

Recent Cases Impacting Elder Law Practice

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1. Oregon Tax Court Decision, Magistrate Division (Income Tax), TC-MD 1902276, 01/28/2020

Enderich v. Oregon Department of Revenue

Issue:

Can an individual deduct attorney fees generated from litigating claim to an estate?

Circumstances:

- Taxpayer litigated claim to grandmother's estate, generating \$41,374 in attorney fees in the process
- Taxpayer claimed those attorney fees as deduction from income
- Oregon Department of Revenue denied the deduction in full. Taxpayer appealed.

Conclusion:

Although tax regulations allow a personal income tax deduction for expenses paid for the production of income, and for the management, protection, and maintenance of property held for the production of income, regulations do not allow expenses paid to litigate a claim to property of a decedent, even if the property is income-producing (See Treas Reg § 1.212-1(k)).

Rule in Question:

26 U.S. Code §212. Expenses for production of income

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

- (1) for the production or collection of income;
- (2) for the management, conservation, or maintenance of property held for the production of income; or
- (3) in connection with the determination, collection, or refund of any tax.

Treas Reg § 1.212-1(k)

(k) Expenses paid or incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in gross income), or in developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenses paid or incurred in protecting or asserting one's right to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible.

2. Lacey v. Saunders, 304 Or App. 23 (2020)

Issue:

When plaintiff files a lawsuit, and then fails to substitute defendant's personal representative for defendant as party to the lawsuit within thirty days of receiving notice of appointment of defendant's personal representative, can plaintiff still prosecute his lawsuit against defendant's estate?

Circumstances:

- Plaintiff sued defendant. Defendant died. Personal representative (PR) initiates probate of defendant's estate. PR sends to plaintiff notice of the estate and the right to assert claim. Thirty days after serving this notice, PR moves to dismiss plaintiff's action because plaintiff had not substituted PR as party within 30 days of receiving the notice. The court dismisses plaintiff's action but without prejudice.
- PR appeals decision, arguing that the dismissal should have been made with prejudice, citing ORCP 34B as authority.

Conclusion:

"we conclude that ORCP 34 B acts as a time limitation, providing the exclusive procedural means through which a claimant may continue an action that began before the defendant's death. As a result, the trial court must grant a motion to dismiss with prejudice based on a claimant's failure to adhere to the rule's time limitation. The current action commenced before decedent's death and could only continue as ORCP 34 provides. Plaintiff failed to comply with the rule's time requirements. Dismissal with prejudice was therefore the only option, and the trial court erred by dismissing without prejudice."

Rule at Issue:

ORCP 34 - SUBSTITUTION OF PARTIES

B Death of a party; continued proceedings. In case of the death of a party, the court shall, on motion, allow the action to be continued:

B(2) Against such party's personal representative or successors in interest unless the personal representative or successors in interest mail or deliver notice including the information required by ORS 115.003 (3) to the claimant or to the claimant's attorney if the claimant is known to be represented, and the claimant or his attorney fails to move the court to substitute the personal representative or successors in interest within 30 days of mailing or delivery.

3. Tyler ex rel. Butler v. Whetzel, 301 Or App. 504 (2019)

Issue:

“This case presents the question whether a trustee of a vulnerable person’s revocable trust is the real party in interest to continue an action under ORS 124.100 for financial abuse of the vulnerable person after the vulnerable person’s death.”

Circumstances:

Mother moves in with daughter, who has mother’s power of attorney. Mother and daughter travel to Kentucky to see the Derby, as they often did. Mother tells daughter that she wants to stay in Kentucky and live with her sister. Daughter goes back to Oregon and hears from Kentucky attorney that daughter’s power of attorney has been revoked, and that daughter should return all of mother’s property to mother in Kentucky. Daughter files for guardianship in Kentucky. The parties agree that no guardian will be appointed in Kentucky, but a curator (like a conservator) will be appointed in Kentucky to manage mother’s estate. Kentucky attorney hires Oregon attorney to sue daughter for elder abuse on mother’s behalf. Oregon judge dismisses elder abuse claim and counter-claims. Mother returns to Oregon. Daughter, on behalf of mother and as trustee of mother's trust, sues Kentucky lawyer, Kentucky conservator, and Oregon lawyer who brought elder abuse claim for elder abuse and other claims. Oregon court dismisses elder abuse claim and awards attorney fees to the defendants. Mother died. Daughter appealed dismissal of elder abuse claim and award of attorney fees on behalf of mother and herself.

Over a year after Tyler filed the notice of appeal, defendants filed a joint motion to dismiss the appeal on the ground that Tyler lacked authority to initiate or pursue an appeal on Butler’s behalf. Defendants argued that, although Tyler presumably had authority as Butler’s trustee under ORS 124.100(3)(d) to bring financial abuse claims on Butler’s behalf while Butler was living, upon Butler’s death, those [301 Or.App. 508] claims survived to the personal representative of her estate, ORS 115.305, and only the personal representative had authority to pursue those claims on appeal.

Conclusion:

Although the elder abuse statute (ORS 124.100(3)(d)) specifically grants standing to a trustee to bring an elder abuse claim, the trustee must bring the claim on behalf of a vulnerable person. After mother’s death, the personal representative of mother’s estate is the only party who can sustain a claim for mother (see ORS 114.305). After mother’s death, the trustee is no longer bringing claim on mother’s behalf. The personal representative must continue the action at any time within one year after mother’s death (See ORCP 34B). Since no personal representative had been appointed within one year of mother’s death, no one was authorized to continue elder abuse claim.

Law at Issue:

ORS 124.100

(1) As used in ORS 124.100 (Definitions for ORS 124.100 to 124.140) to 124.140 (Estoppel based on criminal conviction):

(a) “Elderly person” means a person 65 years of age or older.

(b) “Financially incapable” has the meaning given that term in ORS 125.005 (Definitions).

(c) “Incapacitated” has the meaning given that term in ORS 125.005 (Definitions).

(d) “Person with a disability” means a person with a physical or mental impairment that:

(A) Is likely to continue without substantial improvement for no fewer than 12 months or to result in death; and

(B) Prevents performance of substantially all the ordinary duties of occupations in which an individual not having the physical or mental impairment is capable of engaging, having due regard to the training, experience and circumstances of the person with the physical or mental impairment.

(e) “Vulnerable person” means:

(A) An elderly person;

(B) A financially incapable person;

(C) An incapacitated person; or

(D) A person with a disability who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person’s physical or mental impairment.

(2) A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse. The court shall award the following to a plaintiff who prevails in an action under this section:

(a) An amount equal to three times all economic damages, as defined in ORS 31.710 (Noneconomic damages), resulting from the physical or financial abuse, or \$500, whichever amount is greater.

(b) An amount equal to three times all noneconomic damages, as defined by ORS 31.710 (Noneconomic damages), resulting from the physical or financial abuse.

(c) Reasonable attorney fees incurred by the plaintiff.

(d) Reasonable fees for the services of a conservator or guardian ad litem incurred by reason of the litigation of a claim brought under this section.

(3) An action may be brought under this section only by:

(a) A vulnerable person;

(b) A guardian, conservator or attorney-in-fact for a vulnerable person;

(c) A personal representative for the estate of a decedent who was a vulnerable person at the time the cause of action arose; or

(d) A trustee for a trust on behalf of the trustor or the spouse of the trustor who is a vulnerable person.

(4) An action may be brought under this section only for physical abuse described in ORS 124.105 (Physical abuse subject to action) or for financial abuse described in ORS 124.110 (Financial abuse subject to action).

(5) An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse.

(6) A person commencing an action under this section shall mail a copy of the complaint or other initial pleading to the Attorney General at the time the action commences. Failure to mail a copy of the complaint or pleading is not a jurisdictional defect and may be cured at any time prior to entry of judgment. A court may not enter judgment for the plaintiff until proof of mailing is filed with the court. Proof of mailing may be by declaration or by return receipt of mailing.

ORS 115.305: Survival of causes of action

All causes of action or suit, by one person against another, survive to the personal representative of the former and against the personal representative of the latter. [Formerly 121.020]

ORCP 34 – SUBSTITUTION OF PARTIES

B Death of a party; continued proceedings. In case of the death of a party, the court shall, on motion, allow the action to be continued:

B(1) By such party's personal representative or successors in interest at any time within one year after such party's death;

4. **State of Oregon v. Judd, 301 Or App. 549 (2019)**

Issue:

“The primary issue before us is the extent to which the elder abuse reporting statutes abrogate the psychotherapist-patient privilege contained in OEC 504, as that privilege applies to communications between a licensed clinical social worker and her patient.”

Circumstances:

Read background from case

Social worker reports the killing as elder abuse and later testifies at trial. Defense attempts to exclude testimony based upon privilege but is overruled.(READ TRIAL COURT EXCERPT)

Defendant pleads guilty to second degree manslaughter, is convicted, and appeals.

Conclusion:

Contrary to granddaughter’s argument, a social worker is not a psychiatrist or psychologist, excepted from elder abuse reporting requirements under ORS 124.060(2). ORS 124.060(1) abrogates the confidentiality afforded a client-social worker communication enough to allow the social worker to report the abuse, but not enough to allow the social worker to testify against her client (BASED UPON EXAMINATION OF LEGISLATIVE HISTORY).

Reversed and Remanded

Defendant withdrew guilty plea. Instead plead to criminally negligent homicide

Second Degree Manslaughter: 75 months; no possibility of sentence reduction

Criminally Negligent Homicide: 60 months; possibility of sentence reduction

Law at Issue:

ORS 124.060: Duty of officials to report

(1) Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065 (Method of reporting).

(2) Nothing contained in ORS 40.225 (Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges) affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 (Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges).

(3) An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

(4) The Long Term Care Ombudsman or a designee of the ombudsman is not required to make a report under this section to the extent the report would violate 42 U.S.C. 3058g(d).

ORS 124.050: Definitions for ORS 124.050 to 124.095

(9) "Public or private official" means:

(a) Physician or physician assistant licensed under ORS chapter 677, naturopathic physician or chiropractor, including any intern or resident.

(b) Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.

(c) Employee of the Department of Human Services or community developmental disabilities program.

(d) Employee of the Oregon Health Authority, local health department or community mental health program.

(e) Peace officer.

(f) Member of the clergy.

(g) Regulated social worker.

(h) Physical, speech or occupational therapist.

(i) Senior center employee.

- (j) Information and referral or outreach worker.
- (k) Licensed professional counselor or licensed marriage and family therapist.
- (L) Member of the Legislative Assembly.
- (m) Firefighter or emergency medical services provider.
- (n) Psychologist.
- (o) Provider of adult foster care or an employee of the provider.
- (p) Audiologist.
- (q) Speech-language pathologist.
- (r) Attorney.
- (s) Dentist.
- (t) Optometrist.
- (u) Chiropractor.
- (v) Personal support worker, as defined in ORS 410.600 (Definitions for ORS 410.595 to 410.625).
- (w) Home care worker, as defined in ORS 410.600 (Definitions for ORS 410.595 to 410.625).
- (x) Referral agent, as defined in ORS 443.370 (Definitions for ORS 443.370 to 443.376).

ORS 124.075: Immunity of person making report in good faith

(1) Anyone participating in good faith in the making of a report of elder abuse and who has reasonable grounds for making the report shall have immunity from any criminal or civil liability that might otherwise be incurred or imposed with respect to the making or content of such report. Any such participant shall have the same immunity with respect to participating in any judicial proceeding resulting from such report.

(2) The identity of the person making the report shall be treated as confidential information and shall be disclosed only with the consent of that person or by judicial process, or as required to perform the functions under ORS 124.070 (Duty to investigate). [Formerly 410.660; 2005 c.671 §5; 2015 c.179 §5]

Ethics Cases

1. Case 19-39

Circumstances: Attorney disciplined for advising client to exercise power of attorney after death of decedent who delegated the power, so that client could deplete decedent's estate so that it will qualify as small estate. Attorney then drafted small estate affidavit for client's execution.

2. Case 18-137

Circumstances: Attorney mismanaged probate estate, failing to provide required notices and taking payment of fees without court approval.

3. Case 19-124

Circumstances: Attorney 1 is preparing personal injury case on behalf of client when defendant in case dies. Attorney 1 asks Attorney 2 to petition for appointment as personal representative of decedent defendant's estate, so that Attorney 1 can prosecute case against the estate. Attorney 2 files petition for appointment as personal representative of intestate estate without looking for will or heirs. When he later finds a will, he doesn't notify the court.