in additional costs.

Setting up a revocable trust will not eliminate the need for professional legal and tax advice in the future. Specifically, some professional fees and administrative expenses will likely be incurred for preparation of the decedent’s final income tax return; collection and valuation of assets; filing of a federal estate tax return and Oregon estate tax return, if necessary; payment of all decedent’s liabilities existing as of the date of death; and distribution of the trust assets in accordance with the trust terms.

SHOULD I HAVE A REVOCABLE TRUST? Below are a few questions to ask yourself when choosing whether or not to create a revocable trust.

- Do I have assets that would be governed by the probate process?
- Do I own probate assets in other states, requiring ancillary probate proceedings?
- What is the estimated cost of probating my estate?
- Do I want to reduce administrative expenses as much as possible at the time my estate is distributed?

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- Do I want to simplify the distribution of my estate by taking on some of the complexities myself during my lifetime by setting up and managing a revocable trust?
- Is privacy important to me or do I need non-private court oversight through the probate process?
- Do I want to plan for my incapacity by designating a successor trustee to manage my affairs if I am unable to or will a Durable Power of Attorney be adequate?
- What is the cost of a revocable trust, including asset transfer costs?
- Am I comfortable with a successor trustee administering my trust for my benefit during my lifetime, if I become incapacitated, and for my family's benefit at the time of my death, without court oversight?
- I understand that I must "fund" my trust and manage my revocable trust during my lifetime in order to avoid probate.

DO I NEED A POWER OF ATTORNEY? Yes. A Durable Power of Attorney is a document in which a person nominates another to carry on legal and business affairs. It is less detailed than a living trust and the power terminates at the time of the grantor's death. A Power of Attorney is desirable, however, to permit the "attorney-in-fact" to deal with a person's assets in the event of incapacity.

WHAT IS A "LIVING WILL?" A living will has been designed by our legislature and is now designated an "Advance Directive for Health Care." The Advance Directive does two things:

- It designates someone to make health care decisions if illness or incapacity prevents a person from making his or her own health care decisions; and
- It permits a person to designate the level of care desired in certain life threatening situations. For example, a person may decline artificial life support in the event of a terminal illness.

WHAT IS THE ADVANTAGE OF ESTATE PLANNING? There are a number of advantages to proper estate planning, including:

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- Having a will in which you designate the person to bring your affairs to a close at death.
- Authorizing your personal representative to serve without the expense of a surety bond.
- Designating a guardian and a trustee for minor children.
- Minimizing federal and state estate taxes.
- Evaluating the merits of a revocable trust for probate avoidance and for management of property in the event of a disability.
- Providing for orderly management and distribution of your assets in the event of incapacity of death.
- Peace of mind.

HOW MUCH WILL IT COST? The cost of estate planning will vary depending upon your particular situation and goals. The cost is based upon the complexity of the estate, the degree of tax planning involved, whether or not a revocable trust is used and, of course, the lawyer's time in preparing appropriate estate planning documents. At the end of an initial conference, we can provide you with a flat professional fee to complete an estate plan tailored to meet your estate planning needs.

HOW DO I PROCEED WITH ESTATE PLANNING? The first step is to prepare a personal financial statement listing all of your assets, including life insurance and retirement benefits, together with your estimate of current values and death benefits. Your personal financial statement should disclose whether your assets are jointly owned or owned individually. In addition, the names of family members and others who are to share in your estate must be determined. Parents of minor children should determine who will serve as guardian in the event of premature death.

Proper estate planning will enable you to achieve the following goals: (1) protection and management of your assets in the event of incapacity; (2) orderly distribution of your assets in the event of death; (3) tax savings; (4) protection for your family from themselves, creditors, and predators, and (4) if appropriate, probate avoidance to save fees and expenses of administration.

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