Estate Planning and

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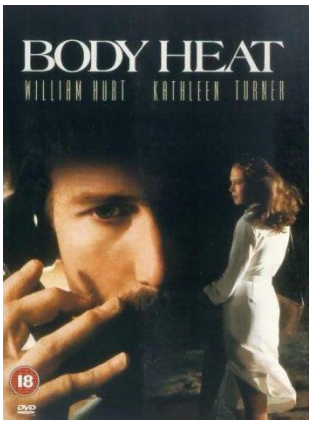
We will be watching clips from six movies, one television program, a news broadcast and a commercial. Each of these clips have been carefully selected to document certain issues that we run across in estate planning, some with more frequency than others. First, I will set the scene by telling you about the movie, then bring you into the specific scene we will be watching. Following the scene, I will be outlining the issues and we will focus on a couple of the issues. With 9 clips, we will spend about 3-4 minutes per clip. Following are a list of issues to watch for related to each clip and at the end of the materials are the explanations and citations.

Special thanks goes out to the good folks at the Estate Planning Council of Southwest Washington whose inspiration and guidance made this project possible. Also, thank you Bill Roller for your amazing video help and Ragna TenEyck for research and editing.

If you are interested in having this presentation for a group that you participate in, please call Robert E. Kabacy at 503-222-3531.



Our first movie is *Body Heat* done in 1981. A shyster lawyer named Ned Racine begins an affair with the wife of a wealthy Florida businessman. Soon Ned hatches a plot with a criminal client to kill the husband and run away with his money. Double crosses and complications build into a treacherous path for Ned. We pick up at a courtroom scene.

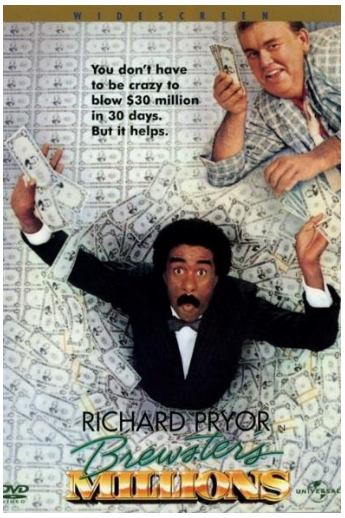
I. Issues:
   a. Romance with clients.
   b. New wills replacing old ones.
   c. Jurisdiction selection;
   d. Lawyer as a witness
   e. Initiation of Probate and witness signatures
   f. Specific bequests
   g. Rule against perpetuities
   h. Lawyer's competence
   i. Will vs. Intestacy
   j. Intent vs. Improperly drawn will

PONDER THOUGHTS:

--Consider a much more mobile client today. Time to review jurisdiction clauses and selection?

--Increasing popularity of professionals claiming to be "estate planning" professionals in all fields.

--Signing correctly is very important.



Our second movie is *Brewster's Millions* done in 1985. After losing his job, Montgomery Brewster, played by Richard Pryor, learns that his great uncle has left him $300 million but he must spend $30 million in 30 days under a complicated set of rules that include limited donations to charity, not retaining new assets and not sharing his situation.

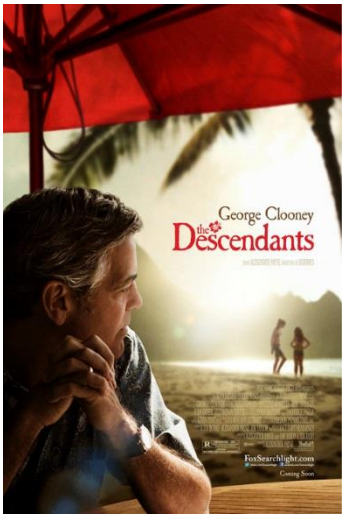
II. Issues:
   a. Sole heir of millions.
   b. Conditions in a will.
   c. Video conditions?
   d. Heirs who never measure up.
   e. Spending is tough.
   f. Trustee duties.
   g. Wimp clauses?

PONDER THOUGHTS:

--How complicated to make conditions?

--Knowing the heirs.

--Realizing that truly spending money is tough.



The third movie is *The Descendants* made in 2011. Here Matt King (played by George Clooney) lives with his family in Hawaii. However, following an accident leaving his wife in a coma he battles with the stipulation that she be allowed to die with dignity but also pressures from relatives to sell their family's enormous land trust all the meanwhile trying to be a good father.

III. Issues:
   a. Family Meetings;
   b. Trustee Duties;
   c. Rule against perpetuities; and
   d. No spoiling and entitlements.
   e. Instructions for health care and directives.

PONDER THOUGHTS:

--Familiarize yourself and your clients with trustee duties. Remember, they may not have been a trustee before.

--Understand health care directives and know that different states have different standards and forms.

--Consider family meetings.

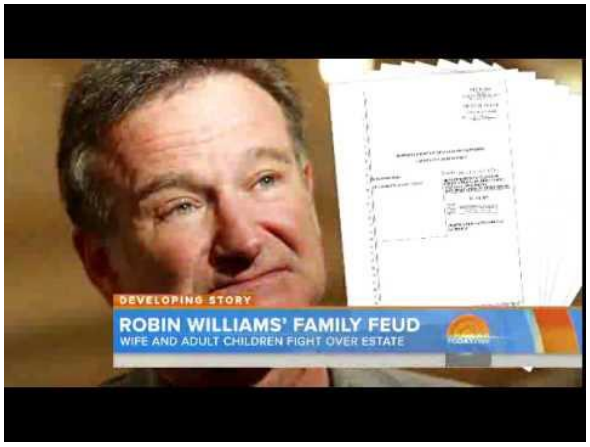
Our fourth movie is *Richie Rich* made in 1994. A child (played by Macaulay Culkin) of wealthy parents has no friends but is forced to make friends when his parents go missing. Suspicions arise that an executive in the company (played by John Larroquette) is to blame for the missing parents and Richie undertakes solving the issue with his new friends.

IV. Issues:
   a. Child as heir;
   b. In local parentes and guardian ad litem.
   c. Power of attorney to minor?
   d. Problem with capacity (minor).

PONDER THOUGHTS:

--How to provide for minors. Easy planning versus responsible planning.

--Establishing guardians is very important.



The next clip is a newscast of the Robin Williams estate following his death and the family fights.

V. Issues:
   a. Dispute over personal property;
   b. Multiple family members/heirs;
   c. Unilateral removal of property/safeguarding property.

PONDER THOUGHTS:

--Personal property is often overlooked in planning.

--Do you have advice for mechanisms to handle the disposition of personal property?

--How should personal property be safeguarded?

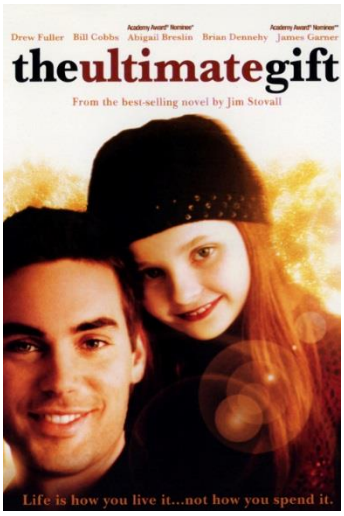
The next clip is from the television show, the *Twilight Zone* as episode 145 in 1964. In this episode, a wealthy family member immediately prior to death requires his family/heirs to wear masks in order to receive their inheritance. To their surprise, as a result of wearing the masks, their faces contort to the shape of the hideous masks after the testator passes.

VI. Issues:
   a. Conditions to receive inheritance;
   b. Public policy imposition.

PONDER THOUGHTS:

--Watch out for public policy issues in estate planning (i.e. $50,000 if my heir commits a felony).

--Watch and test conditions in planning documents.



Our next movie is *The Ultimate Gift* made in 2006. When Jason Stevens's grandfather passes away, Jason expects to receive a healthy inheritance. However, he must set out on a journey of self-discovery to earn the true gift his grandfather meant him to have. He discovers what is really important in life.

VII. Issues:
- a. Holographic will binding?
- b. Ungrateful heirs
- c. Business transition with board in control.
- d. Full disclosure or privacy of will?
- e. Trustee control of property?
- f. How to give without ruining heirs.

PONDER THOUGHTS:

--How to transition businesses…multiple methods.

--Responsible giving…how do you advise clients?

--How to handle ungrateful heirs when you are the planner.

Our next clip is a Volkswagen Beetle Funeral commercial. It doesn't really stand for any legal principal other than what is the value of money and buying a Volkswagen. This is really the commercial break in case you need to use the bathroom.

PONDER THOUGHTS:

Commercials generally do not require much thought.

Our final movie is *Waking Ned Divine* created in 1998. Best friends in an Irish village discover someone has won the lottery and design a plot to see if the winner will share. Figuring out that Ned Devine is the winner they pay him a visit only to find him dead from shock. Since he is the only one that can claim the prize, the townsfolk band together to convince the lottery official that one of the friends is really Devine.

VIII. Issues:
- a. Sudden wealth syndrome.
- b. Scheming to take wealth;
- c. Need to be careful if you win the lottery.

PONDER THOUGHTS:

--How to you help heirs avoid sudden wealth syndrome?

--Recognize that people may scheme and present false fronts in an estate setting.

Bonus: Here are eight big battles of the Rich and Famous!

I. J. Howard Marshall II (DOD 1995). Anna Nicole Smith and the decedent's son battled in court for years over a fortune. Both died before final disposition. Multi-jurisdictional issues caused the case to drag on for years.

II. Gary Coleman (DOD 2010). Anna Gray vs. Shannon Price decided to battle it out. Price had claimed a common law marriage and a Judge said that the marriage had ended. He had three wills the last of which was a handwritten codicil according to Forbes.com. Estate size was modest.

III. James Brown (DOD 2006). With an estimated net worth of $50 million, his widow and children are not fond of how much he left to charity. The estate is in limbo.

IV. Thomas Kinkade (DOD 2012). Amy Pinto, his girlfriend, and Nanette Kinkade, his estranged wife, battled over art, a home and money. A secret settlement was reached in this $66 million estate.

V. Jimi Hendrix (DOD 1970). An $80 million estate was disputed by a stepsister, brother and children following Jimi's father's death who battled record companies for the rights to Jimi's songs and prevailed. A multi-generational drama! Undue influence was at the heart of the matter.

VI. John Seward Johnson I (DOD 1983) who was worth an estimated $400 million. He was one of the sons of the Johnson & Johnson founders. The third wife and six children contested the will claiming incompetence and undue influence. Allegedly the legal bill rose to about $25 million.

VII. Howard Hughes (DOD 1976). Twenty-two cousins divided $2.5 billion with approximately $156 million passing to Melvin Dummars who gave Hughes a ride in the desert when Hughes was stranded. An "ex" may have received an undisclosed amount.

VIII. Leona Helmsley (DOD 2007). Two grandchildren and charities prevailed over her pet in a $4 billion estate with $12 million contested. The pet ended up receiving $2 million.

IX. BONUS: According to Forbes, the Michael Jackson estate is battling the IRS in tax court over a $731 million tax bill (including valuation misstatement and negligence penalties of $205.1 million). The estate reported a value of $7 million.

Following are notes on each of the issues that were discussed.

1. Romance with clients: Ethical problems.

The ABA Model Rules of Professional Conduct[1], Oregon Model Rules of Professional Conduct[2] and Washington Model Rules of Professional Conduct[3] (collectively, "Model Rules") all prohibit an attorney from engaging in a consensual sexual relationship with a client unless the consensual relationship existed prior to the beginning of the attorney-client relationship. The Model Rules do not define the term "romance" nor address the issue of a romantic relationship during an attorney/lawyer relationship.

2. Lawyer as a witness in context of will preparation/execution: Ethical problems.

Pursuant to the Witness-Advocate rule of the ABA Model Rules of Professional Conduct,[4] an attorney may not serve as an advocate at a trial if it is likely that the attorney will be a necessary

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[1] **Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules**
(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

[2] **Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**
(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.
For purposes of this rule:
(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and
(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

[3] **RPC 1.8 Conflict of Interest: Current Clients: Specific Rules**
(j) A lawyer shall not:
(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or
(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.
(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

[4] **Rule 3.7 Lawyer as Witness**
a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
1) the testimony relates to an uncontested issue;
2) the testimony relates to the nature and value of legal services rendered in the case; or
3) disqualification of the lawyer would work substantial hardship on the client.
b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

Rule 1.0 Terminology
(f) Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

witness unless the testimony is uncontested. If the lawyer may be called to testify regarding will preparation and/or execution, then the lawyer should not act as an advocate in the matter

The Model Rules prohibit an attorney from revealing information related to the representation of the client without the client giving informed consent. The U.S. Supreme Court explained the purpose of this rule in *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998), saying that posthumous application of the privilege encourages full and frank communication with counsel. *Swidler* outlines the body of cases that allow for an exception to the privilege for testamentary disclosure: "[T]he general rule with respect to confidential communications … is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs. *Osborn*, 561 U.S., at 1340. The rationale for such disclosure is that it furthers the client's intent."[5] The Personal Representative or Executor may waive the privilege on behalf of the decedent.

3. Initiation of probate and witness requirements…can they be related?

Both Washington and Oregon allow a will to be self-authenticating with an accompanying Affidavit of Attesting Witnesses ("Affidavit"). Any person interested in an Oregon estate may file a motion within 30 days of the admittance of the Will to probate requesting that the witnesses provide oral testimony even though an Affidavit exists.[6] Washington requires oral testimony if no Affidavit exists.[7] If none of the attesting witnesses are available, then both Washington and Oregon may allow the testator's signature to be authenticated via oral testimony.

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[5] "In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Court concluded that survival of the privilege was 'the clear implication' of its early pronouncements that communications subject to the privilege could not be disclosed at any time. 408 Mass., at 483, 562 N. E. 2d,at 70. The court further noted that survival of the privilege was 'necessarily implied' by cases allowing waiver of the privilege in testamentary disputes. *Ibid.*

Such testamentary exception cases consistently presume the privilege survives. See, *e.g.*, *United States* v. *Osborn*, 561 F.2d 1334, 1340 (CA9 1977); *DeLoach*v. *Myers*, 215 Ga. 255, 259—260, 109 S. E. 2d 777, 780—781 (1959); *Doyle* v. *Reeves*, 112 Conn. 521, 152 A. 882 (1931); *Russell* v. *Jackson*, 9 Hare. 387, 68 Eng. Rep. 558 (V.C. 1851). They view testamentary disclosure of communications as an exception to the privilege: '[T]he general rule with respect to confidential communications … is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs.' *Osborn*, 561 U.S., at 1340. The rationale for such disclosure is that it furthers the client's intent. *Id.*, at 1340, n. 11.

Indeed, in *Glover* v. *Patten*, 165 U.S. 394, 406—408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent. *Id.*, at 407—408 (quoting *Blackburn* v. *Crawfords*, 3 Wall. 175 (1866), and *Russell* v. *Jackson*, *supra*)."

[6] **ORS 113.055 Testimony of attesting witnesses to will**

(1) Upon an ex parte hearing of a petition for the probate of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching the affidavit to the will or to a photographic or other facsimile copy of the will, and may identify the signature of the testator and witnesses to the will by use of the will or the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken.

(3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will or of probate thereof in solemn form, proof of any facts shall be made in the same manner as in an action tried without a jury.

[7] **RCW 11.20.040 Proof where one or more witnesses are unable or incompetent to testify, or absent from state**

The subsequent incompetency from whatever cause of one or more of the subscribing witnesses, or their inability to testify in open court or pursuant to commission, or their absence from the state, shall not prevent the probate of the will. In such cases the court shall admit the will to probate upon

4. Rule Against Perpetuities…what does it mean and how does it work?

Oregon has adopted the Uniform Statutory Rule Against Perpetuities that takes a "wait and see" approach. A non-vested property interest must vest or terminate within 21 years of the death of a person that was alive at the time of the creation of the interest or 90 years after creation of the interest.[8] To avoid the Rules Against Perpetuities in Washington, the interest must vest within 150 years of the effective date of the creation of the interest; in the event the interest did not vest within 150 years, then the provision violates the Rule Against Perpetuities and is ineffective.[9]

5. Lawyer competence to prepare estate plan: Ethical issues.

The standard for a lawyer to meet to decide if the lawyer is competent in an area of law is very low. Competent representation "consists of legal knowledge, skill, thoroughness and

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satisfactory testimony that the handwriting of the testator and of an incompetent or absent subscribing witness is genuine or the court may consider such other facts and circumstances, if any, as would tend to prove such will.

[8] **ORS 105.950 Statutory rule against perpetuities**

(1) A nonvested property interest is invalid unless:
  (a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
  (b) The interest either vests or terminates within 90 years after its creation.
(2) A general power of appointment, not presently exercisable because of a condition precedent, is invalid unless:
  (a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
  (b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.
(3) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:
  (a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
  (b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.
(4) In determining whether a nonvested property interest or a power of appointment is valid under subsection (1)(a), (2)(a) or (3)(a) of this section, the possibility that a child will be born to an individual after the individuals death is disregarded.
(5) The language in a governing instrument is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives if, in measuring a period from the creation of a trust or other property arrangement, that language seeks:
  (a) To disallow the vesting or termination of any interest or trust beyond the later of:
    (A) The expiration of a period of time not exceeding 21 years after the death of the survivor of the specified lives in being at the creation of the trust or other property arrangement; or
    (B) The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement.
  (b) To postpone the vesting or termination of any interest or trust until:
    (A) The expiration of a period of time not exceeding 21 years after the death of the survivor of the specified lives in being at the creation of the trust or other property arrangement; or
    (B) The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement.
  (c) To operate in effect in any similar fashion upon:
    (A) The expiration of a period of time not exceeding 21 years after the death of the survivor of the specified lives in being at the creation of the trust or other property arrangement; or
    (B) The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement.

[9] **RCW 11.98.130 Rule against perpetuities**

No provision of an instrument creating a trust, including the provisions of any further trust created, and no other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument is invalid under the rule against perpetuities, or any similar statute or common law, during the one hundred fifty years following the effective date of the instrument.

Thereafter, unless the trust assets have previously become distributable or vested, the provision or other disposition of property is deemed to have been rendered invalid under the rule against perpetuities.

preparation reasonably necessary for the representation."[10] Having answered the question about wills on the bar exam does not make a person competent to be an estate planner. There are many attorneys that perceive estate planning or, for that matter, any transactional work as an area of law that requires very little expertise. Some even believe that transactional work is the fill-in-the-blank type of practice of law. These lawyers do not appreciate the fact that it may be numerous years before a mistake in the preparation or execution of an estate document is discovered.

A lawyer is left to self-regulate himself or herself as to whether the lawyer is competent to practice in a specific area of law. When a lawyer makes the wrong decision, malpractice attorneys or litigators may come into the picture to clean up the mess between parties of a poorly drafted plan, not to mention attention is drawn to the drafting lawyer.

6. Will vs. intestacy…what do they mean?

When a will is executed, the will-maker directs the disposition of the will-maker's assets at the will-maker's death. A person that dies without a will, whether aware of the statutes or in most cases not, has opted for their assets to be distributed as set forth by the state legislature through the intestate succession section of the state statute. Once a person familiarizes themselves with the state's estate plan, the person will often decide to prepare a will and direct the disposition of their assets. The main difference between Oregon's[11] and Washington's intestate distribution is application of Washington's community property laws.[12]

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[10] ABA Model Rules of Professional Conduct 1.1 states that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".

[11] **ORS 112.025 Share of surviving spouse if decedent leaves issue**
If the decedent leaves a surviving spouse and issue, the intestate share of the surviving spouse is:
(1) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the entire net intestate estate.
(2) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the net intestate estate.

ORS 112.035 Share of surviving spouse if decedent leaves no issue
If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

ORS 112.045 Share of others than surviving spouse
The part of the net intestate estate not passing to the surviving spouse shall pass:
(1) To the issue of the decedent. If the issue are all of the same degree of kinship to the decedent, they shall take equally, but if of unequal degree, then those of more remote degrees take by representation.
(2) If there is no surviving issue, to the surviving parents of the decedent.
(3) If there is no surviving issue or parent, to the brothers and sisters of the decedent and the issue of any deceased brother or sister of the decedent by representation. If there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degrees take by representation.
(4) If there is no surviving issue, parent or issue of a parent, to the grandparents of the decedent and the issue of any deceased grandparent of the decedent by representation. If there is no surviving grandparent, the issue of grandparents take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degrees take by representation.
(5) If, at the time of taking, surviving parents or grandparents of the decedent are married to each other, they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

[12] **RCW 11.04.015 Descent and distribution of real and personal estate**
The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:
(1) Share of surviving spouse or state registered domestic partner. The surviving spouse or state registered domestic partner shall receive the following share:
(a) All of the decedent's share of the net community estate; and
(b) One-half of the net separate estate if the intestate is survived by issue; or
(c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents, or by one or more of the issue of one or more of his or her parents; or
(d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent.
(2) Shares of others than surviving spouse or state registered domestic partner. The share of the net estate not distributable to the surviving

7. Intent vs. improperly drawn will…what are fixes?

In Oregon[13] and Washington[14] a will is determined to be the controlling intent of the testator. If a provision in an Oregon will is ambiguous, the court may resolve the ambiguity.[15] If no ambiguity exists then the will as drafted is the testator's intent.[16]

Both Washington and Oregon laws allow for revisions of a will when the will is in violation of a state statute, for example, if the surviving spouse is not benefited in violation of law.

Absent of evidence to the contrary that the testator was under undue influence, incompetent, or not free to dispose of their property as they wish, the will shall be considered to reflect the intent of the testator. The courts usually determine that the will-maker read the will and understood the consequences of the will as written.

8. What conditions are valid and invalid in a will?

A condition that is against public policy or illegal is invalid and will not be honored.

9. How do trustees measure conditions?

Trustees must follow the trust document unless a condition is contrary to public policy or illegal, i.e. if Sally never marries she will receive $500,000.

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spouse or state registered domestic partner, or the entire net estate if there is no surviving spouse or state registered domestic partner, shall descend and be distributed as follows:

(a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation.

(b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate.

(c) If the intestate not be survived by issue or by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation.

(d) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate; if both maternal and paternal grandparents survive the intestate, the maternal grandparent or grandparents shall take one-half and the paternal grandparent or grandparents shall take one-half.

(e) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents or by any grandparent or grandparents, then to those issue of any grandparent or grandparents who survive the intestate; taken as a group, the issue of the maternal grandparent or grandparents shall share equally with the issue of the paternal grandparent or grandparents, also taken as a group; within each such group, all members share equally if they are all in the same degree of kinship to the intestate, or, if some be of unequal degree, then those of more remote degree shall take by representation.

[13] **ORS 112.227 Intention of testator expressed in will as controlling**
The intention of a testator as expressed in the will of the testator controls the legal effect of the dispositions of the testator. The rules of construction expressed in this section, ORS 112.230 and 112.410 apply unless a contrary intention is indicated by the will.

[14] **RCW 11.12.230 Intent of testator controlling**
All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.

[15] *McClain v. Hardy*, 184 or App. 448, 453, 56 P.3d 501 (2002).

[16] *Riley v. Sammons*, 2115 or App. 401, 408, 120 P.3d 1067 (2007).

10. Whether to have a family meeting or not.

There is no legal requirement that families have a family meeting, but psychologists encourage such meetings. A family meeting allows families to discuss health care issues, end of life wishes, and to set shared goals as a family. These meetings allow everyone to check in with each other, for example: is everyone competent or does someone need assistance. This is also a time when family members might discover that a family member is being unduly influenced by another family member or a nonrelated third party.

Family meetings are difficult sometimes with family members in many different areas, but with the use of technology families can make this work.

11. Is a reading of the will necessary?

The reading of a will is not required in any state.

12. How to avoid spoiling heirs?

The best way to not spoil heirs is to establish a trust so that heirs receive support for health, education, maintenance, and support only. A trustee can distribute assets over a period of time.

13. How do states address health care directives? Different for each state. What does WA allow and what does OR allow?

Oregon:
Must be a capable adult;
No time period required;
Execute statutory form;
No judicial review is required;
Durable Power of Attorney for Health Care Decisions; and
Requires agent to accept appointment.

Washington:
Health Care Directive/Living Will;
Durable Power of Attorney for Health Care Decisions;
No requirement for agent to be notified of appointment

14. Can a child have a power of attorney if they are a minor? What does *in loco parentis* mean and how does it differ from guardian ad litem?

Neither Oregon nor Washington specifies that an attorney in fact must be an adult. If a minor acted as an attorney in fact, the minor's legal disability to contract would remain. The minor would be limited in acting on behalf of the Principal.

In loco parentis is when a person assumes parental rights and duties for a child, whereas a guardian ad litem is usually appointed by the court and represents the child's interest in a legal proceeding.

15. What type of capacity is required for execution of a will? Is it different for a power of attorney?

It is well settled that a will-maker must know they are making a will, understand what property they have and how it will be distributed, and who their potential heirs are. The ABA Model Rules provides guidance for attorneys working with a client that might be incapacitated.[17]

Capacity of a person to appoint an attorney-in-fact has not been litigated in Oregon. The Restatement (Second) of Agency §20 (1994) adopts the position that the delegation of authority is valid if a grantor has the capacity to do the act that he or she has delegated. This position recognizes that the degree of capacity required may vary with the complexity of the delegable act, and equates the capacity to grant a power of attorney with the capacity to contract. Is the grantor capable of understanding, in a reasonable manner, the nature and effect of his or her act?[18]

Some courts have applied a test that requires determining whether the grantor of the power met different competency tests to perform the various transactions authorized by the general power of attorney, from a simple sale of an item of personal property to conducting an intricate business transaction.[19] Courts in other jurisdictions have created a less cumbersome test.[20] This test focuses on the grantor's ability to understand the general nature of the document executed rather than the grantor's competency to perform the acts included in the power of attorney.[21]

16. How long must someone be disappeared before they are presumed dead? Is it a state law issue?

In Oregon, a person not heard from in seven years is presumed dead,[22] except as related to intestate succession in which, when a person is absent for a continuous period of five years, and

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[17] **Rule 1.14 Client With Diminished Capacity**
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[18] *Golleher v. Horton*, 715 P2d 1225, 1228 (Ariz App 1985).

[19] *Beaucar v. Bristol Federal Savings and Loan Ass'n*, 268 A2d 679, 687 (Conn 1969); *In re Dean*, 74 A2d 538, 541 (Pa 1950).

[20] *See Golleher, supra; Roybal v. Morris*, 669 P2d 1100, 1104 (NM App 1983); *Umscheid v. Simnacher*, 482 NYS2d 295, 298 (2 Dept 1984); *Tomlinson v. Jones*, 677 SW2d 490, 492 (Tex 1984).

[21] *Golleher, supra.*

[22] **ORS 40.135 Rule 311. Presumptions**
(1) The following are presumptions:
(s) A person not heard from in seven years is dead.

has made no contact with another person during the five year period, then property will be distributed and the probate closed.[23]

Washington deems a person deceased when the person has been absent from the county for a time of seven years, and his or her whereabouts are unknown or cannot be ascertained with reasonable diligence.[24]

17. How are disputes over personal belongings resolved?

If disputes exist and the Personal Representative has no guidance from the testamentary document or state statute, then the Personal Representative must fulfill the testator's wishes. If the Personal Representative is overseeing an intestate succession, then the Personal Representative must distribute assets equally among the class that is inheriting.

18. How do you safeguard personal belongings and what do you do if there is unilateral removal of property? What remedies exist?

Both Oregon[25] and Washington[26] require the Personal Representative to take control of the personal belongings.

If a person takes estate property without authority, an Oregon Personal Representative would have the same recourse as any private citizen who had property taken unlawfully.

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[23]**ORS 112.582(4) Evidence of death or status**
An individual whose death is not otherwise established under this section but who is absent for a continuous period of five years is presumed to be dead if the person has made no contact with another person during the five-year period and the absence of the person cannot be satisfactorily explained after diligent search or inquiry. A person presumed dead under this subsection is presumed to have died at the end of the five-year period unless it is proved by a preponderance of the evidence that death occurred at a different time.

[24]**RCW 11.80.100 Final distribution — Notice of hearing — Decree**
Whenever the owner of such property shall have been absent from the county for a space of seven years and his or her whereabouts are unknown and cannot with reasonable diligence be ascertained, his or her presumptive heirs at law or the legatees and devisees under the will, as the case may be, to whom the property has been provisionally distributed, may apply to the court for a decree of final distribution of such property and satisfaction, discharge and exoneration of the bonds given upon provisional distribution. Notice of hearing of such application shall be given in the same manner as notice of hearing of application for the appointment of trustee and for provisional distribution and if at the final hearing it shall appear to the satisfaction of the court that the owner of the property has been absent and unheard of for the space of seven years and his or her whereabouts are unknown, the court shall exonerate the bonds given on provisional distribution and enter a decree of final distribution, distributing the property to the presumptive heirs at law of the absentee or to his or her devisees and legatees, as the case may be.

[25]**ORS 114.225 Possession and control of decedent's estate**
A personal representative has a right to and shall take possession and control of the estate of the decedent, but the personal representative is not required to take possession of or be accountable for property in the possession of an heir or devisee unless in the opinion of the personal representative possession by the personal representative is reasonably required for purposes of administration. [1969 c.591 §121]

ORS 114.305 Transactions authorized for personal representative
Subject to the provisions of ORS 97.130(2) and (10) and except as restricted or otherwise provided by the will of the decedent, a document of anatomical gift under ORS 97.965 or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:
(2) Retain assets owned by the decedent pending distribution or liquidation.

[26] **RCW 11.48.060 May recover for embezzled or alienated property of decedent**
If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he or she shall stand chargeable, and be liable to the personal representative of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate.

Washington allows the Personal Representative to pursue any person who has unlawfully taken assets from the care of the Personal Representative with the threat of jail.[27]

19. Are video wills allowed? Can video conditions be used and valid?

Neither Washington nor Oregon allow video wills. A valid will in Oregon must be in writing. Washington allows nuncupative wills for members of the United States armed services and a person employed on the vessel of the United States merchant marine.

An oral will may not dispose of more than $1,000 of personal property. The testamentary words must be spoken at the time of the testator's last sickness and in front of two witnesses. The testamentary words must be committed to writing and offered within six months of the witnesses hearing the testamentary words.[28]

Practice tip: In the event that a will-maker's testamentary capacity or intent might be challenged, videotape the will-maker reading the will so others can see the will-maker was competent to make a will. The will that is being read must meet all the criteria in the will-maker's state to be a valid will. The video does not substitute for adhering to the will formalities in the will-maker's state.

[27] **RCW 11.48.070 Concealed or embezzled property — Proceedings for discovery**
The court shall have authority to bring before it any person or persons suspected of having in his or her possession or having concealed, embezzled, conveyed, or disposed of any of the property of the estate of decedents or incompetents subject to administration under this title, or who has in his or her possession or within his or her knowledge any conveyances, bonds, contracts, or other writings which contain evidence of or may tend to establish the right, title, interest, or claim of the deceased in and to any property. If such person be not in the county in which the letters were granted, he or she may be cited and examined either before the court of the county where found or before the court issuing the order of citation, and if he or she be found innocent of the charges he or she shall be entitled to recover costs of the estate, which costs shall be fees and mileage of witnesses, statutory attorney's fees, and such per diem and mileage for the person so charged as allowed to witnesses in civil proceedings. Such party may be brought before the court by means of citation such as the court may choose to issue, and if he or she refuses to answer such interrogatories as may be put to him or her touching such matters, the court may commit him or her to the county jail, there to remain until he or she shall be willing to make such answers.

[28] **RCW 11.12.025 Nuncupative wills**
Nothing contained in this chapter shall prevent any member of the armed forces of the United States or person employed on a vessel of the United States merchant marine from disposing of his wages or personal property, or prevent any person competent to make a will from disposing of his or her personal property of the value of not to exceed one thousand dollars, by nuncupative will if the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and that such nuncupative will was made at the time of the last sickness of the testator, but no proof of any nuncupative will shall be received unless it be offered within six months after the speaking of the testamentary words, nor unless the words or the substance thereof be first committed to writing, and in all cases a citation be issued to the widow and/or heirs at law of the deceased that they may contest the will, and no real estate shall be devised by a nuncupative will.