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This article is the second of two articles on this topic, the first being published in the October newsletter.

Why Own an Annuity?

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The annuity business is a multi-trillion-dollar, 200-year-old, mature yet growing sector of the U.S. financial system. A current Google search of the word "annuity" delivers a stunning 34 million results. Click on links fortunate enough to be on the front page or two of the search results and you'll be directed to websites that tout the "amazing benefits" of annuities. Click the next link down the page and you will be warned of the dire consequences of annuities, that they are a scam and only the gullible would consider one. Among my favorites is a site where someone claims they would rather die and go to hell than sell an annuity. Full disclosure here: I have sold many annuities, I own an annuity, I have seen them used ethically and judiciously, and I have seen them sold in an abusive and unsuitable manner. Over the next couple of thousand words or so I hope to illustrate the good, the bad, and the ugly of the annuity world using several real-life case studies.

Historically, annuities have been designed and used to create guaranteed, lifetime income, generally for retirees. Many generations of Americans have relied on this type of income from both private and public sector defined benefit pension plans and Social Security. Both function much like an annuity requiring contributions, the passage of time, and generally a monthly payment for life. With the advent of the 401(k) plan and other defined contribution plans, the path to lifetime retirement income is not so clear. Today's retirees often retire with a six-figure retirement account balance and no real idea how long it will last. That, of course, depends on the rate of return earned by the investments in the account, the level of withdrawal, and the length of the person's life. Most people roll their retirement plan balance into an IRA and invest in do-it-yourself portfolios or engage a financial advisor for investment and distribution advice.

Financial advisors often use Monte Carlo simulation software to calculate the success rates of various asset allocation strategies and withdrawal rates. Current thinking is that an inflation adjusted withdrawal rate of more than 3% to 4% presents an unacceptably high failure rate. Failures – running out of money while you and/or your spouse are still living – occur more often in those scenarios when the account's investments experience negative returns in the early years of the withdrawal period. This failure rate and concern about running out of money during retirement years is the driving force behind the annuity market.

According to an AARP report, the average new retiree in 2017 received $1,404 per month in Social Security benefits during their first year of retirement. For illustrative purposes let's assume a male age 66, which is this year's full Social Security retirement age. Let's also assume that $1,404 isn't enough to support him in his retirement years.

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A 66-year-old male has a life expectancy of about 17 years. If that person had $250,000 in his IRA and began taking monthly withdrawals of $1,404 while earning 3% interest on the balance, the account would be fully depleted in less than 20 years. Purchase an annuity with a $1,404 monthly lifetime guarantee with that same $250,000 and the payments are guaranteed to last as long as that person is living. The latest Social Security life expectancy tables show that 37% of 66-year-old males will survive 20 years and 49% of females age 66 will survive 20 years.

Some readers will contend that the 3% rate of return used in this example is too conservative and that a higher return would solve the problem of running out of money too soon. The 2016 Dalbar Quantitative Study on Investor Behavior found that investors averaged a return of 2.26% in asset allocation (balanced) funds over the 20-year period ending December 31, 2016. This is more a function of poor investor behavior than the markets themselves, but this has been a recurring theme since the earliest Dalbar studies. In this case, an immediate annuity can take away market risk and longevity risk, laying both off on a multi-billion-dollar insurer .

The pros, cons, and considerations of this type of annuity planning are many. The National Association of Insurance Commissioners ("NAIC") has created annuity suitability rules in an attempt to guide companies, advisors, and consumers in the judicious use of an annuity in this situation. Suitability rules focus on numerous areas including liquidity, cash flow, net worth, tax impact, and health.

Generally speaking, from an advisor's and a company's standpoint, this transaction would be suitable for a person who needs additional monthly income, has a conservative investment philosophy, has an adequate emergency fund, and the purchase of the annuity will not exceed 50% of their liquid net worth. An advisor should inquire about the health of the proposed annuitant and their family longevity as part of the suitability process. The obvious advantage of this annuity is that it provides an income stream that is guaranteed for life. The disadvantages are decreased liquidity, potential low rate of return and inflation risk. Insurers have addressed some of these issues by building in features that allow an annuitant to access more than the monthly payment and monthly payouts that increase by a fixed percentage each year or increase by an amount tied to an inflation index, such as the CPI-U. The ultimate rate of return on this type of annuity is unknown until death, since the number of payments is a factor in all internal rate of return ("IRR") equations. These types of annuities generally have an option that provides a refund of the unpaid balance to a beneficiary, limiting the minimum return to zero. Once the initial deposit of $250,000 has been paid out, the IRR turns positive and increases as the annuitant/payee ages.

In the above example the IRR is 1.65% after 17 years – his current life expectancy. Should the annuitant live to age 90 the IRR improves to 4.41% and for those lucky enough to make it to 100, the rate of return increases to 5.84%. Regardless of the pros and cons, this income strategy should be thought of as income insurance rather than focusing on the rate of return.

Insurers adjust their payout rates as interest rates rise and fall, as new life expectancy tables are released, and according to their own actuarial experience. Advisors would do well to reserve lifetime payout recommendations to healthy people with longevity in their family.

A few insurers are willing to evaluate medical records in determining their monthly lifetime payout. This is only done when an annuitant's medical history indicates a shorter than average life expectancy for their age. If the 66-year-old male in our example had heart disease, diabetes, or cancer, an insurer might agree to improve the monthly payout from $1,404 to $1,637, the rate for a 71-year-old male.

Jack and Irene

Jack and Irene are ages 81 and 79 respectfully and, while not quite shooting their age on the golf course, manage to enjoy several rounds a week. They have a home here in Oregon but spend just over six months a year in Arizona. They are the personification that "80 is the new 60." When they retired in 2001, the federal estate tax situation was much different than it is today and they purchased a $1.5 million survivorship whole life policy from a large mutual insurance company to pay anticipated federal and state estate taxes. Their premium is nearly $28,000 per year and their cash value has grown to nearly $625,000. Their adjusted cost basis in the contract (premiums paid less dividends) is just under $400,000. Their $4 million estate is no longer subject to federal estate tax and the $28,000 premium is a burden.

Current mortality tables show there is nearly a 50% chance that either Jack or Irene will be alive in 12 years, a 22% chance that one will be alive in 16 years, and a 6% chance that one of them will live to see age 100.

Jack and Irene no longer need their life insurance and do not want to pay the premium. Surrendering the policy for its cash value would create a taxable event of approximately $225,000 – their gain in the policy. An annuity could be a useful tool here, providing an investment vehicle or an income vehicle while allowing the taxable gain to be sheltered by exchanging the life insurance policy for an annuity via a 1035 exchange. IRC § 1035 states that a life insurance policy may be exchanged for an annuity without triggering a taxable event.

As of this writing, Jack and Irene could purchase a fixed, deferred annuity with a five – to seven-year term with a guaranteed rate of between 3% and 3.6%. This would allow their $625,000 to continue to grow tax-deferred and be used for retirement income through systematic withdrawals. Alternatively, they could exchange their life insurance policy for a single premium immediate annuity, which would generate nearly $50,000 per year in income payable as long as either of them are living. Should they die early, the balance of the $625,000 would be paid to their beneficiaries.

Let's examine this from an IRR perspective. Since the annuity company is obligated to pay out the entire $625,000 to either Jack and Irene or their beneficiaries, the minimum return on their investment is 0%, a breakeven. At $50,000 per year, the $625,000 will be paid out in 12 years six months. The following table illustrates the IRR to Jack and Irene should either of them live beyond the 12-year six-month period.

13 years	0.61%
14 years	1.66%
15 years	2.51%
16 years	3.25%
17 years	3.85%
18 years	4.36%
19 years	4.81%
20 years	5.18%
21 years	5.49%

This scenario is quite common and is exacerbated by a protracted low interest environment that has led many life insurers to reduce dividends or interest rates and increase policy expenses. This, in turn, leads to life insurance policies underperforming, often requiring increased premiums, reduced death benefits, or some combination of the two in order to avoid a lapse of the policy.

Had Jack and Irene purchased a current assumption universal life policy 17 years ago from a company that dropped the interest crediting rate on the policy and/or increased internal policy expenses, Jack and Irene would face a different tax situation. Their cost basis in the policy would be the sum of their premiums, $476,000, and their cash value would likely be significantly lower. Let's assume the cash surrender value of the life insurance policy is $350,000. If they surrender the policy, they will have a $126,000 loss, which is not tax deductible. However, using IRC § 1035, they can exchange their life insurance policy for an annuity and carry the cost basis, and therefore the loss, into the annuity policy. The annuity policy would show a $350,000 deposit with a $476,000 cost basis. At 3% interest the $350,000 would grow to $476,000 in approximately 10 years, and all that growth would be income tax-free when the annuity was used for retirement income, surrendered for a lump sum, or left to their beneficiaries at death.

Variable Annuities

There is probably more controversy over the variable annuity ("VA") than any other type of annuity. Representing about 50% of the annuity marketplace, with deposits of $100 billion annually, the VA utilizes professionally managed, mutual fund like sub-accounts to hold the annuity owners' deposits. Investors can deposit after-tax dollars in non-qualified VAs or utilize them for IRA dollars. More criticism has been levied against the VA in a qualified account because a qualified account is already tax deferred. VAs carry a heavier fee load than mutual funds with similar investment objectives, averaging nearly 3% annually. In a non-qualified VA, one can argue that the ability to move funds from equities to bonds to cash without triggering taxable income is a valuable benefit. Unlike mutual funds, which report short-term and long-term capital gains and dividends each year before tax time, trading gains and dividends remain sheltered in a VA. On the flip side, gains in a VA are always taxed at ordinary income tax rates when withdrawn and do not receive a step up in basis at death.

Most VAs are sold with income rather than accumulation as their primary objective. Insurers have created an income rider that promises to deliver lifetime income, even if withdrawals and poor investment performance reduce the account value to zero. Here's an example of how this would work for a 60-year-old female utilizing a VA for retirement income beginning at age 70.

If she were to deposit $1 million into a VA, its value will fluctuate daily as the equity and bond markets advance and retreat over the 10 years in question. However, the income rider promises to increase the $1 million at 6% simple interest each year for 10 years for use in calculating future lifetime income. At age 70, the income base has grown to $1.6 million (10 years x 6% simple interest) regardless of how the underlying sub-accounts have performed. Insurers then calculate the lifetime income amount by multiplying an age – and gender-based factor by the income base. In this case, you would multiply $1.6 million by 5.5% and arrive at $88,000 as the lifetime income amount. This concept is one of the most misunderstood in the annuity world. Potential annuity buyers hear "6% for 10 years" and "5.5% for life" and equate that to the low interest rates paid on CDs, bonds, and fixed annuities when, in fact, they are part of a formula used to calculate a future payment stream. Our 60-year-old would need to live to age 95 in order to achieve a 4% IRR on her initial deposit under these cashflow assumptions. Her odds of making age 95 are about 13%. However, if the performance of the sub-accounts, after fees and expenses, exceeds 6%, her income could increase beyond $88,000.

The Spendthrift Annuity

Other than a gambling addiction, drug addiction, money management problems, and an alcohol problem, "Mike" is a pretty solid citizen. He is one of two children and is age 50. His father is a retired CPA, age 75. Mike's mother is deceased, and his father has been diagnosed with a serious case of pancreatic cancer and has been told he has less than three months to live and to put his affairs in order. Mike's sister Sara, on the other hand, is truly squared away and resourceful and dad has made her the successor trustee to his living trust, which contains about $1 million in a brokerage account. He loves both of his children and wants to benefit them equally. He also knows that giving $500,000 in a lump sum to Mike may create more problems for him than it will solve. Leaving it in his trust with Sara as trustee with instructions to pay it to Mike over time will likely create tension and animosity between the siblings.

One solution is to have the trust purchase a 30-year period certain immediate annuity. The payments will go to Mike's father during the rest of his short life and then continue for the balance of the 30-year term to Mike. Insurers will add an endorsement to the policy referred to as a "restrictive endorsement rider." This contract language makes the annuity policy unassignable, irrevocable, and non-commutable, and does not allow a change of payee. This means the policy cannot be sold to a factoring company or surrendered to the insurer for a lump sum. Mike's beneficiary is entitled to the balance of his payments should he not survive the 30-year term.

This is the same kind of language that is used when elder law attorneys use single premium immediate annuities to shelter their clients' assets in Medicaid spenddown planning. The community spouse can purchase an annuity with a payment schedule corresponding to their life expectancy, preserving their income and removing the asset from the Medicaid eligibility form.

Abuses

It's easy to review state insurance department records and FINRA records and find problems and complaints in the annuity world. These complaints generally involve a dissatisfied VA owner who has lost money due to negative market performance or a fixed annuity owner who has lost access to their funds due to a penalty for early withdrawal. Since the enactment of the NAIC suitability rules in 2003, annuity sales have been held to a much higher standard. While the U.S. Department of Labor's fiduciary rule is being sorted out, there is likely even more scrutiny coming for advisors and agents who recommend annuities to their clients.

Crossing the River to Avoid Oregon Taxation of Trust Income

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This purpose of this article is to highlight factors to keep in mind when drafting trusts and selecting fiduciaries to avoid Oregon taxation of trust income. State income taxation of trusts has become increasingly complex and is bound to become more challenging in light of the new federal limit on the deduction of state income taxes and other changes ushered in by the Tax Cuts and Jobs Act. Oregon imposes a state income tax that applies to trusts while Washington does not tax trust income.

A useful starting point for understanding Oregon taxation of trust income is to examine the process of filing and paying trust income tax in Oregon. The process of reporting trust income tax in Oregon usually begins with trustees determining if an Oregon fiduciary return (Form OR-41) must be filed. To figure out if an Oregon fiduciary return must be filed, the trustee will need to determine if the trust is an Oregon resident trust required to file a federal Form 1041 or 990-T, a nonresident trust or a part-year resident trust with federal gross income of $600 or more from Oregon sources for the tax year, or if the trust is terminating to report final distributions to beneficiaries.

Rather than waiting until the tax return is due, estate planners can preemptively avoid Oregon taxation of trust income by working through the analysis of what will cause a trust to be an Oregon "resident trust" and drafting around that result.

I. Brief Summary of Income Taxation of Trusts

Before discussing Oregon income taxation of trusts specifically, it may be useful to review federal income taxation of trusts. Trusts and their beneficiaries are taxed on the conduit theory, which is similar to the method of taxing partnerships in that income and deductions pass through on the Form K-1 to the beneficiaries. However, unlike partnerships, trusts are taxable entities as well as pass-throughs. Generally, estates and most types of trusts must file Form 1041, U.S. Income Tax Return for Estates and Trusts.

First, the fiduciary will need to determine fiduciary accounting income or FAI by determining which receipts and disbursements are considered income and which are principal. FAI is governed by state law and the governing instrument.[1] Oregon has enacted the Uniform Principal and Income Act as its guideline in the absence of instruction in the trust instrument.[2] Rental income, dividends, and interest are common examples of FAI.

1 Treas Reg § 1.643(b)-1.
2 ORS 129.210.

Once the fiduciary has determined the amount allocated to income, he or she will calculate taxable income generally in the same manner as in the case of an individual.[3] Since a trust's income tax is calculated in much the same manner as an individual, one must be aware that many provisions of the Tax Cuts and Jobs Act will apply. For example, trusts and estates will not be able to deduct miscellaneous itemized deductions such as tax preparation fees.[4] A plain reading of IRC § 67(e) gives the impression that trustee's fees will continue to be deductible from trust income, though the informed advisor will be looking for clarification on this point.

A major distinction between individuals and trusts is that trusts are allowed a deduction from taxable income for distributions to beneficiaries. The distribution deduction determines the amount of any distributions that will be included in the beneficiaries' gross income, thus ensuring that the income is taxed only once. The income distribution deduction is limited to the lesser of distributable net income ("DNI") or the sum of the trust income required to be distributed and other amounts "properly paid or credited or required to be distributed" to the beneficiaries.[5]

DNI is generally taxable income before the distribution deduction, plus the personal exemption amount, plus tax-exempt income net of any expenses. The default rule is that capital gains are not included in DNI, subject to some exceptions. Whether capital gains are included in DNI is a fairly complex question. There are ways for capital gain to be included in DNI, which are delineated in Treasury Regulation § 1.643(a)-3. Also, note that even if the trust has made a 645 election, under which it is treated in the same manner as the decedent's estate for income tax purposes, DNI will need to be calculated separately for the trust and estate[6] and only one personal exemption amount is permitted.[7]

Once the fiduciary has determined the amount of the distribution deduction, the fiduciary will file Form 1041, pay the tax due on the undistributed income, and send copies of Form K-1 to the beneficiaries informing them of the items of income, deduction, and credit to be used to report on each of their income tax returns.

II. Preliminary Definition of Resident Trust

In general, Oregon follows the federal taxation regime, described above, for "resident" estates or trusts. In Oregon, an estate is a "resident estate" if: 1) the fiduciary is appointed by an Oregon court or 2) the administration is carried on in Oregon. A trust is a "resident trust" if: 1) the fiduciary is a resident of Oregon or 2) the administration is carried on in Oregon. Oregon statute defines a "nonresident trust" by omission – it is a trust that is not a resident.[8] Nonresident trusts are only subject to Oregon income tax for income that is "derived from or connected with sources" in Oregon.[9] Sources in Oregon include: (a) ownership or disposition of Oregon real or tangible property; (b) an Oregon business, trade, profession or occupation; and (c) Oregon lottery prizes. Further, income from intangible personal property (like annuities, dividends, interest, and gain from sale of intangible personal property) is included only to the extent that the property is employed in an Oregon business, trade, profession, or occupation.

For corporate trustees, the residence and place of administration both refer to the place where the majority of fiduciary decisions are made in administering the trust.[10] If a corporate trustee is appointed as the personal representative by an Oregon court, that appointment will result in an Oregon resident estate. However, if a trust is established by the decedent during the estate planning process, the trustee will take office without impacting residency of the trust.

3 IRC § 641(b).
4 IRC § 67(g).
5 IRC § 661(a).
6 Treas Reg § 1.645-1(e)(2)(iii).
7 Treas Reg § 1.645-1(e)(2)(ii)(A).
8 ORS 316.302.
9 ORS 316.307(1).
10 ORS 316.282(1)(d).

Therefore, an estate planner may want to guide the client to name a corporate entity as the trustee of a revocable trust instead of naming that same entity as the personal representative of the estate.

However, as explained in more detail below, the trust must not be administered in Oregon and the trustee must not be an Oregon resident.

III. Determining Place of Administration

For trustees who reside in or with only one office in either Oregon or Washington, determining if the trustee is an Oregon resident is only a matter of looking up the address. For corporate trustees with multiple offices, the determination is more nuanced. In such cases, the Oregon Administrative Rules provide some clarity. Under OAR 150-316-0400(5), for a corporate trustee "engaged in interstate trust administration" the place of administration is considered to be Oregon if the trust "conducts the major part of its administration of the trust in Oregon."[11] Since Washington has no state income tax, it is a preferable location to administer an Oregon trust in order to reduce trust reporting requirements and possibly trust income tax. The trustor can choose either a trustee who resides in and only provides services in Washington or a corporate trustee who resides in Washington and has offices in Oregon and Washington but does not "conduct the major part of its administration of the trust in Oregon."[12] It turns out that "administration" is based upon the type of decisions being made and not solely by the existence of mere physical presence.

The term "administration" relates to fiduciary decision-making of the trust and not to "incidental execution of such decisions." Incidental functions include but are not limited to:

- Preparing tax returns;
- Executing investment trades as directed by account officers and portfolio managers;
- Preparing and mailing trust accountings; and
- Issuing disbursements from trust accounts as directed by account officers.

The Oregon Department of Revenue regulation on income taxation of trusts[13] provides examples to help distinguish between a resident and nonresident trust. In one example, a trust administered by a corporate trustee headquartered in Oregon but with offices in both Washington and Oregon is not "administered in Oregon" because its Washington-based account officers do the following:

- Serve as the company's primary beneficiary contact;
- Hire lawyers, accountants, and other professionals;
- Make the majority of fiduciary decisions, including when to make trust distributions and where to invest trust assets.

In this example, Oregon is not considered the place of administration even though various incidental functions are performed by Oregon personnel, trust assets are invested on the advice of unaffiliated investment companies located in Oregon or other states, and a committee of managers, including some stationed in Oregon, oversee the account officer's activities.

However, a second example states that, where the majority of fiduciary decisions are made by Oregon-based account officers, a Washington trust is considered to be administered in Oregon and therefore is an Oregon resident trust.

IV. Unresolved Questions About Residency

Despite the relative clarity of the law in this area, some additional questions remain. First, what about so-called "directed" trusts, in which, for example, a Washington resident trustee does all the administration, but the investment decisions are directed by an Oregon resident? The first issue in this situation is whether the Oregon resident is considered a fiduciary. The Oregon directed trust statute provides that trust "advisors" under the statute are fiduciaries by default unless the document creating the advisor role states otherwise. If the governing document provides that the trust advisor is not a fiduciary, then the second question is whether Oregon-based investment decisions alone are a significant enough administrative function to cause the trust to be administered in Oregon and therefore be an Oregon resident trust. There currently is no answer to this question.

A second issue arises for nonresident trusts holding Oregon real estate. If the nonresident trustee holds Oregon real property, income from that property (either from rents or from gains upon sale) is Oregon-source income and therefore subject to Oregon income tax. However, it is probably also true that, if that same property is held in an entity like an LLC, the income now derives from intangible property rather than real property and so is no longer Oregon-source income. Further, if the LLC holding the property is sold, rather than the property itself, the sale proceeds also are probably not Oregon-source income.

V. A Few Reminders

There are a number of circumstances and factors that may change the analysis of your estate planning strategy. Here are a few reminders:

A. The appointment of a Washington fiduciary as the personal representative of an estate by an

11 Practitioners should note that the law in this area may be affected by the recent U.S. Supreme Court case, S. Dakota v. Wayfair, Inc., No. 17-494, slip op. 2018 WL 3058015 (U.S. June 21, 2018). The Court has overruled previous cases which held that a state cannot require an out-of-state seller with no physical presence in the state to collect and remit sales taxes on goods the seller ships to consumers in the state.

12 OAR 150-316-0400(5).

13 OAR 150-316-0400.

Oregon court does not avoid Oregon taxation of estate income.

B. Oregon taxation of trusts is not based on governing law or situs provisions in the document. Instead, it is based on three factors: whether the trustee is an Oregon resident, or if not, whether the trust is "administered" in Oregon, or whether the trust has Oregon-source income.

C. The presence of a co-trustee who is an Oregon resident, even if that co-trustee does no administrative work, causes all undistributed income to be taxed in Oregon.

D. A corporate trustee cannot simply open a Washington "satellite" office, staffed only with one or two people, and expect to avoid Oregon income taxation on the trusts "administered" there.

CASE LAW UPDATE – SUMMER 2018

Sibylle Baer
Cartwright Baer Johansson, PC

***Bates v. Bankers Life and Casualty Co.,* 362 Or 337 (2018)**

Elder Financial Abuse

FACTS: Plaintiffs purchased long-term healthcare insurance policies from Bankers Life and Casualty Co. Plaintiffs alleged Bankers engaged in a systemic bad-faith scheme to deny or delay insurance claims by, among other things, failing to answer phone calls, losing documents, denying claims without notifying policyholders, denying claims for reasons contrary to Oregon law, and paying policyholders less than what they were owed under their policies.

ISSUE: Is an insurer's bad-faith delay in processing claims and refusing to pay benefits owed under an insurance contract a wrongful taking of money or property such that plaintiff can sustain a claim for elder financial abuse under ORS 124.110(1)?

RULING: No. The Oregon Supreme Court found that Plaintiffs paid insurance premiums to Bankers in exchange for insurance policies. Plaintiffs did not seek return of their premium payments; they sought payment of the contractual benefits they were entitled to under the contract. The Court held that neither the policies nor the contractual right to benefits under those policies constitute money or property Bankers acquired from Plaintiffs for purposes of sustaining an action of elder financial abuse.

***Williams v. Astoria Sunday Market,* 290 Or App 928 (2018)**

Attorney Fees

FACTS: The trial court granted Defendant's motion for summary judgment. Defendant subsequently filed an ORCP 68 statement for attorney fees, costs, and disbursements and a proposed supplemental judgment and money award. Plaintiff objected. The court granted Defendant's request for fees without hearing and issued an order stating it had reviewed the parties' written submissions and was fully informed of all relevant facts and law. The court noted it did so even though Plaintiff's submissions were untimely. Plaintiff objected and requested that the court withdraw the supplemental judgment, consider his written objections, and issue findings and conclusions. Plaintiff failed to request a hearing.

ISSUE: Did the trial court err in ruling on an award of attorney fees based only on written submissions?

RULING: No. The Oregon Court of Appeals noted that although Plaintiff's responsive pleadings were timely filed, Plaintiff never requested a hearing. Furthermore, the trial court made findings and conclusions and rejected Plaintiff's objections on the merits.

***In re McGraw*, 362 Or 667 (2018)**

Ethics

FACTS: The Accused was appointed conservator for wife after husband determined he could no longer manage her finances. Husband continued as wife's guardian and managed his own finances. The Accused was to charge $250/hour for in-office legal work, $300/hour for in-court legal work, and $150/hour for fiduciary work. The Accused served as conservator for approximately 28 months. The Accused became embroiled in disputes with husband culminating in, among other things, attempts by the Accused to obtain conservatorship over husband, to remove husband as wife's guardian, to eject husband from his residence, and to remove husband as personal representative of wife's estate after wife's death to protect wife's creditors and pursue elder abuse claims against husband. The Accused used conservatorship assets to pay the costs of initiating the foregoing actions and billed the conservatorship for his time spent pursuing these goals. Approximately six months after his appointment as conservator, the Accused sent husband an e-mail that he would be charging all of his time out at his full hourly rate ($300/hour) as an attorney. Approximately 20 months after his appointment, the Accused sought approximately $37,000 in fees. The trial court reduced his fees to about $24,000. As part of the basis for the fee reduction the court identified the Accused's decision to bill fiduciary work at attorney rates. Nine months later, following the death of wife, the Accused submitted a final accounting of the conservatorship and requested payment of fees and costs of $42,000 plus an additional $5,000 reserve for a final accounting. Again, the trial court reduced the award of fees and costs to about $27,000. In issuing its decision, the court noted that the Accused failed to manage the conservatorship assets for the exclusive benefit of wife and to protect her economic interest, as the statute requires. The court noted that the conservatorship brought in about $92,000 and the Accused had billed for a total of approximately $71,000. The court further explained that the "very high level of animosity and conflict" between the Accused and husband prompted much of the litigation resulting in a "high conflict conservatorship."

The Oregon State Bar subsequently alleged the Accused violated the disciplinary rules as follows:

1. RPC 1.5(a), charging excessive fees when the Accused charged attorney rates for fiduciary work and when the Accused charged the conservatorship for time he spent seeking to (a) become husband's conservator, (b) have criminal charges brought against husband, and (c) opposing husband's appointment as personal representative of wife's estate.
2. RPC 3.1, knowingly advancing a meritless position when the Accused (a) knowingly attempted to hold husband personally liable for conservatorship obligations without a legal basis; (b) asked law enforcement to file criminal charges against husband; and (c) attempted to have himself appointed conservator over husband without adequate evidence to indicate husband needed a conservator.
3. RPC 4.4(a), taking action with no substantial purpose other than to embarrass, harass, or burden another, when the Accused (a) sought support from husband's friends, family, and creditors to appoint himself conservator over husband and to remove husband as guardian of wife; and (b) encouraged creditors to unite to recover claims from wife's estate and pursue claims against husband for elder abuse.
4. RPC 8.4(a)(4), engaging in conduct prejudicial to the administration of justice when the Accused (a) charged excessive fees, (b) threatened to eject husband, (c) tried to have himself appointed husband's conservator, and (d) contacted creditors to band together against husband in pursuing recovery from wife's estate.

The Oregon Supreme Court discusses each of the above violations in great detail. The Court found the Accused violated RPC 1.5(a), 4.4(a), and 8.4(a)(1) as alleged, but did not find that the Accused violated RPC 3.1. The Court upheld the trial panel's sanction suspending the Accused from the practice of law for 18 months.

ISSUES: The primary issues to take away from this opinion are as follows:

1. Does filing a fee request in a protective proceeding that is excessive violate RPC 1.5, even if the court does not allow the fees sought?
2. Does an attorney charging attorney rates for work performed as a fiduciary violate RPC 1.5?
3. Does pursuing recovery of assets after the death of a protected person constitute a violation of RPC 4.4(a) when the conservator's authority ends upon the death of the protected person, subject to approval of the final accounting?

RULINGS: As to the issues identified above:

1. Yes. The Supreme Court was clear that the ethical violation arose from the filing of the fee request seeking excessive fees. It is ***not*** a defense to assert that there is no ethical violation for charging or collecting an excessive fee when payment of the fees necessitates prior court approval.
2. Yes.
3. Yes.

Events Calendar

Seattle Estate Planning Seminar
November 12-13, 2018
at the Washington State
Convention Center in Seattle

Basic Estate Planning & Administration
November 16, 2018
Live Seminar/Webcast
at the Multnomah Athletic Club

The Editors want to include announcements of upcoming events that are open to the public and may be of interest to our readers. If you know of an event, please send basic information, including point of contact information to Chris Cline at *chriscline@riverviewbank.com* for inclusion in the next issue of the Newsletter.