

**OREGON STATE BAR
LEGISLATIVE PROPOSAL
Part I – Legislative Summary**

Re: Omnibus Estate Planning Bill

Submitted by: OSB Estate Planning and Administration Section

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1. Does this amend current law or program? Yes No Specify

A) Automatic revocation of agency under power-of-attorney upon divorce. Create an automatic revocation of the agency of the ex-spouse under a power-of-attorney upon divorce. Adds a new statute.

B) Finalize asset transfer to a revocable trust when transfer is incomplete. Allow a petition to be filed requesting a court order authorizing the transfer of assets from the settlor's name to the settlor's revocable trust when there is evidence of intent that the assets were intended to be held in the trust. Adds a new provision (possibly to ORS 130.245).

C) Extend liability protection for tenants by the entirety with revocable trusts. Adopt a provision which extends liability protection for tenants by the entirety if a married couple transfers such real estate to a revocable trust. Modifies ORS 93.180.

2. Problem Presented:

A) Power of attorney: If a married couple divorces in Oregon, the former spouse's agency established under a power of attorney is not automatically revoked upon dissolution of marriage. This power, if placed in the hands of a disgruntled or resentful ex-spouse, could have disastrous implications for the principal spouse who granted power of attorney. Currently, ten states have enacted legislation that automatically revokes the agency established under powers of attorney granted from one spouse to another on the date of divorce. In the remaining 40 states, including Oregon, the agent who has been granted power of attorney has the full ability and authority to enter into any transaction on behalf of their principal, former spouse, including selling or transferring ownership of assets, gaining sensitive information regarding accounts, assets, and debts, and contracting for debts in the principal's name. This situation applied to health care powers of attorney as well. The level of severity is high when considering the implications of Oregon's current law.

B) Unfunded Revocable Trust: When a settlor creates a revocable trust, the settlor often fails to complete the funding of the trust by re-titling assets or naming the revocable trust as the pay-on-death beneficiary. The settlor may also remove assets from the trust in order to complete a refinance and then forgets to transfer it back to the trust. Under current law, the small estate affidavit may only be used if the value of the assets meets certain

limitations. As a result, a probate is frequently required to transfer ownership of the assets to the trust.

Oregon has case law which indicates that a trust may be created by listing assets on a schedule to the trust agreement or by stating "in trust". However, financial institutions and title companies will not transfer title to assets to the trust without a court order, letters of administration/testamentary or a small estate affidavit.

- C) Tenants by Entirety:** Under current law, when a married couple owns real estate as tenants by the entirety, there is liability protection for each spouse from the other spouse's separate creditors. If the married couple transfers tenants by the entirety real estate to a trust for estate planning purposes, the couple loses that liability protection.

3. Solution:

Please include each of these concepts in the same bill draft with as narrow a relating clause as possible.

- A) Power of attorney:** Adopt language mirroring automatic revocation statutes from other states; namely, California. California is the closest state to Oregon that has an automatic revocation statute, and it is very straightforward.
- B) Unfunded Revocable Trust:** Modify the current law to allow a petition to be filed requesting a court order authorizing the transfer of assets from the settlor's name to the trust when there is evidence of intent that the assets be held in the trust, that there is a Will that names the trust as the sole beneficiary, and if creditors and DHS are not harmed.
- C) Tenants by entirety:** Add a provision which extends the liability protection for tenants by the entirety if a married couple transfers such real estate to a revocable trust or trusts.

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LEGISLATIVE PROPOSAL
Part II – Legislative Language**

Please provide your legislative language below:

A) Power of Attorney:

Adds a new statute.

- (a) If after executing a power of attorney the principal's marriage to the attorney-in-fact is dissolved or annulled, the principal's designation of the former spouse as an attorney-in-fact is revoked and the successor agent, if named, succeeds in the place of the ex-spouse, unless stated otherwise in the divorce decree. Such powers to be revoked include but are not limited to powers related to the personal, financial, or health care-related decision-making designated by the power of attorney.
- (b) If the attorney-in-fact's authority is revoked solely by subsection (a), it is revived by the principal's remarriage to the attorney-in-fact.

B) Unfunded Revocable Trust:

Adds a new provision (possibly to ORS 130.245).

(1) If a settlor creates a revocable trust during the settlor's lifetime and the deceased settlor owned property in the deceased settlor's name at the time of death, the trustee of such trust may file a petition requesting that the court make a judgment verifying that a trust was created and that the settlor intended to transfer title of such property into the name of the settlor's trust prior to the settlor's death. The petition shall set forth the following facts:

- (a) the name and contact information for the trustee;
- (b) information about the trust;
- (c) a copy of the settlor's death certificate;
- (d) documentation of the settlor's intent that the assets be included in the revocable trust at the time the trust was signed, which may include a copy of the settlor's will, a trust schedule identifying the property, or an assignment;
- (d) a description of the assets to be confirmed as part of the trust;
- (e) names, addresses, and ages of all beneficiaries of the trust, beneficiaries of the Will, and heirs at law.
- (f) The trust is the named beneficiary for such property under the decedent's will.
- (g) DHS will be notified of the petition.

(2) The trustee shall set a time for filing objections to the petition. Not less than [30] days before the time set, the trustee shall mail a copy of the petition for judgment and notice of the time set for objections pursuant to ORS 130.035. Those persons entitled to notice include (1) each person claiming an interest in, or having title to or possession of, the property; and (2) any heir or devisee whose interest in the property may be affected by the petition. Proof of the mailing to those persons entitled to notice shall be filed in the proceeding.

(3) The notice of time to object shall contain all of the following:

(a) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice shall state the street address or, if none, a description of the property's location and assessor's parcel number.

(b) A statement advising any person interested in the property that he or she may file an objection to the petition.

(4) Any person entitled to notice under Section (2) may, within the time fixed for the filing, file in the proceeding objections to the petition for judgment, specifying the particulars of the objections. Upon the filing of objections the court shall fix the time for hearing thereon.

(5) (a) If no objections to the petition for judgment are filed, or if objections are filed, upon the hearing, if the court is satisfied that a conveyance, transfer, or other judgment should be made, the court shall enter a general judgment authorizing and directing the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief. (b) The judgment is prima facie evidence of the correctness of the proceedings and of the authority of the other person to make the conveyance or transfer to the trustee. (c) After entry of the judgment that the other person execute a conveyance or transfer, the Trustee entitled thereunder has the right to the possession of the property, and the right to hold the property, according to the terms of the judgment as if the property had been conveyed or transferred in accordance with the terms of the judgment.

(6) If decedent's assets are transferred to the trust pursuant to this section, then the assets remain subject to the decedent's creditors pursuant to existing Oregon law.

C) Tenants by entirety legislation:

Modifies ORS 93.180.

Any real property of spouses married to each other that is held by them as tenants by the entirety and conveyed to their joint revocable trust, or to their separate revocable trusts, and any proceeds of the sale or disposition of such property, shall have the same protections from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (i) they remain married to each other, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their real property, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts. The protection from the claims of separate creditors under this subsection may be waived as to any specific creditor, including any separate creditor of either spouse, or any specifically described property, including any former tenancy by the entirety property conveyed into trust, by the trustee acting under the express provision of a trust instrument or with the written consent of both spouses.