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Storage and Disposition of Original Estate Planning Documents

Every estate planning lawyer faces choices regarding the storage and disposition of original estate planning documents. This article discusses the two alternative approaches of (1) retaining the client's original estate planning documents, and (2) returning original estate planning documents to the client for safekeeping.

It should be emphasized at the outset of this discussion that the decision as to where original documents are stored is to be made by the client. However, the lawyer can remove his office as one of the options by informing the client that he does not retain originals. A lawyer's recommendation of one approach or another must be motivated by the lawyer's desire to do what is in the best interests of the client.

Storage of Original Documents by Attorney or Law Firm

Most lawyers who retain clients' original estate planning documents believe that they are providing their clients with a solution that will minimize the chances of the documents inadvertently getting lost or destroyed—or altered by well-meaning clients who do not realize the need to amend their documents in a formal manner. Clients may also appreciate this service because they can trust that their documents will be securely filed away at their trusted lawyer's office.

A lawyer who stores original documents needs to recognize that rather than placing the risk of loss or destruction on the client from the outset, the lawyer is taking on significant responsibility and risk, which may continue throughout—and possibly beyond—the lawyer's career. Before offering this service to clients, the following issues should be considered:

- Documents must be kept in a facility that is safe from fire, theft, and natural disasters.
- Documents must be stored in a place where the access to the stored documents is limited, to protect confidentiality of client information.
- Documents must be filed in a cabinet or safe that is secure against fire and other hazards. Fireproof storage cabinets are quite expensive.
- The lawyer needs to keep an inventory of original documents and utilize a system that enables easy and quick retrieval of a document when needed.
- Clients need to be clearly informed of where original documents are located. It is a good idea to indicate on copies of documents that are returned to the client the name, address, and phone number of the law firm where the original copy is located.

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- Clients should be reminded to keep the law firm informed of their current address, so they can be contacted if the law firm ever needs to return an original document to the client.
- It may be difficult or impossible to insure against liability for loss or destruction of original estate planning documents because the value of such documents, or the potential liability in the event of loss, may be impossible to quantify.

In addition to the issues identified above, it is necessary to develop a plan for how original documents will be handled in the event of a lawyer's departure from practice, whether due to retirement, death, or disability. While original documents can always be returned to clients, the clients may not be easy to locate. The client may have moved—or even died—without the lawyer being contacted. According to the U.S. Census Bureau, Americans move, on average, 11.7 times in their lifetimes.

If the client cannot be located, each document must continue to be stored, with all of the necessary safeguards as to privacy and security, until a solution is found for disposition of the document. The PLF advises that it may be difficult to find a new lawyer willing to take on the responsibility of storing or disposing of a collection of original wills.

Because of the potential liability associated with storage of original client documents, and the cost and burden of dealing with stored documents when an attorney in possession of such documents retires or unexpectedly ceases the practice of law, the PLF encourages lawyers to return original documents to clients. The PLF's published guidelines for file retention and destruction (**http://www.osbplf.org/docs/aids/File_Retention.pdf**) provide: "Whenever possible, do not keep original papers (including estate plans or wills) of clients." *See also* Oregon State Bar Professional Liability Fund, *Why Did We EVER Want to Keep Original Wills?*, In Brief, Mar. 2007 (advocating against storing clients' original estate planning documents).

Returning Original Documents to Clients

The complexities described above can be avoided by adopting the practice of returning original estate planning documents to clients. However, this approach requires a number of additional considerations for both the lawyer and the client.

A lawyer choosing this approach should consider the following:

- The lawyer should keep copies (electronic, hard copies, or both) of the documents. In some cases (but not in the case of wills), it may be possible to create multiple originals, with the law firm and the client each retaining one or more originals.
- A lawyer returning original estate planning documents to a client should obtain a receipt from the client or, at a minimum, send the documents using a method that includes confirmation of delivery, such as certified mail with return receipt.

When original documents are returned to the client, the client should be advised:

- To inform the lawyer of the location where the original documents will be stored. If possible, the lawyer should keep a record of the physical location (including the branch address of the bank, if the documents will be stored in a safe deposit box).
- To store the documents in a location that is secure and that protects against loss or damage due to theft, fire, or natural disasters. The client should be encouraged to store the documents in a safe deposit box. Some lawyers encourage their clients to add their personal representative or beneficiaries as signers on a safe deposit box. Others discourage this practice based on the concern that it may give creditors direct access to a safe deposit box. ORS 708A.655 permits certain interested persons to open a safe deposit box in order to search for and obtain an original will. The client may wish to let one or more trusted persons know where to find the key to the safe deposit box.
- To refrain from marking up original estate planning documents. Unfortunately, it is quite common for clients to cross out will provisions, add language, or write comments in original estate planning documents.

The client should be discouraged from storing documents at home. Storage in the home may expose original documents to risks such as fire, theft, and even destruction or alteration by dishonest beneficiaries. A safe located in the home may actually become a target for thieves.

Procedures for Destruction of Original Wills

What can be done with an original will when the testator cannot be located? Oregon law limits the ability of attorneys to destroy original wills. Under ORS 112.815, 40 years must elapse before original wills can be destroyed. ORS 112.815 provides: "An attorney who has custody of a will may dispose of the will in accordance with ORS 112.820 if: (1) The attorney is licensed to practice law in the State of Oregon; (2) At least 40 years has elapsed since execution of the will; (3) The attorney does not know and after diligent inquiry cannot ascertain the address of the testator; and (4) The will is not subject to a contract to make a will or devise or not to revoke a will or devise."

Once the requirements of ORS 112.815 are met, the attorney seeking to destroy an original will must publish

notice setting forth certain required information in a newspaper of general circulation in the county of the last-known address of the testator. If the testator fails to contact the attorney within 90 days after the date of the notice, the attorney may destroy the will. Within 30 days after destruction of the will, the attorney must file with the probate court in the county where the notice was published an affidavit stating the name of the testator, the name and relationship of each person named in the will whom the testator identified as being related by blood, adoption, or marriage, and other required information.

Importance of Written Documentation

Regardless of where original estate planning documents are located, it is critical that a lawyer keep a written record of the lawyer's disposition of the documents. If it cannot be clearly established that a lawyer returned original documents to the client, the lawyer may be blamed for loss of documents that cannot be located. Such a written record might include both a copy of the transmittal letter to the client returning the original documents, and a designation on the copies of the documents in the lawyer's files of the physical location where the client has indicated the documents will be stored.

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Save the Date

Your Estate Planning Section CLE Committee is working hard on CLEs for later this year. Mark your calendars now with these dates. More information will be available soon.

Special Needs Trusts
Date: Friday, June 10, 2011
Time: 8:30 a.m. – 12:30 p.m.
Location: Oregon Convention Center

Advanced Estate Planning
Date: Friday, June 24, 2011
Time: 9 a.m. – TBD
Location: Oregon Convention Center

Administering the Basic Estate
Date: Friday, November 18, 2011
Time: TBD
Location: DoubleTree Lloyd Center Hotel

To inquire about participating as a presenter or to suggest a topic, contact committee chair Holly Mitchell at (503) 226-1371 or **hmitchell@duffykekel.com**.

Ending the Paper Chase: Setting Up a Paperless Estate Planning Practice

At some point in the last few years, you have undoubtedly heard the phrase "going paperless." For technology-savvy practitioners, the phrase requires little explanation. However, even the most reluctant of computer users can benefit from going paperless. Although this article is geared towards smaller firms and sole practitioners, it is also possible for larger firms (over 20 attorneys) to implement this paperless approach.

While a paperless practice will not eliminate the workload, your practice will use less paper, which will reduce overhead costs, and it is good for the environment as well. Productivity and efficiency will increase as any document can be accessed with the click of a mouse. Documents can be sent to clients or colleagues through email, cutting down on postage costs. In addition, costs for filing and storage will decrease because digital files will not take up any physical space. Also, files will no longer need to be groomed and destroyed after 10 years since everything can be easily saved on the hard drive. By going paperless, you can organize your files more efficiently and avoid large spindles and the accompanying hassle of breaking apart a physical file to get one page out and then having to reconstruct the file. Best of all, documents can be located quickly and viewed from your home or from a beach in Thailand so long as you have an internet connection.

In many ways, you have already adapted to the use of computers in your practice. Surely the number of handwritten letters your estate planning practice receives in the mail has decreased while emails flood your inbox. Quick Books or some type of accounting software has likely replaced paper business records. By using existing tools and software that are in common usage and readily accessible, the days of overflowing client folders and rows of three-ring binders can be a thing of the past.

Contrary to the term's plain meaning, going "paperless" will not mean the total elimination of all paper from your practice. While every piece of paper that comes through your practice will be scanned, it will still be necessary to save certain important documents (e.g., signed wills, court orders, and promissory notes) in a physical file for each client. Once the case has been closed, this file can be given back to the client, and you will have copies of everything saved and backed up on your computer.

The idea of going paperless is not new; businesses have been coming up with ways to minimize paper usage and use technology to improve productivity for years. This article will not attempt to reinvent the wheel and instead proposes a simple approach to "going paperless." Ideas on how to establish a paperless estate planning practice have

been culled from numerous sources. In addition, interviews with Richard Noble, a sole practitioner (and the father of the author) who transitioned to a paperless practice in West Linn over the last year added a reality check to these ideas. Richard Noble is by no means a computer expert, but he was able to go paperless on his own, over a short period of time, and with few complications. As a result, his practice has benefited in all the ways described above. This was proven recently when he accessed files and worked on cases while vacationing in Hawaii.

Whether you feel uncomfortable using a computer and keep all your records by hand or you have a scanner and scan everything for the sake of having a copy, there is a simple and logical step-by-step process to going paperless. If you have not done so, read Helen Hierschbiel's article, "Going Paperless: Ethical Considerations" published by the Oregon State Bar in April 2009. The Professional Liability Fund is a great resource and has a vested interest in you going paperless and securing the information of your clients. To get you started, this guide is broken down into three parts: preparation, tools, and process. Once the basic elements have been implemented, you can fashion a system that best suits the needs of your office.

Preparation

Planning is the key to successfully implementing a paperless estate planning practice. The first issue is when to begin going paperless. If you are just starting an estate planning practice, the answer is simple: now. But if you have already been practicing for a number of years, you are faced with a dilemma: should you start going paperless only with new clients or retroactively digitize existing matters or closed matters? Most resources and my father recommend picking a start date and going paperless with new clients from that point on.

Bringing your entire staff enthusiastically onboard with the idea of going paperless will help make the transition a smooth one. If any part of your legal team is tentative or is not fully committed to going paperless, the benefits of such a system can be compromised. To make sure your staff is up to speed, it may be helpful in the months leading up to the paperless switch to organize weekly meetings to discuss the new process and how it will be implemented. These meetings can also be used to go over document naming and backup protocol as well as to explain how new or existing equipment will be used in tandem with the new process. In addition, all procedures should be reviewed and revised regularly by you and your staff until you figure out the best practice for your office.

Finally, it is important to explain to your clients what it means to have a paperless practice and how that benefits them. Besides the clients' ability to have any and all of their estate planning documents burned onto a compact disc or emailed to them, you can remind each client that their personal information is safe from theft and that their estate planning documents are backed up and cannot be lost.

Tools

All of the items discussed below (except additional monitors) should be purchased at the same time and set up before switching over to a paperless system. If you need assistance in setting up your new equipment, ask around and find one of the well respected and knowledgeable computer experts in your area to assist in getting your equipment functioning and to provide training on how to operate that equipment.

Scanner

A scanner is the most important piece of hardware you will need in going paperless. When purchasing a scanner, keep in mind the speed with which it can process documents (i.e., pages per minute) and the size of the sheet feeder. A multi-function printer that can copy, fax, print, and scan may be useful, but be sure the scanner can handle high-volume scanning. For example, the Brother MFC-8890DW all-in-one printer with high-volume scanning capabilities can be purchased for around $400. In a smaller practice, it may be more practical to have a high-volume scanner in a central location while providing your office staff with desktop scanners to use when scanning only a few pages.

Shredder

Every piece of paper that is not a vital, original document will be shredded, so it makes sense to purchase a reputable paper shredder. A high-quality shredder will cost about $200, though cheaper ones can be found for under $40.

Monitors

Because the vast majority of documents you review, retrieve, and work with will be on your computer, it is helpful to have two (or even three) computer monitors. Multiple monitors can be connected to share one desktop, which allows you to drag images across the screens or draft on one screen while reviewing a related document or research result on the other screen. Staff should also have multiple monitors so that increased productivity can be achieved throughout the office. Additional computer monitors can be purchased for about $125.

Software

The essential piece of software in a paperless office is Adobe Acrobat Pro Extended. It can currently be purchased for around $500. It will copy, crop, remove, and rotate pages within a document. It allows for redaction and provides ways to secure files and prevent documents from being altered. Adobe Acrobat Pro Extended can also integrate with other types of software, such as Microsoft Outlook, so that email messages and attachments can be converted to PDF format and saved as one file. Use and proficiency in Microsoft Word and Excel are also vital to running a paperless estate planning practice.

Another important tool in taking full advantage of a paperless practice is utilizing software that provides access to your office computer over the internet. LogMeIn is an online example of this type of software that allows users,

through an internet connection, to remotely access their office computer securely, view the same desktop, and have access to all files and applications. Thus, if all your client files and documents are in your office computer system, you will be able to work from just about anywhere.

Backup

In a paperless office, regular data backups of your client files or business records are of unparalleled importance. Your server should have multiple hard drives that mirror each other. Also, an external hard drive should be programmed to back up the information on the main drive on a nightly basis. Finally, off-site backups are readily available through private companies that provide the final tier of protection. All of these backup systems should be employed jointly to create a web of security around the data of your practice. At any moment, your information could be lost or compromised, but with backups you can safeguard your files from a major catastrophe or recover a single file that has been accidentally deleted.

Process

The organization of your records in a paperless system can mimic the way you currently organize your physical files. In Richard Noble's practice, any document that comes into the office is scanned and, in most cases, shredded. The resulting electronic document is then renamed and placed in the appropriate electronic file on his office server. From there, he records what he did in the Time Memo (described below), including the billable time and a hyperlink to the electronic document. This process is described in greater detail below.

Scanning to Create PDF Documents

Under a paperless regime, any document or receipt, whether received by email, postal mail, or fax, should be immediately scanned and converted to PDF format by you or your office staff. The original document should then be stamped to indicate that it has been scanned. At this point, my father examines the document and determines whether the original should be saved or shredded. Regardless of whether an original document is kept, all electronic documents should be kept in a uniform and easy-to-understand manner. Emails and any accompanying attachments can be converted to PDF format in Microsoft Outlook.

Document Naming

After the document has been scanned, it will be sent to a pre-determined central location on your computer. The scanner will automatically name the file using a long series of numbers. Immediately after scanning, locate the recently scanned document and rename it. One common naming convention is a chronological system. For example: 2011-04-26-Jones-Advanced Directive will allow you to easily search and find the document.

Files and Subfiles

In order to keep your documents organized, it is important to have a place to deposit the documents you create or work on for a client. On your central hard drive, you will typically have a file titled "Clients" or something similar. Within that file will be folders with the names of your clients. If you handle multiple matters for each client (e.g., Will, Estate Plan, Probate Administration), you will have that same number of subfolders inside the client folder.

Time Memo

The Time Memo, by no means revolutionary, was something Richard Noble came up with for his practice that you may want to consider adapting to your practice. The Time Memo supplements the information in the Amicus software in that it creates a chronological record of what he has done in a case and gives him the ability to instantly access documents in a case by clicking on the hyperlink. Every client matter will have its own Time Memo, which is essentially a Word document with (in his practice) five columns: the date, a brief description of what you did, billable time for you, billable time for your legal secretary (or for another attorney), and a detailed explanation of what you did. If your work involved a document that was created or scanned, the explanation of what you did should be hyperlinked to the document that was created or scanned. After you have done this, any time you look at the Time Memo in the future, you will be able to click on the hyperlink and bring up a copy of the email you wrote or the scanned copy of the will the client signed. Another benefit of having a Time Memo is that the billing information can be directly transferred to an Excel spreadsheet to quickly calculate the final bill for the client.

Finding Your Own Way

Use these tips as a starting point to develop the system that best suits your estate planning practice. Do not expect to go paperless overnight and be open to tinkering with the process after it's been implemented. As new technologies are developed, you will be well-positioned to adopt them into your paperless practice.

More Resources

For more information on going paperless, do a Google search of the term to access hundreds of helpful websites and blogs dedicated to this topic. One site the author found informative and helpful, "Going Paperless: A Blog about one lawyer's quest to improve productivity through technology," can be located at **www.goingpaperlessblog.com**. You can also contact Richard Noble at **richardnoble@richardnoble.com** to ask him questions about how he set up his paperless practice.

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Legislative Update: Oregon Inheritance Tax Return Filing Deadline Extended for Some 2010 Estates But Not the Tax Due Date

As a result of Congress passing the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 in December 2010, the Oregon Legislature had to act expeditiously to determine which 2010 federal tax changes Oregon would adopt. As part of this review the 2010 Oregon Inheritance Tax return ("OIT return") filing requirements for some 2010 decedents were changed to track with the federal filing requirements. Thus, if a decedent died after December 31, 2009 and before December 17, 2010 while holding property taxable in Oregon and a federal estate tax return is required, the due date for the OIT return is extended until the federal estate tax is due.

Generally, this means that for 2010 decedents who died before December 17, 2010 and had gross estates valued over $5 million, the extended filing deadline is September 19, 2011 for an OIT return (Form IT-1), plus six additional months if a timely extension request is applied for. For 2010 decedents with gross estates under $5 million, the 2010 OIT return remains due nine months after the date of decedent's death. For 2010 decedents who died after December 16, 2010, the filing requirements remain unchanged, and the OIT returns are due nine months following the date of decedent's death.

However, the Oregon Legislature did **not** extend the Oregon inheritance tax payment due date. Oregon inheritance taxes remain due and payable nine months after the date of the decedent's death. Also, any penalties and interest must be calculated based on nine months after the date of the decedent's death irrespective of the filing extension. The filing extension provision, tax due date, penalty and interest changes are contained in Section 33 of SB 301. (http://www.leg.state.or.us/11reg/measpdf/sb0300.dir/sb0301.en.pdf).

The Governor signed SB 301 on March 9, 2011, but it will not become law until the 91st day after the close of the legislative session. After SB 301 becomes law, Section 33 will be retroactive to estates of decedents who died after December 31, 2009. A representative from the Oregon Department of Revenue has confirmed that the Department will currently follow the intent of the new law and allow the filing deadline extension.

If you are working with an estate that may be eligible for this filing extension, consider contacting the Oregon Department of Revenue to confirm the estate's eligibility for these changes. Please note these changes in the law do not address the filing deadline for estates that elect to file the Form 8939 information return in lieu of the federal estate tax return.

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Five "Dirty" Questions: Identifying and Evaluating Land Use Issues When Representing Your Estate Planning Clients

Why should estate planning attorneys care about the Oregon land use system? Because without appropriate due diligence when real property transfers are involved, estate planning clients or their beneficiaries may discover that land cannot be separately conveyed as intended, or cannot be used or developed as intended. Beneficiaries may discover that the business or residence bequeathed to them was not lawfully established. Even opportunities for separate ownership or additional development might be overlooked without a review of the land use laws. Attorneys can help their clients and their clients' beneficiaries to avoid these unfortunate surprises by considering the following five land use questions when creating estate plans for clients with real property assets.

1) Is each unit of land that a client intends to bequeath a legal unit of land?

Illegal units of land create risk for the seller or transferor.

When preparing an estate plan, ask the client to verify that units of land that are to be conveyed to beneficiaries are not illegal units of land, or that the client's desires do not illegally divide a legal unit of land. If these issues are overlooked, the damage to the beneficiary may not be realized until the local government denies a building or development permit because the beneficiary is unable to establish that the subject property is a lawfully established unit of land, or when a subsequent attempted transaction uncovers the illegal status. Oregon Revised Statutes (ORS) 92.018(1) provides, "[i]f a person buys a unit of land that is not a lawfully established unit of land, the person may bring an individual action against the seller in an appropriate court to recover damages or to obtain equitable relief. The court ***shall*** award reasonable attorney fees to the prevailing party in an action under this section." (Emphasis added.)

Given the potential harm, the estate planning attorney should discuss with their client whether each unit of land subject to the estate plan is a "lawfully established unit of land." ORS 92.010(3) defines a "lawfully established unit of land" as a tract of land created either by government action, such as a partition, subdivision, or court judgment, or by a deed or land sale contract recorded prior to the date the local government adopted land use regulations prohibiting such a division of land.

How to determine whether a unit of land is a "lawfully established unit of land."

In many instances, the inquiry is relatively easy to answer because an express government action created the unit of land. This is most often the case for urban properties. If the local government created the unit of land by a partition, subdivision, or judicial order, an express reference in the deed's legal description to the applicable plat, land use application, or court judgment will satisfy the inquiry and comply with the requirements of ORS 92.027. A rare caveat exists to this rule. Local governments do have the authority to vacate undeveloped subdivisions pursuant to ORS 92.205 to 92.285.

If government action did not create the unit of land, further inquiry is necessary to determine whether the unit of land is lawfully established. While ORS 92.010(3) defines a legal unit of land, local governments are the arbiters of whether an individual lawfully created a unit of land. Different counties and cities adopt land division regulations at different times and continue to vary their interpretations of the applicable criteria. In order for your client to have a final determination of whether the privately created units of land are lawful, your client may find it necessary to seek an examination of their deed history (and possibly the deed history of the surrounding properties) and the relevant jurisdiction's current and historical zoning and land division ordinances. A title company can assist by providing a chain of title report.

Generally, the key to the local government's analysis is determining <u>when</u> the current owner or predecessor-in-interest first conveyed the unit of land as a separately described unit in a recorded deed or land sale contract. Such analysis considers three basic classes of transactions.

The first class involves those units of land created by deed or land sale contract recorded prior to the local government's adoption of any land use or land division regulations. They continue to be separate and discrete units of land that are freely transferable. ORS 92.017.

The second class of transactions involves those units of land created by deeds or land sale contracts that the current owner, or predecessor-in-interest, recorded before the local government enacted a minor partition ordinance. A minor partition is a land division that did not create a private or public roadway or driveway, except for limited agricultural or farming purposes. Prior to the adoption of Oregon Law 1985, chapter 717 section 1, such land divisions were only regulated if the local jurisdiction had enacted a minor partition ordinance. While jurisdictions vary greatly as to the enactment date of their minor partition ordinances, most jurisdictions adopted such ordinances in the 1960s or 1970s. The regulations of minor partitions occurred either as an ordinance applying to all land divisions in the applicable jurisdiction or as part of the development standards for a particular zone. For those units of land where a property owner or predecessor-in-interest first recorded a deed or land sale contract separately describing the unit of land during the 1960s or 1970s, and the unit of land did not create a private road (i.e., contains sufficient right-of-way frontage), then further analysis and confirmation with the governing jurisdiction's current and historical zoning laws is appropriate.

The last class of transactions involves those units of land that were privately divided without the necessary government authority and are deemed illegal units of land. Historically, these private transactions were common. If a client has an illegal unit of land, remedies may be available if the parent parcel is still in common ownership or through validation if the local government has adopted ORS 92.176. In recognition of the many illegal units of land that exist, the legislature adopted Oregon Laws 2007, chapter 866, codified in part at ORS 92.176, authorizing local governments to validate illegal units of land. Essentially, ORS 92.176 allows local governments to validate an illegal unit of land if the owner could have secured a government approval at the time the illegal land division occurred, or if the local government authorized the construction of a dwelling or other building on the property after the division but prior to 2007. ORS 92.176 grants local governments discretion in the adoption of this statute, and, as a result, not every jurisdiction has codified this remedy. If the local jurisdiction has adopted ORS 92.176 or a similar ordinance, the client may decide to apply to the local planning department for validation of the illegal unit of land. Such land use decisions, if not appealed, are final land use decisions and bind the local jurisdiction.

It is worthwhile to discuss with the client the concept of legal and illegal units of land whenever real property, particularly rural property, is part of an estate plan.

2) Is each unit of land independently developable?

Distinguishing transferable properties from developable properties.

A fundamental rule of Oregon land use law that clients often need help understanding is that the laws governing transferability of property are different from those regulating the development of property. In other words, just because one can sell a unit of land does not mean one can develop that unit of land. If a client intends not only that a unit of land be transferred to his or her devisees but that the unit of land be independently developable, additional analysis of the local zoning ordinance is necessary.

State law prohibits local governments from merging boundary lines of legal units of land in a manner that prohibits future conveyances. *Kishpaugh v. Clackamas County*, 24 Or. LUBA 164, 169-71 (1992). However, local governments can effectively "consolidate" separate units of land for development purposes. Specifically, local governments can adopt land use regulations that impose zoning or other restrictions that directly or indirectly require two or more lawfully created units of land for specified development such as residences and commercial uses. *Campbell v. Multnomah County*, 25 Or. LUBA 479, 482 (1993). Thus, whether a unit of land is independently developable depends on the local development standards provided by the jurisdiction's zoning ordinances.

Avoid unintended consolidation.

In some cases, whether or not a property is independently developable hinges on whether the client owns the adjoining units of land. A client who owns two or more adjoining legal units of land, in different legal names, may unintentionally "consolidate" these parcels for development purposes by transferring them all to one owner, such as their trust. If the client's units of land are adjoining, understanding the local development standards prior to transferring those units to a single owner may preserve future development rights. In situations where it is known that transferring adjacent units to a single owner does in fact result in consolidation, using one or more single asset entities may be appropriate as part of the client's estate plan.

3) What is the current use of the land, and were all of the uses properly permitted?

Determining what uses, if any, local and state laws authorize on a client's property can ensure that a client's estate plan can be implemented as the client intends. When the client intends for a beneficiary to receive a specific parcel of property, together with the business currently conducted on that parcel, a mistake as to the lawfulness of the use on the property could effectively disinherit that beneficiary. The analysis of this type of scenario is a multistep process.

The first step is to describe or classify the current use of the property. While some uses may appear obvious, local zoning ordinances can be highly technical in the definition of allowed uses. The most common methods for classifying property uses are the Occupational Safety and Health Administration (OSHA) Standard Industrial Classification (SIC) code or the North American Industry Classification System (NAICS) code. These code systems classify and catalog zoning uses into code numbers in the same way the Dewey Decimal System classifies books into numbers.

Next, determine whether the local jurisdiction's zoning ordinance authorizes the client's particular use on the subject property. Zoning laws generally define uses in four categories: permitted uses, conditional uses, nonconforming uses, and illegal uses. Zoning laws allow permitted uses, as the name suggests, without discretionary approval from the local jurisdiction. Be alert to the possibility that a client's existing use, or the applicable zoning laws, may evolve over time.

In cases where there is sufficient doubt concerning the lawfulness of a client's use, the client may decide that seeking an administrative decision from the local planning authority is appropriate. Use determinations are land use decisions that are noticed and appealable, creating some risk to the client. However, informal statements, even written statements, by local planning officials also create risk because they are not binding on a local jurisdiction. Only an official, noticed land use decision ensures a property's use is lawful.

Where the use is not permitted, it may be subject to a conditional use permit. Conditional uses require discretionary approval from the local jurisdiction. If the client's property is subject to a conditional use permit, the client should monitor that use to ensure the actual use remains in compliance with the permit and conditions of approval and that no unintended consequences will result from the planned transfer. For example, some discretionary permits are restricted to the initial applicant and will not transfer to the beneficiary.

A use not allowed by the local governing regulations is either an illegal use or a permitted, nonconforming use. If the local government previously permitted the use, but subsequent changes in the zoning ordinances prohibit it, your client's use may continue as a permitted, nonconforming use. Nonconforming uses existing within county jurisdictions are governed by ORS 215.130. City ordinances govern nonconforming uses located within a city's jurisdiction. While nonconforming uses are transferable, they are disfavored and vulnerable to becoming void in part or in whole if not properly managed. The client should create a property-specific plan to ensure the nonconforming use will remain lawful.

If a client's use is an illegal use, it may still be possible to validate the illegal use through a conditional use permit, a zone change, or some combination thereof. This analysis is often extensive, and it is appropriate to consult a land use attorney on these matters. The analysis should always include the legal risks caused by the client's illegal use.

4) Are there opportunities for strategic property line adjustments, land divisions, or new dwellings for rural properties?

In the interest of maximizing value and options for an estate planning client, discuss whether the client is in a position to create new parcels or dwellings, or if a strategic property line adjustment could increase the options for a more equitable distribution. Rural dwelling applications sometimes depend on ownership history or on rural income over a period of several years. ORS 215.700-.783. Strategic conveyances might help clients to obtain entitlements for

dwellings sooner than would otherwise be available.

For example, a client owning two adjoining units of rural land comprised of 70 acres and 30 acres may desire a property line adjustment to create two 50-acre units of land. This type of plan can work unless one unit of land is 80 acres or greater. A local government cannot approve a property line adjustment that decreases a unit of land below the statewide minimum of 80 acres for resource lands (properties outside of the Willamette Valley generally have a 160-acre minimum parcel size). Local ordinances can also create higher minimum parcel sizes.

5) Is the land subject to any statutorily created development credits?

Measure 49, or HB 2132 (2011), created a pilot program authorizing the transfer of development rights from forest-zoned properties to other areas. These and similar development rights are highly regulated. Prior to conveying property subject to these rights or severing development rights from the land, a complete review of the applicable state laws is necessary to avoid an unnecessary degradation of such rights. For example, Measure 49 rights are freely transferable to one's trust or spouse. Or Laws 2007, ch 424, § 11(7). However, a transfer to a limited liability company will require development to occur within 10 years. *Id*. Clients with estate plans involving development rights should consider including beneficiary agreements allocating the costs, profits, and decision-making authority for these shared rights.

Conclusion

Discussing these land use issues with your estate planning clients can help them to achieve their estate planning goals, avoid liability, and maximize their real property assets. For further information regarding Oregon land use laws, the Oregon State Bar's book *Land Use* is a great resource and was updated in 2010.

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Families, Property, Liberty and the Law: Mediating Probate Cases

The number of probate disputes in the United States continues to grow as we face an increasingly aging and aged population. Disputes may involve the distribution of property or the petition for a guardianship or conservatorship. Historically, court-ordered solutions were the only option for families in conflict over these issues. Recently probate mediation arrived in Oregon. Mediation promotes not only economical decisions and a faster process but also the preservation of ongoing relationships and comprehensive, customized agreements. Mutually satisfactory outcomes lead to a higher rate of compliance and decisions that hold up over time. "Dispute resolution offers people opportunities that were previously unavailable," said Lane County Circuit Court Probate Judge Lauren Holland. "For an attorney, the more you are familiar with different processes of resolution for your client, the better advocate you are."

The following two short articles describe the Multnomah County Probate Mediation Program and the Probate Mediation Clinic, a partnership between Lane County Circuit Court and the University of Oregon School of Law Mediation Program.

The Multnomah County Probate Mediation Program

When I last wrote about the use of mediation in probate and protective proceedings in this Newsletter (July 2008), I stated that efforts in this direction were under way in Multnomah County. I am pleased to report that after a two-year effort by an advisory committee spearheaded by Judge Katharine Tennyson, Multnomah County established a probate mediation program implemented by supplementary local rule 12.045. The program is intended to apply broadly to most protective proceedings including guardianships, conservatorships, and issues arising from trusts and estates. The rule allows the court to order a case into mediation and also allows a party to channel a case to mediation. A party may object to a case being mediated, and the court may remove the case from mediation if it appears that the case is not appropriate for mediation.

Under the rule, the parties are free to choose any mediator by agreement. If they cannot agree, the court may appoint a mediator from a list of approved mediators maintained at **http://courts.oregon.gov/Multnomah/docs/CivilCourt/Probate_Annexed/AllProbate.pdf**, a Multnomah County Court website. At last count, 18 qualified mediators were listed on this website. Qualified mediators include attorneys with five years of experience in the relevant areas, individuals with special skills or training in the relevant areas, or

individuals with special skills or training as a mediator.

A mediator appointed by the court must comply with the Oregon Judicial Department's court-connected mediator qualification rules and have attended specialized training. To date the advisory committee has held two specialized trainings, one in June 2009 and another in April 2010. These trainings were facilitated by the Oregon Family Institute, a non-profit organization that assists courts in implementing programs that help families in the litigation process. Approximately 45 individuals attended each training session. Feedback from trainers and participants indicated the training was highly successful. The advisory committee is contemplating holding a third training in 2012. Because about 90 individuals have completed the training program but only 18 have qualified for the court roster, it is plausible that many trainees have attended in order to familiarize themselves with the process, rather than to become qualified mediators.

All available evidence suggests that the implementation of supplementary local rule 12.045 is making a significant difference in the number of cases being mediated. Several mediators I contacted noted a significant increase in demand for mediation of these types of cases. Some attorneys report that a number of parties are also exercising their right to request to be removed from the mediation track. Some cases in this area are simply not going to be appropriate for mediation, and early evidence indicates that the opt-out function is working. Given the difficulty of some probate and protective proceeding cases, it is not surprising that some mediated cases have been highly successful while others have not.

The advisory committee is currently working on proposed amendments to the rule to streamline the mediation process. The committee is contemplating a system in which once an objection is filed and the case is contested, the parties have 30 days to make a plan for mediation and to give a status report to the court. Practitioners should be alert for a revision of the rule sometime in 2011. In summary, the development of the probate mediation program represents a positive step for the Multnomah County probate system.

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The Probate Mediation Clinic in Lane County

The Probate Mediation Clinic, a partnership between Lane County Circuit Court and the University of Oregon School of Law, provides students with an opportunity to apply what they have learned about mediation in the classroom to a cutting-edge area of mediation practice. "Although the classroom can provide background knowledge to prepare students for practice, confronting real issues and the complexities of working with real people greatly enriches the learning process," said Professor Susan Gary.

The Probate Mediation Clinic, launched in January 2011, was developed by a unique inter-disciplinary team of law school faculty, with support and guidance from Lane County Circuit Court Probate Judge Lauren Holland. Professors specializing in probate law, trusts and estates, elder law, child advocacy law, Medicaid, and women and the law teamed up with the Director of the Appropriate Dispute Resolution Center (ADR Center), the Administrator for the Oregon Office for Community Dispute Resolution, and Judge Holland.

While the family dynamics inherent to many probate disputes are considered by many to be highly appropriate for mediation, multi-party disputes and cases involving diminished capacity prove challenging for even highly experienced mediators. The complex legal framework surrounding guardianship, conservatorship, and other probate issues can also complicate the mediation process. "The challenge of probate mediation is if the mediator is not experienced with the substantive law, there may not be a sufficient basis to understand the legal parameters for and legal consequences to the parties," said Judge Holland. "I have a great deal of faith in the lawyers that appear and in the importance of knowing what the substantive law is in order to ensure that all rights are being protected."

Prior to the start of the clinic, the University of Oregon School of Law's ADR Center presented a specialized two-day probate mediation training on relevant topics, including diminished capacity, guardianships and conservatorships, disability, Medicaid, ethics, and trusts and estates. The training was well attended by students, mediators, court visitors, and seasoned attorneys seeking information on this new approach to probate cases. "This was a great training. It provided a lot of information from many perspectives," said Judge Holland. "Putting together probate mediation training is an exciting challenge. One of the goals is to address the different needs of probate attorneys needing mediation information and mediators needing probate information."

While participants represented myriad occupations, experience levels, and interests, it became clear that there is tremendous interest in exploring new approaches to resolving probate issues. While mediation is clearly not appropriate for every case, it can be very useful in certain situations, particularly those involving contentious familial relationships. Lane County Probate Court is in a somewhat unique position because, unlike many courts electing to establish court-connected mediation programs, Judge Holland's courtroom is not burdened by an overloaded docket. "We're not broken. We work well. It's a risk to take right now because we are working efficiently," said Judge Holland. Despite the risk, she says that she has supported the incorporation of mediation as an additional resource because she believes it enables families and their attorneys to generate creative solutions that may reside well outside of the options available in a hearing and to potentially work

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together rather than in opposition to one another.

When a hearing is scheduled in a probate case, Judge Holland determines whether she believes mediation might be beneficial. If she concludes that mediation may assist the parties in resolving their dispute, she recommends mediation to the parties when they appear for the hearing. Mediation is voluntary, and the parties decide whether to engage in mediation or to continue with the hearing. If they agree to mediate, they proceed directly into mediation with the mediators provided by the law school's Probate Mediation Clinic. The law students partner with experienced mediators, trained in probate mediation, to ensure adequate oversight and supervision. Each law student enrolled in the clinic observes two or three mediations before participating as a co-mediator.

For those cases referred to mediation in Lane County Probate Court, participants have expressed satisfaction with their experiences. Even in those cases that were not resolved through mediation, the parties indicated that the process was helpful. Mediation may provide parties with the tools to work together to resolve current and future issues.

The Probate Mediation Clinic is off to a good start. It combines the resources of the University of Oregon School of Law with the needs of the community, and it benefits all participants.

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Summary

Because these cases almost always involve family relationships, they are particularly appropriate for mediation. The parties are often able to reach more creative solutions than some of the legal solutions that must be imposed by the court. Mediation can keep sensitive family matters private and protect the dignity of the participants. Finally, mediation allows the parties to deal with a range of emotional and other non-financial issues that frequently are present in these cases.

Have It Your Way! Seeking Comments for Revisions to the O-UTC

The Executive Committee of the Estate Planning and Administration Section expects to develop a bill for the 2013 session to address needed revisions to the Oregon Uniform Trust Code ("O-UTC"). The Oregon Legislature adopted the O-UTC in 2005 and then enacted technical corrections in 2007. Practitioners have now had several years of experience working with the O-UTC and have identified a few places in which the statutes could be improved.

Chuck Mauritz is heading the effort to collect concerns, ideas and suggestions for revisions to the O-UTC. He will work with a subcommittee to develop a bill the Section may propose for consideration in the 2013 legislative session. Although 2013 seems a long way off, the best bills are those developed with the thoughts and input of many people, with enough time for analysis, research and review.

Please send comments to Chuck Mauritz: **cmauritz@duffykekel.com**.