ANNUAL PROBATE UPDATE
Multnomah Bar Association
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1) **Hoffart v. Wiggins** - *Elder Financial Abuse; ORS 124.100*
No. C064483CV; A136936
Court of Appeals of Oregon
Filed October 3, 2008

Plaintiff invested funds with defendant with understanding that plaintiff could get money back upon request. When plaintiff requested money back, defendant returned some, but not all. Plaintiff sued under Elderly and Disabled Persons Abuse Prevention Act. Trial court granted defendant's motion for summary judgment because plaintiff agreed with defendant's allegation that the initial investment was a legitimate business transaction, not a "wrongful taking." The trial court indicated that the "initial taking of the money has to be wrongful" for purposes of a financial abuse claim. The appellate court reversed this decision, citing the act's prohibition of the wrongful retention of funds belonging to a vulnerable person. An initial wrongful taking is not required. Note: In a separate action, defendant prevailed on breach of contract claim. This may establish issue preclusion in the financial abuse claim.

2) **Robison v. Robison, 226 Or App. 96 (2009)** - *Joint ownership of property, account; Inter vivos gift*

Father-in-law (plaintiff), mother (deceased), and son (defendant), execute and record deed to ranch, conveying "one-third [to] each, [as] joint tenants with the right of survivorship." The parties also each sign a joint account agreement with regard to an investment account, establishing rights of survivor ship. Father seeks declaratory judgment that he owns ranch and account free of son's claims. Trial court grants summary judgment in his favor. On appeal, court reverses and remands matter with regard to ranch, indicating that essential elements of inter vivos gift appeared to be present, when viewed from a perspective most favorable to defendant, making summary judgment inappropriate. With regard to investment account, court upheld summary judgment, finding that an inter vivos gift had not occurred. Joint account agreement is not intended to be for benefit of donee signatory until donor's death. Donee is merely trustee until the death occurs.

3) **Connall v. Felton, 225 Or. App. 266 (2009)** - *Effect of probate avoiding deed*

Mom conveyed property to defendant, reserving life estate. Mom had six children. Mom's spouse, who predeceased her, was not the father of the six children, but had one child from a previous relationship. That child was defendant. Deed of conveyance stated that "the true and actual consideration paid for this transfer is $-0-; estate planning." Mom died, and her personal representative sued to quiet title to the property, asserting that the deed and extrinsic evidence indicate that mom's intent was simply to avoid probate, and for defendant to hold the property in trust, so that it could be shared equally among all seven children. The trial court agreed, and entered a general judgment requiring defendant to return the property to the estate. The court of appeals reversed, indicating that the deed on its face was unambiguous, and made no reference to a trust. The court of appeals stated that the trial court inappropriately considered extrinsic evidence such as mom's

conversations with family members and her will which did not occur at the same time as deed execution. Only evidence contemporaneous with the execution of the deed should be considered, and none was offered at trial.

4) **Brown and Albin, 219 Or. App. 475 (2008) -** *Dissolution of marriage; Trust interest subject to division*

Husband's grandmother established trust, giving husband income interest. Husband's father established trust, giving husband income interest, and then share of corpus. Both trusts were established prior to husband's marriage. Upon dissolution of the 24 year old marriage, trial court included husband's trust interest in the dissolution judgment. Husband appealed, arguing that the trust interests should not be included in the judgment. The appellate court agreed with husband that "the trusts were created by husband's father and grandmother, wife was not an intended beneficiary of either trust, and wife did nothing to contribute to husband's interests in the trusts." However, the more relevant consideration was what was "just and proper." The trial court concluded and the appellate court agreed, that the trust interests had been "completely integrated into the financial planning of the parties" during their marriage. Relying on the trust interests, the parties made major purchases, retired from their jobs, moved from Montana to Oregon. Due to the duration of the marriage, the appellate court was more concerned with an equal separation than with the relative contributions of the parties.

5) **In the Matter of Marriage of Githens, 2009-OR-0402.440** - *Dissolution of marriage; Trust interest not subject to division*

Mom created revocable living trust, to which son had a beneficial interest. Upon dissolution of son's marriage, son's wife argued that son's beneficial interest in trust was a property interest subject to division. The trial court first agreed, then disagreed, and would not include son's beneficial interest in trust in property division. Appellate court affirmed, labeling the beneficial interest in the trust an "expectancy," rather than property subject to division. The revocability of the trust was the key factor (although mom's participation in trial revealed signs of dementia indicating that trust may no longer be revocable). Like a will, the revocable living trust establishes an expectancy, not property.

6) **Olson and Olson, 218 Or. App. 1 (2008)** - *Dissolution of marriage; inherited property subject to division*

During marriage, husband inherited property from his father. Husband kept property in his own name. Upon dissolution, trial court split property equally between the spouses. Husband appealed, arguing that the property should not have been subject to division. The appellate court considered the value of the property at the time that husband inherited it, and the appreciation of the property post-inheritance. The appellate court awarded wife only 25% of the value of the property upon inheritance, because she did not influence the making of the bequest, she was not the object of the donative intent, and commingling of the land occurred minimally. However, the wife made uncompensated contributions to the family (child raising) and direct contributions to the property (fence building; blackberry removal; recreational use, etc.), that entitled her to an equal split of the post-inheritance appreciation of the property. The appellate court considered a "just and proper" standard prior to making this ruling.

7) **Kennett v. Herriott, 223 Or. App 437 (2008)** - *Trusts; Right to attorney fees in trust dispute*

Co-trustee and beneficiary bring action to remove other co-trustee and to compel accounting. Parties agree to settlement procedure, endorsed by court in order, through which each co-trustee would submit list of issues to be resolved, and the parties would attempt to resolve them without court intervention. One co-trustee submitted issue of attorney fees, asserting that trust assets should pay them. The co-trustees could not agree on this issue. When one co-trustee petitioned for fees to be paid from the trust, the other co-trustee objected, citing ORCP 68, which requires a party seeking attorney fees to allege the basis for the award in a prior pleading. The trial court agreed, and denied the fees. The appellate court reversed this decision , as it pertained to ORCP 68. Although a prior pleading had not alleged a basis for an award of attorney fees, the parties had agreed upon a settlement procedure which included the submission of contested issues, one of which was attorney fees. To the extent that the parties could not settle the submitted issues, they would submit the unresolved issues to the court. This agreement placed attorney fees properly before the court, and functioned as a bypass to the ORCP pleading requirement.

8) Wilson v. Wilson, 224 Or. App.360 (2008) - *Elective share*

Mom's conservator brought action against the estate of mom's deceased husband, seeking to enforce mom's spousal elective share. Husband had transferred most of his assets to a revocable living trust two years prior to his death, and did not disclose this to mom. Husband's admitted intent was to insulate the assets from the elective share and to disinherit mom's son, her conservator. Trial court granted summary judgment in favor of husband's estate. The appellate court upheld this decision, affirming that the only evidence that the transfer of assets to the trust was fraudulent was a statement that mom, now deceased, made. The statement was inadmissible hearsay. In addition, while mom or her conservator could assert her right to an elective share, her estate could not, even if the assertion was made during mom's lifetime. An elective share is personal to a surviving spouse.

9) Sollars v. City of Milwaukie, 222 Or. App. 384 (2008) - *Probate; right of estate to undiscovered funds in house that was sold*

Plaintiff purchased house from estate. Eighteen months later, plaintiff's contractor finds $122,000 cash bundled and hidden in house. Police seized the money. Estate filed motion to recover money (handwriting on bundles indicated that it was hidden by deceased). Trial court awarded funds to estate, reasoning that the sale agreement was for the transfer of the property. Transfer of the funds was not part of the bargain. Appellate court reversed, indicating that the language in the sales contract was unambiguous: "The estate shall remove all personal property that is not a part of this transaction and deliver possession of the property to plaintiff." The fact that the parties did not intend to include all personal property of substantial value, the existence of which was unknown to them, was unpersuasive to the appellate court.

10) In re Sunderland, OR Supreme Court Case Number 07-01, 08-98 (07/08/2009) - *Disciplinary rule violation; Inadequate representation, conflict of interest in estate planning, conservatorship*

Attorney suspended from practice of law for three years, for conduct in two probate cases. In one of the cases, Attorney represented Vera, in Vera's capacity as beneficiary of an estate. Attorney communicated with PR, and negotiated distribution of $50,000 to Vera. Attorney deposited the distribution in his trust account, released $30,000 to Vera, and kept $20,000. Attorney decided that

Vera was financially incompetent and needed a conservator. Purporting to represent both Vera and Valerie, the proposed conservator, Attorney filed a conservatorship petition and secured Valerie's appointment. Valerie used Vera's funds for her own benefit after Valerie's appointment as conservator. No bond, inventory, annual accountings were filed. When Vera died, Attorney petitioned for Valerie's appointment as personal representative. After three months, the court removed Valerie, and replaced her with Jim Cartwright as PR of the estate. Cartwright asked for accounting for $50,000 estate distribution to Vera. Attorney gave misleading information. Disciplinary board cited Attorney for failing to provide adequate representation to Vera and to Valerie, and for representing Vera and Valerie although their positions were in conflict and they did not provide informed consent. In second case, Attorney opened probate proceeding, took little action, and withdrew without notifying his client. Disciplinary Board cited Attorney for failure to communicate, for neglect, and for collecting excessive fee. Attorney prior disciplinary history contributed to the length of the suspension.

11) In Re Schenck, 345 Or. 350 (2008) - *Disciplinary rule violation; client conflicts in estate planning*

Attorney was suspended from practice of law for violating a number of disciplinary rules, including DR5-105(E) prohibition against representation of multiple current clients in any matters when such representation would result in actual or likely conflict. Attorney sought Oregon Supreme Court review. OR Supreme Court affirmed suspension, finding that attorney drafted a will for each of two sisters who were in actual conflict in each other. Attorney argued that he drafted wills as a friend, not as a lawyer, and the simple wills did not require legal expertise. For these reasons, he didn't have to comply with the disciplinary rule. Court didn't buy it. In one sister's will, she made gifts to attorney's wife (personal property, contingent interest in one-half residue). This violates DR 5-101(B), which prohibits preparation of instrument which gives lawyer or relative of lawyer substantial gift. Attorney argued that gift was not substantial. Personal property was worth $1,000. Court thought that was substantial enough.

12) In re Runnels, Disciplinary Board Reporter 07-47

Attorney representing personal representative took fees without court approval and generally neglected the case. One year suspension.

13) In re Hughes, Disciplinary Board Reporter 08-87

120- day suspension for attorney representing personal representative in two separate cases. Neglect of cases, failure to file, failure to respond to court notices.

14) In re Dolton, Disciplinary Board Reporter 07-157

Reprimand for failure to file acknowledgment of account restriction in timely manner, failure to appear at show cause hearing.

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