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245 WINTER STREET SE
SALEM, OREGON 97301

PHONE 503-370-6973
FAX 503-370-3158
www.willamette.edu/wucl/olc

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Amendments to the Oregon Uniform Trust Code

Work Group Report

SB 592

Prepared by:

Professor Susan N. Gary
University of Oregon School of Law
Oregon Law Commissioner

From the Offices of the Executive Director
Jeffrey C. Dobbins and
Deputy Director
Wendy J. Johnson

Submitted to the Oregon Law Commission for Approval
at its Meeting on March 20, 2013.



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

I. Introductory summary

The law of trusts in Oregon was overhauled, effective January 1, 2006, with the adoption of much of the Uniform Trust Code. Over the past several years, several additional modifications have been made to the Oregon Uniform Trust Code (the "OUTC"). However, as lawyers continued to work with the OUTC in practice, lawyers identified a number of places where amendments to the OUTC could improve results for people working with or using trusts. Settlers, trustees, and beneficiaries, as well as their advisors will benefit from the proposed revisions.

II. History of the project

A committee of the Estate Planning and Administration Section of the Oregon State Bar identified a number of issues that should be addressed by legislative action. The committee worked for several months and developed a proposal that the committee presented to the Executive Committee of the Estate Planning and Administration Section. Due to the complicated nature of some of the issues, the committee was unable to develop legislation that the Executive Committee of the Section could approve. The Executive Committee thought having a broader group – a Work Group of the Oregon Law Commission – work on appropriate legislation would produce better results. Susan Gary, a member of the Estate Planning and Administration Section, and Charles Mauritz, chair of the committee, worked with Wendy Johnson, Deputy Director and General Counsel of the Oregon Law Commission, to develop a proposal for the Oregon Law Commission. The Oregon Law Commission approved the creation of a Work Group in November 2012.

Due to the significant work already completed on the project by the Estate Planning and Administration Section, and because those who use trusts and the Oregon Uniform Trust Code would benefit from adoption of the amendments as soon as possible, the Work Group's goal was to prepare a bill for the 2013 session. The Work Group met several times in January and February, completing its work in time for legislative counsel to complete work on the bill by the deadline. The Work Group included representatives from the original committee, other members of the Estate Planning and Administration Section who disagreed with some of the original proposals, a representative from the charities division of the office of the Attorney General, a representative of the Oregon Bankers' Association, and Legislative Counsel.

Work Group members included Chair, Prof. Susan N. Gary, University of Oregon School of Law and OLC Commissioner; Susan Bower, Oregon Dept. of Justice; Bill Brewer, Hershner Hunter LLP; Christopher Cline, Wells Fargo Bank; John Draneas, Draneas & Huglin PC; D. Charles Mauritz, Duffy Kekel LLP; Hilary Newcomb, HAN Legal; Robert Saalfeld, Saalfeld Griggs PC; Lane Shetterly, Shetterly Irick & Ozias and Chair of OLC; Jeff Thede, Thede Culpepper Moore Munro & Silliman LLP; Vanessa Usui, Duffy Kekel LLP; Matthew Whitman, Cartwright, Whitman, Baer PC; Ken

Sherman, Jr., Sherman Sherman Johnnie & Hoyt. Staff members included Prof. Jeff Dobbins, Executive Director of the OLC; Dave Heynderickx, Special Counsel to the Legislative Counsel; Wendy Johnson, Deputy Director and General Counsel of the Oregon Law Commission; Bealisa Sydlik, Deputy Legislative Counsel.

III. Statement of the problem area and objectives of the proposal

The proposed legislation seeks to balance the interests of beneficiaries in trusts with the need for efficient administration of trusts. The amendments facilitate the use of nonjudicial settlement agreements for trust modification, provide a means for a trustee to get advance authorization for certain actions through notice to beneficiaries, and provide a number of clarifying changes to delegation rules, removal, and the appointment of advisers that should improve the administration of trusts. Some of the amendments follow common estate planning practices.

IV. Review of legal solutions existing or proposed elsewhere

David English, Reporter for the Uniform Trust Code, provided comments on the original proposal, and his comments informed some of the Work Group discussions. The Work Group also considered the language of the Uniform Trust Code and in one case the amendment made in this bill returns the language of the Oregon statute to the language of the Uniform Trust Code because Oregon had adopted that section with non-uniform language.

V. The proposal

Section 1: This section adds two new definitions to the ORS 130.010:

(15) "Remote interest beneficiary" means a beneficiary of a trust whose beneficial interest in the trust, at the time the determination is made, is contingent upon the successive terminations of both the interest of a qualified beneficiary and the interest of a secondary beneficiary whose interests precede the interest of the beneficiary.

(17) "Secondary beneficiary" means a beneficiary, other than a qualified beneficiary, whose beneficial interest in the trust, at the time the determination of interest is made, is contingent solely upon the termination of all qualified beneficiary interests that precede the interest of the secondary beneficiary.

The OUTC provides for certain rights of notice to be given to different categories of beneficiaries. The current OUTC provides for "beneficiaries," "qualified beneficiaries," and "permissible distributees." The intention of the amendment is to create two new categories of beneficiaries, "remote interest beneficiaries" and "secondary beneficiaries." The purpose of the new categories is to provide that in some circumstances notice need not be given to beneficiaries whose interest is so

remote that they will likely never benefit from the trust. Trustees have sometimes found it difficult to obtain consent for needed modifications if consent must be obtained from all beneficiaries and some beneficiaries' interests are remote. Beneficiaries who know that they will likely never receive anything from the trust may fail to respond to requests for consent. The purpose of the amendments will be to limit the necessary notice in situations where a beneficiary's interest is remote. A remote interest beneficiary is a beneficiary that is at least third in line and in many situations fourth in line. The definition of secondary beneficiary is necessary to create the desired definition of remote interest beneficiary.

Section 2: This section amends ORS 130.045, the section that provides for nonjudicial settlement agreements on matters involving a trust. The amendment changes the persons who may enter into an agreement and clarifies the effect of filing the agreement in court. The current definition includes as "interested persons" who may enter into an agreement "beneficiaries of the trust who have an interest in the subject matter of the agreement." That provision is changed to "qualified beneficiaries." Thus, all qualified beneficiaries can be parties to the agreement without a determination that each one is interested in the subject matter.

The Attorney General is an interested person under the current definition if the trust is a charitable trust, and that provision is clarified so that the Attorney General will be an interested person whether the charitable trust is subject to the supervision of the Attorney General (as an Oregon trust) or not. This change is needed so the Attorney General can represent the interests of an Oregon charity that is the beneficiary of a trust created and operating outside Oregon. If a trust includes a gift to a charity and the settlor reserves the power to change the name of the charity (the identity of the beneficiary), the Attorney General represents the interests of all charitable beneficiaries so that a named charity that may not remain a beneficiary will not be an interested person for purposes of the agreement.

The changes to ORS 130.045 clarify that if the agreement is not filed with the court, the agreement will be binding only on the parties to the agreement. If the parties file the agreement with the court and provide notice of a right to object to beneficiaries, the agreement will be binding on all those who receive or waive notice, if no one objects. If someone objects and a hearing is held, the decision of the court will be binding on all beneficiaries of the trust and all parties to the agreement. If the court does not approve the agreement, the agreement will not be binding on any beneficiary or party.

The time period for objections is decreased from 120 days to 60 days. The longer time period impedes the ability of trusts to accomplish modifications in an efficient manner, and 60 days allows ample time for objection.

Section 3: This section amends ORS 130.170 to confirm that a trust created to distribute funds to charities is a charitable trust. Because the definition of charitable trust defines as a charitable trust a portion of a trust devoted to

charitable purposes, the changes clarify that if the charitable interests are negligible or if the charitable beneficiaries are all remote interest beneficiaries, the portion of the trust held by charitable beneficiaries will not be considered a charitable trust. For example, if a trust provides for three generations of family members, with multiple people at each generation, and then provides a contingent remainder interest in a charity so that the charity takes only if all family members die before the trust terminates, the contingent remainder interest will not be considered a “charitable trust” for purposes of the OUTC.

Section 4: This section adds a cross-reference to ORS 130.195.

Section 5: ORS 130.200(1) provides that if a settlor and all beneficiaries consent, a court can approve a modification of an irrevocable trust. Section 5 limits the beneficiaries who must consent to beneficiaries other than remote interest beneficiaries. Even if not all beneficiaries agree, ORS 130.200(5) permits a court to approve a modification if the court could have done so under the section with the consent of all beneficiaries. Consistent with the change to ORS 130.200(1), this subsection is changed to exclude remote interest beneficiaries from the beneficiaries who would have been required to consent.

Under ORS 130.200 the settlor’s power to consent to modification can be exercised by an agent acting under a power of attorney only if the terms of the trust authorized an agent to consent to modification. Section 5 permits the authorization to occur either in the terms of the trust or in the grant of the power of attorney. This change conforms Oregon law to the Uniform Trust Code.

Section 6: Section 6 amends ORS 130.215, the provision that permits termination of a trust if the value of the trust property is too small to justify the cost of administration. The change will permit termination if the trustee is a beneficiary, so long as the trustee is not a qualified beneficiary (someone currently receiving distributions or who will receive distributions if the trust terminates).

Section 7: This section amends ORS 130.305, which governs spendthrift provisions. The amendment adds a clarifying subsection that states that entering into a settlement agreement is not, by itself, a transfer in violation of a spendthrift provision.

Section 8: This section changes the language to clarify that a court may order execution against an amount a trustee is required to distribute.

Section 9: A new subsection in ORS 130.315 provides that creditors cannot reach assets in a trust solely because the trustee holds a discretionary power to pay taxes or to reimburse the settlor for taxes paid. Property becomes subject to creditors only if the property is subject to a power of withdrawal greater than the amount of the annual exclusion or, if the donor was married, twice that amount. Assets in an inter vivos marital deduction trust will be deemed contributed by the donor’s

spouse. Assets contributed to a trust by a settlor will not be subject to claims of the settlor's creditors if someone else is given a non-general power of appointment.

Section 10: This section explains which provisions of the OUTC apply to revocable trusts. The changes clarify that the statutory rules apply to trusts that were revocable on the occurrence of an event or until the settlor's death.

Section 11: This section amends ORS 130.555 to clarify when a child will be considered a pretermitted child for purposes of a revocable trust. A child will not be considered pretermitted if the settlor acknowledges or mentions the child by name or by class either in the trust instrument or in the settlor's will. The amendment links the rules that apply to wills and revocable trusts so that the law will apply consistently in a situation in which a settlor has both a will and a revocable trust. Section 11 amends the statute so that a child will be covered if the child is born or adopted while the settlor is alive but not after the settlor's death unless the child is in gestation at the settlor's death.

ORS 130.555 currently gives a pretermitted child the share the child would have received if the settlor had died intestate, with no trust. Section 11 incorporates the provisions from the intestacy statute into ORS 130.555, so the statute now directly states the share to which a pretermitted child will be entitled.

Section 12: This section amends the provision in ORS 130.610 on delegation of duties by a co-trustee to another co-trustee. Section 12 adds language to make clear that a delegation or a revocation or termination of a delegation must be in writing.

Section 13: This section amends ORS 130.615 to provide that a vacancy in a charitable trust can be filled by unanimous agreement of all qualified beneficiaries and the Attorney General. The current version of the subsection requires the agreement of all charitable beneficiaries, which would include remote interest charitable beneficiaries and secondary charitable beneficiaries. The change will make it easier to fill a vacancy in a trusteeship, and the Attorney General can protect the interests of any charitable beneficiaries who are not qualified beneficiaries.

Section 14: ORS 130.630 authorizes the court to remove a trustee if removal "best serves the interests of all of the beneficiaries" and certain other requirements are met but only if "[r]emoval is not inconsistent with a material purpose of the trust." A trustee can always argue that a settlor's choice of trustee is a material purpose of the trust, which has made removal under this provision difficult. Section 14 amends the subsection to permit the court to remove the trustee if the other requirements are met unless the trustee establishes "by clear and convincing evidence that removal is inconsistent with a material purpose of the trust."

Section 15: ORS 130.630 states the duties of a trustee who has been removed or has resigned. Section 15 provides that the successor trustee or the court may require

the departing trustee to prepare a final report, and if the departing trustee is required to prepare a final report, the trust must pay reasonable fees and costs.

Section 16: This section clarifies rules on fees paid to trustees by adding two subsections. Compensation must reflect the total services provided to the trust by co-trustees or by third parties such as financial advisors, so that the trust is not paying duplicative fees.

Sections 17 and 18: A trustee has a duty of obedience to carry out the terms of the trust (ORS 130.650) and a duty of loyalty to administer the trust solely in the interests of the beneficiaries (ORS 130.655). These duties could suggest to a trustee that any modification of a trust would be a violation of one or both of these duties. Section 17 amends ORS 130.650 and Section 18 amends ORS 130.655 to clarify that the mere existence of these duties does not require a trustee to object to a modification of a trust.

Section 19: ORS 130.710 requires the trustee to keep the qualified beneficiaries informed about the administration of the trust. The current statute requires a trustee who leaves office to send a report to the qualified beneficiaries. The amendment states that the former trustee must send the report if the successor trustee or the court requires it.

Section 20: This section clarifies ORS 130.725(22) to indicate that distribution of trust property may include payments in cash or in kind.

Section 21: This section rewrites ORS 130.730 to provide more clarity in the trustee's duties on termination of a trust and the effectiveness of a release executed by a beneficiary.

Section 22: ORS 130.735 provides rules for the appointment of a person who will act as an adviser to the trustee. Section 22 adds a sentence indicating that "[t]he appointment may provide for succession of advisers and for a process for the removal of advisers." Section 22 also adds a provision on removal of an adviser by the court.

Section 24: This section creates a new section in ORS chapter 130. The new section states that if a trustee is permitted or obligated to divide a trust into separate shares for separate beneficiaries, each share will be deemed a new trust and the trust from which the new trust is created will be deemed to terminate.

Section 25: This section creates a new section in ORS chapter 130. The new section creates a process by which a trustee can give a beneficiary notice of a proposed action and then proceed with the action if the beneficiary does not object within 45 days. The notice to the beneficiary must clearly inform the beneficiary of the right to object and the way to object and must provide sufficient information for the beneficiary to make an informed decision about whether to object. The beneficiary

must object in writing. If the beneficiary does not object the beneficiary is barred from taking action against the trustee in connection with the action. The notice process does not apply to a number of types of self-dealing transactions between the trustee and trust, including, among others, settlement of trust accounts or the trustee's report, actions involving property sales or exchanges between the trustee and the trust, and settlement of actions by the trust against the trustee. The new section lists the types of actions to which the section does not apply.

Amendment on Abatement: An amendment to the Bill will add a new section to the OUTC. The new section will apply the abatement rules from probate law to property being distributed from a revocable trust. As with property distributed under a will, the new section will provide that after the payment of creditors and expenses of administration, the trustee will first pay specific gifts (identifiable items), then general gifts (fungible gifts like gifts of money), and then the residuary gifts.

VI. Conclusion

These amendments to the OUTC will improve trust law for Oregonians and will benefit settlors, trustees, and beneficiaries, as well as their advisors. The bill should be adopted because the amendments will improve the operation of the law with respect to trusts.