

CLOSING AND DISTRIBUTION OF ASSETS
Oregon Law Institute CLE Seminar: ABCs of Decedents' Estate Administration
April 8, 2016
Richard A. Pagnano, The Elder Law Firm
111 SW Fifth Avenue, Suite 1890
Portland, Oregon 97204
503-452-5050

I. INTRODUCTION

The culmination of any estate proceeding is the filing of a Final Accounting and Petition for General Judgment of Final Distribution. This step is taken when all statutory requirements concerning conducting a probate have been completed including: filing of the Inventory, notice to creditors, payment of claims and creditors; filing of the decedent's last tax returns and any fiduciary income, Federal Estate, or Oregon Inheritance tax returns required; waiting until the required time periods for filing of claims or Will contests have expired, and all disputes between beneficiaries have been resolved. The purpose of the Final Accounting is to explain to the Court and beneficiaries what has transpired during the period of administration of the estate and gain court approval for all acts or actions taken and to be taken to complete the administration and close the estate.

The Final Accounting is a pleading which must be filed by the Personal Representative. ORS 116.083(1). It is important to note that the Personal Representative may be liable for and is chargeable with responsibility for all the property of the estate of the decedent that has come into the possession of the Personal Representative during the course of the probate. ORS 116.063.

If it is possible to close a probate estate within one year of the appointment of the Personal Representative (plus the 60 day grace period), the only accounting that will be required is the final accounting. If the estate cannot be closed within one year from the date of initiation, then an interim or annual accounting will be required and is due within 60 days after the anniversary date of the personal representative's appointment. ORS 116.083.

PRACTICE TIP: Changes to ORS 111.205, which became effective in 2008, make it easier to prepare and file final accountings, which for many years required the signature of the personal representative to be notarized on the final account. Accountings no longer require notarization, but instead should include the subject to penalty for perjury language specified in ORCP 1E. *See* ORS 116.083(2)(g). Since this makes completing a final account easier than notarizing, all of my forms have been changed to reflect the easier way of doing things. *See* "New Forms for Probate Practice," Oregon State Bar Estate Planning and Administration Section, January 2009 Newsletter.

II. FINAL ACCOUNTING

A. Time and Method for Filing

At such time as the estate is ready for final settlement and distribution, the Personal Representative must file an account of the personal representative's administration. ORS 116.083(1)(c). Practitioners please note, the following counties now require electronic filing of the accounting: Benton, Clackamas, Clatsop, Columbia, Coos, Crook, Curry, Deschutes, Douglas, Gilliam, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Sherman, Tillamook, Wasco, Wheeler, and Yamhill circuit courts. Washington County will require e-filing beginning May 31, 2016. Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, and Wallowa counties will require electronic filing beginning August 29, 2016.

PRACTICE TIP: My legal assistant breaks down the accounting into separate, searchable PDFs that include: 1) The narrative and exhibits; 2) Vouchers; 3) Final professional fiduciary disclosure (if necessary); 4) Final fiduciary fee statement (if requesting extraordinary fees); and Final attorney fee statement. All of the sections of the accounting should be filed in the same electronic “envelope,” while notices and proofs of service may be filed in the same or a separate envelope.

B. Statutory Requirements

The final accounting must include a declaration under penalty of perjury by the personal representative (ORS 116.083(2)(g) and ORS 111.205) and include the information set out in ORS 116.083(2) as follows:

1. The period of time covered by the accounting;
2. The total value of the property subject to administration as reflected on the Inventory, or if there was a prior account, according to the balance of the prior account;
3. All money and property received during the period of the accounting;
4. All disbursements made during the period covered by the accounting, including vouchers for all disbursements set out in chronological order unless otherwise provided by order or rule of the court (*See also* UTCR 9.180, ORS 116.083(2)(d), and Multnomah County SLR 9.073 for exceptions to the “voucher rule”);
5. All of the money and property of the Estate as of the ending date of the accounting;
6. Other information considered necessary to explain the condition of the estate; that the Personal Representative considers necessary or that the Court may require;
7. A declaration under penalty of perjury in the form required by ORCP 1E that all Oregon income, inheritance or estate taxes, and personal property taxes, if any, have been paid and that all required tax returns have been filed; and
8. A Petition for a General Judgment authorizing the Personal Representative to distribute the estate to the persons entitled to the decedent’s property in the proportions specified in the decedent’s Will.

PRACTICE TIP: Explain with particularity which property will be distributed to each person or entity, using actual numbers where available or percentage interests when appropriate.

9. The Oregon Revised Statutes now also require the final account to reference in the case caption the filing fee required by statute, and a reference to the statute that establishes the filing fee for the pleading. ORS 21.105. If the proceeding is subject to a filing fee established under ORS 21.170 or ORS 21.180, the caption of the pleading must indicate the value of the estate. ORS 21.170(2) sets out the filing fees for annual or final accountings filed in probate proceedings:

- (a) If estate value (the beginning value) is less than \$50,000.00, the filing fee is \$32.00;
- (b) If estate value is \$50,000.00 or more but less than \$1,000,000.00, the filing fee is \$268.00;
- (c) If estate value is \$1,000,000.00 or more but less than \$10,000,000.00, the filing fee is \$531.00;
- (d) If estate value is more than \$10,000,000.00, the filing fee is \$1,056.00.

C. UTCR Requirements

In addition to the statutory requirements set forth above, the following requirements from the Uniform Trial Court Rules apply and most courts will no longer tolerate deviation from these rules:

1. The name, address, telephone and fax number, email address, and bar number of the attorney of record must be typed or printed on the last page of every Petition, Motion and Order. The

name, address, and telephone number of the personal representative must also be included on every order (UTCRC 9.030); and

2. A voucher for each disbursement reported in the accounting and a depository statement showing opening and closing balances must be included for each account (UTCRC 9.180), unless the beginning statement was already provided in a prior accounting, and unless the fiduciary is excused from filing vouchers.

PRACTICE TIP: Because of the passage of the “Check 21” law, banks are no longer required to return original canceled vouchers to account holders upon demand. The law instead sets out two standards for images or copies of the front and back of each voucher, which most courts should accept in lieu of the originals. Some courts may require that the fiduciary provide the higher standard of image, dubbed “legal images,” of the vouchers in place of the originals. The Multnomah County Probate Court will accept bank copies of the checks pursuant to SLR 9.073.

PRACTICE TIP: In an accounting, the fiduciary may either request that the court keep or return the vouchers, if the fiduciary provides a self-addressed, postage-prepaid envelope for their return. Many fiduciaries elect not to have the vouchers returned, in which case the court will destroy them after 90 days from the approval of the accounting. In Washington County, however, the fiduciary does not have the option to not have the vouchers returned, and must provide a self-addressed, postage-prepaid envelope for their return with any accounting filed. Note that this will no longer apply with respect to electronically filed accountings, as the original documents including vouchers must be held in your file.

3. UTCRC 9.160 states that accountings substantially in the format described and specified in the rule must be accepted by all judicial districts. Most counties in Oregon have made the UTCRC forms of accounting mandatory, including Multnomah County (SLR 9.161), Clackamas County (SLR 9.165), Marion County (SLR 9.010), and Washington County (unwritten rule).

4. The “Form of Accounting” provisions of 9.160(1) require the first and last date of the accounting period (the last day of the accounting period should be within 30 days of the anniversary of appointment of the fiduciary) and a statement regarding whether a bond was required and if so, the total amount of the bond. If no bond was required, you must provide the date of the court order waiving the bond or refer to the statute exempting the filing thereof. For interim accountings, the rule also requires a calculation to determine whether the required bond is sufficient which takes into account the current value of the assets, the estimated income, any restricted assets or income, and the fiduciary’s request for any changes in the amount to be bonded. If the requested bond is different from the amount that should be bonded, you must offer an explanation to the court that will aid the court in determining whether to grant the request.

5. UTCRC 9.160(2) requires an “Asset Schedule” containing at least five columns that reflects the life of an asset during the accounting period including the date of acquisition and disposal of an asset held in an estate or conservatorship at any time during the accounting period. The asset schedule must summarize all property held in the estate. It is important to note that any asset restrictions must be noted by including the date and title of the court order. The asset schedule must also contain a reference to where the statement of receipts and disbursements can be located for a particular asset listed on the schedule. UTCRC 9.160(2)(a)(i). The asset schedule must also list the beginning value of any assets owned by the estate or conservatorship. *See Asset Schedule, Exhibit I to Form 6-1*. Note that a trust company acting as a fiduciary is exempt from the requirement to file an asset schedule. Also note that the failure of attorneys to prepare and file an Asset Schedule which complies with the Uniform Trial Court Rules is a concern for the courts.

6. UTCR 9.160(3) contains the requirements for “Receipts and Disbursements.” Section three requires a separate statement of receipts and disbursements in chronological order for each account maintained in the estate. Receipts must start with the beginning balance and show the source or payor of the receipt. Disbursements must show the payee or recipient and include a brief explanation of its purpose. The total disbursements must lead to the ending or closing balance of the account and if not, then you must include a reconciliation that explains any difference between the balance shown on the statement of receipts and disbursement and the balance on the depository statement. Please note that failure to reconcile statements with provided receipts and disbursements is also a concern of the courts. Real property sales must be evidenced by a Seller’s Closing Statement from escrow. Transfers between accounts shall be labeled with regard to the source or destination of the deposit or withdrawal. UTCR 9.160(3)(e). *See Receipts and Disbursements, Exhibit 2 to Form 6-1*. Once again, a trust company acting as a fiduciary is exempt from the requirement to provide the statements of receipts and disbursements for each account. Instead, they may provide a chronological list of receipts and disbursements with a total for the amount of receipts and a total for the amount of disbursements.

PRACTICE TIP: For brokerage accounts, practitioners should at a minimum include a list of receipts and disbursements made to or from the account, and provide information about unrealized capital gain or loss in the account in monthly, quarterly, or annual rollup amounts. The court staff does not wish to review the monthly brokerage statements. Please note that the font size of the type on the statement of receipts and disbursements must be no smaller than ten point type and the side margins may be one-half inch. UTCR 9.160(3)(g).

7. UTCR 9.160(4) contains requirements for the “Narrative” portion of the accounting. Unless clearly shown in the asset schedule, you must include a paragraph in the narrative portion of your accounting which explains any changes in asset holdings including, but not limited to corrections to previously declared values, omitted assets, the closing of an account, the sale or purchase of an asset, a significant change in living expenses, or a stock split.

8. UTCR 9.170 contains the requirements for “Fiduciary Disclosure in Accountings.” The narrative portion of accounting must explain gifts made by the fiduciary and transactions involving a person or entity with whom the fiduciary has a relationship that could affect or compromise the fiduciary’s decision making, unless the gift or transaction was previously approved by the court. An explanation must also be given for all fiduciary payments made for goods and services provided by a person who is not engaged in an established business whose purpose is to provide the goods or services to the general public. An explanation must also be given for all fiduciary payments made for goods and services provided at a higher rate than ordinarily charged to the general public. Court staff also requests that disclosure of any mistakes or problems caused by the fiduciary’s action or lack thereof be included here. Do not make the court staff discover the problems during audit!

D. Practice Tips on Form and Contents of Petition and Accounting

As is indicated in the introduction to this chapter, the purpose of the final accounting is to explain to the Court and other interested parties what has happened during the course of probate administration and what needs to be done to complete the administration and close the estate. Of particular importance are the Personal Representative’s explanations regarding management of assets and payment of creditor claims or other expenses. The Personal Representative should explain all significant receipts received and disbursements made from the decedent’s date of death through closing of the estate. A separate exhibit should list all receipts and disbursements for each account

by date and value. In any accounting, the statement of receipts and disbursements must reconcile with the Personal Representative's asset statement and, if not, the narrative must explain why.

Because changes may occur in the asset holdings after the decedent's date of death, it is important to carefully explain each change in assets in the narrative portion of the Personal Representative's final accounting. This explanation is required by UTCR 9.160(4). The more clearly any and all changes in assets are explained (especially decreases or losses) in the final accounting, the less the likelihood that there will be a misunderstanding or objection filed over the Personal Representative's management of assets. In addition, the Uniform Trial Court Rules require an exhibit referred to as the "Asset Schedule" which succinctly shows any changes in value in assets over the accounting period. UTCR 9.160(2).

The final accounting is comprised of two parts. The narrative section and the supporting attachments or exhibit section. The narrative section of the accounting should contain all of the statutory and UTCR requirements set forth above. This section also provides the opportunity to explain to the Court and other beneficiaries what has occurred during probate administration. This section should include information regarding the treatment or disposition of all assets managed by the Personal Representative; it should also include information concerning all claims presented against the estate and the status or disposition of all such claims; it should also include a recitation concerning any and all disputes which occurred during the course of the probate between beneficiaries or others and the steps taken to resolve such disputes. In addition, the narrative section should include information regarding adjustments to inventory, advancements, partial distributions, disclaimers, lapses, elections against the Will by a surviving spouse, or any other information regarding the condition of the estate.

The narrative section must also include a statement regarding whether any claims remain unpaid and whether the Personal Representative is aware of any further debts, obligations or claims. The narrative section must also include a statement or statements regarding computation of the Personal Representative's fee or whether such fee will be waived, and that remaining claims and expenses of administration will be paid out of the estate upon approval of the final accounting. Please also note that if the Personal Representative's fee exceeds the statutory schedule, the justification for the increased fee must be supported by Affidavit of the Personal Representative and noted in the accounting. UTCR 9.060(3). The narrative section should also include a request for the payment of reasonable attorney's fees as supported by an Affidavit or Statement of the attorney. *See* ORS 116.183; UTCR 9.060(2); UTCR 5.080.

The prayer should include a request for Court approval of the Final Account (and all prior Accounts); approval of Personal Representative's and attorney's fees requested, and any remaining administrative expenses such as tax preparation fees; authorizing final distribution to the persons or entities entitled thereto in the proportions to be distributed pursuant to the will or intestate succession and confirming any interim distributions; discharging the Personal Representative; exonerating the bond (if one has been filed); and closing the estate upon filing of receipts evidencing distribution of the estate in conformity with the Court's Judgment.

The second section of the final accounting includes exhibits referenced in the body of the Petition. The exhibits must contain information listing:

1. The assets for which the Personal Representative is chargeable according to the Inventory, an Amended or Supplemental Inventory or from a prior Accounting, if any. ORS 116.083(2)(b); UTCR 9.160(2);
2. All receipts of money and property by date, source and amount. ORS 116.083(2)(c); UTCR 9.160(3);

3. All disbursements made during the period covered by the accounting listing date, check number, payee, purpose and amount. ORS 116.083(2)(d); UTCR 9.160(3);

4. A summary of all property of the estate as of the ending date of the accounting. UTCR 9.160(2);

5. The Asset Schedule should contain 6 columns showing a description of each asset; value of each asset at beginning of accounting period; value and date of later acquired asset; value and date at disposition; current value of assets held at the end of the accounting period; and whether or not the asset is restricted, and the name and date of the order restricting or unrestricting any asset. The totals of each of the second through fifth column shall be included at the bottom of each of those columns.

6. Unless exempted, a voucher for each disbursement reported in the accounting must accompany the accounting as a separate exhibit or shall be attached to a cover page showing the case caption (UTCR 9.180(1)). Please note that because some banks will no longer provide original canceled checks back to the personal representative, a bank copy of the front and/or front and back of the check will be accepted by most courts;

7. Unless exempted from the requirement of filing vouchers, the accounting should include depository statements for each account maintained by the Personal Representative showing the beginning balance, unless one was submitted with a prior accounting, and the closing balance in the account within thirty (30) days of the end date of the accounting, or as of the date of closing for an account closed during the accounting period. UTCR 9.180(2). A depository is any entity holding assets of the estate, including banks, stocks, bonds, brokerages, mutual funds, or similar entities; and

8. An exhibit must be included for real property sales which includes a Seller's Closing Statement from escrow. UTCR 9.160(3)(d).

PRACTICE TIP: The practitioner should use his or her discretion in including documents as exhibits (other than those required by statute) that will be helpful to the court or beneficiaries in understanding the accounting or tasks performed by the attorney or personal representative. ORS 116.083(2)(f).

E. Attorney's Fees and Other Expenses of the Personal Representative

Another exhibit or attachment to the Personal Representative's Final Accounting and Petition for General Judgment of Final Distribution which must be included in the final accounting is an Affidavit or Statement prepared by the Personal Representative's attorney in support of the attorney's fees requested in the Petition. UTCR 9.060(2); UTCR 5.080; ORS 116.183. The Personal Representative is allowed all necessary expenses incurred in the care, management and settlement of a probate estate, including reasonable fees of appraisers, attorneys and other qualified persons employed by the Personal Representative. These expenses must be requested in the Final Account. However, please note that a partial award of such expenses, including fees, may be allowed prior to settlement of the Final Account, where the Personal Representative shows that the Final Account cannot reasonably be filed upon petition to the Court as indicated in ORS 116.183.

PRACTICE TIP: Multnomah County may allow for approval of up to one-half of total fees when requested in an interim accounting or petition for partial distribution.

With respect to attorney's fees, the Court will award reasonable attorney's fees after considering customary fees charged in the community for similar services, the time spent by counsel, counsel's experience in such matters, the skill displayed by counsel, the excellence of the result obtained, any agreement as to fees which may exist between the Personal Representative and the Personal Representative's lawyer, the amount of responsibility assumed by the Personal

Representative's lawyer considering the total value of the estate and such other factors as may be relevant. However, please note that no single factor is controlling. ORS 116.183(1).

In common practice, the attorney for the Personal Representative has the burden of proving that the fees requested are reasonable within the context of the specific probate. Attorney's fees may not be paid until they have been approved by Order of the Court. *See In Re: Altstatt*, 321 OR 324 (1995). Never pay the personal representative's attorney's fees without court approval.

The Attorney's Fee Statement or Affidavit filed in a probate proceeding provides the practitioner with an opportunity to explain to the Court and other interested parties why the practitioner is entitled to the fees requested in the Final Account. Although requirements for Attorney's Fee Statements or Affidavits vary from county to county, most Courts require a breakdown of the time spent by the lawyer or lawyers, law clerks, legal assistants and others, the hourly rate charged, the services performed and who performed such services. The narrative portion of the Attorney's Fee Request should include an explanation of the necessary tasks performed by the attorney in the course of estate administration. Any extraordinary factors or services provided by the attorney which increased fees should be set forth clearly in order to explain why the additional fees are being sought. In today's climate, practitioners should treat the Attorney's Fee Request as an opportunity to argue, explain and persuade the finder of fact that the attorney's fees requested are reasonable given the particular complexities and requirements of the specific probate administration performed.

PRACTICE TIP: Practitioners in Multnomah County should refer to the Supplemental Local Rule for additional reporting requirements in unusual circumstances, such as establishing and administering trusts, tax planning, preparation of tax returns, involvement with tax audits or hearings, preparation and filing of disclaimers, real estate management problems, sales of real property, operation or sale of business interests, management of family-owned corporations or closely held stock, contested matters, election of a spouse's marital share, and disputed creditors' claims. SLR 9.095(1)(B).

F. Personal Representative's Compensation

Compensation of the Personal Representative is determined under statute in Oregon. *See* ORS 116.173(1). This is the rule unless the decedent has made a special provision in his or her Will regarding compensation of the Personal Representative, in which case the Personal Representative is not entitled to any other compensation for services unless prior to appointment the Personal Representative signs and files with the Clerk of the Probate Court a written renunciation of the compensation directed under the Will.

The statutory formula states that the Personal Representative is entitled to compensation "upon application to the Court." ORS 116.173(1). If more than one Personal Representative is then acting, compensation will not be increased but shall be divided among those acting as Personal Representative as they may agree or as provided by Court Judgment. The compensation is determined by calculating the property subject to the jurisdiction of the Court (probate property) including income and realized gains and is computed as follows:

1. 7% of any sum not exceeding \$1,000;
2. 4% of all above \$1,000 and not exceeding \$10,000;
3. 3% of all above \$10,000 and not exceeding \$50,000;
4. 2% of all above \$50,000;

PRACTICE TIP: Most practitioners also include (and the statute allows) income earned during probate administration into the total fee to be computed.

5. 1% of the decedent's property, exclusive of life insurance proceeds, not subject to jurisdiction of the Probate Court, but reportable for federal estate tax or Oregon inheritance tax purposes. ORS 116.173(1)(b).

The statute also provides that in all cases, a Personal Representative may seek additional compensation for extraordinary and unusual services not ordinarily required in the performance of duties as a personal representative. ORS 116.173(2). Any fee requested by the Personal Representative above the statutory fee must be supported by Affidavit. UTCR 9.060(3). The Personal Representative's Fee Affidavit should set out the justification for the additional fees claimed.

G. Notice Requirements

Upon filing of the Final Account and Petition for General Judgment of Final Distribution, several steps must be taken before the practitioner can hope to obtain a General Judgment of Distribution. First, the Personal Representative "shall fix a time for filing objections thereto in a notice thereof." ORS 116.093(1). The deadline cannot be less than twenty days after the mailing of notice giving interested parties the right to object. The notice should clearly state the deadline for filing objections and must include the accounting together with any attorney or fiduciary fee affidavit on persons entitled to notice (UTCRC 9.060[4]) and be mailed to:

1. Each heir at the last known address of the heir, if the decedent died intestate.
2. Each devisee at the last known address of the devisee, if the decedent died testate.
3. Each creditor who has not received payment in full and whose claim has not otherwise been barred.
4. Any other person known to the Personal Representative to have or to claim an interest in the estate being distributed.
5. If the Department of Human Services, Oregon Health Authority, or the Department of Corrections or their authorized agent has presented a claim which has not been settled or paid in full, the Personal Representative must also mail a copy of the notice, together with the Final Account, to such agency. ORS 116.093(4).

Proof of mailing to those persons entitled to receive notice of the time for filing objections as set forth above must also be filed in the estate proceeding at or before approval of the Final Account. ORS 116.093(3). Any person entitled to notice provided under ORS 116.093 may file objections to the Final Account within the time set by the Personal Representative's notice. Any objections must be filed in the estate proceedings and must specify the particulars of the objections. ORS 116.103. Upon filing of objections to the Final Account, the Court will set a time for hearing the matter. The hearing will proceed as an action triable without a jury. ORS 111.205.

PRACTICE TIP: In cases where it is urgent that the Final Account be approved as soon as possible and the Personal Representative or others are unable to wait through the twenty day notice period, it is possible to expedite this process by obtaining signed waivers of the right to object. In order for this process to be available, the Personal Representative must secure signed waivers from all parties entitled to notice as set forth under ORS 116.093. The Personal Representative should submit the signed waivers of notice, together with the final accounting. ORS 111.225. When waivers have been obtained prior to submission of the Final Account, the practitioner should submit the Judgment Approving the Final Accounting and General Judgment of Final Distribution for approval at the time of filing the Final Account.

H. General Judgment Approving Final Account and Authorizing Final Distribution

Provided no objections are filed within the notice period or, if objections are filed, after hearing by the Court, the Court shall give its General Judgment of Final Distribution. ORS

116.113(1). The General Judgment must designate the persons in whom title to estate property will vest and the proportions to which each devisee is entitled under the Will, by agreement approved by the Court, or pursuant to intestate succession. Do not just say “Bill and George take” but rather specify what they will take (e.g. “Bill will receive 30% and George will receive 70% of the residue”).

Pursuant to ORS 116.113, the General Judgment shall also contain any findings of the Court with respect to:

1. Advancements;
2. Election against the Will by the surviving spouse;
3. Renunciation;
4. Lapse;
5. Adjudicated controversies;
6. Partial distribution, which shall be confirmed or modified;
7. Retainer;
8. Claims for which a special fund is set aside and the amount set aside;
9. Contingent claims that have been allowed and are still unpaid;
10. Approval of the Final Account in whole or in part.

If final distribution is to follow the terms of a settlement agreement, rather than the decedent’s Will or intestate succession, the General Judgment should specifically approve such settlement agreement. In such case, the General Judgment will act as a transfer of the probate property between the parties to the agreement as indicated in the General Judgment. ORS 116.113(3).

PRACTICE TIP: The General Judgment of Final Distribution should include a detailed list of the property and assets to be distributed, including the legal description of all real property to be distributed. Please note that a Personal Representative’s Deed must be recorded in the Deed Records of any county where real property belonging to the estate is situated.

PRACTICE TIP: The format of judgments submitted electronically to the court has changed slightly. More space is now required between the body of the judgment and the line for the judge's signature. Date lines should no longer be included, nor should the designation of "Circuit Court Judge" beneath the signature line. These items will be indicated by the court.

PRACTICE TIP: A certificate of compliance with UTCR 5.100 must now be attached to all judgments submitted to a court for the judge's signature. Even in undisputed matters, the certificate of compliance must be included and the option selected that indicates there is no statutory requirement to serve the proposed judgment on anyone prior to its approval by the court. **NOTE:** In Multnomah County, the certificate of compliance must be submitted as a separate document but in the same envelope that includes the proposed judgment. Every other county in the state complies with the wording contained in the chief justice's order amending UTCR 5.100, which requires that the certificate be attached to the proposed judgment itself and submitted as a single document.

To the extent that the Personal Representative’s Final Account is approved, the Personal Representative and the surety of the Personal Representative, if any, are relieved from liability for the administration of the Trust. ORS 116.123. Of course, the Court may disapprove the Account, in whole or in part, surcharge the Personal Representative for any loss caused by any breach of duty and deny in whole or in part the right of the Personal Representative to receive compensation. In

addition, the General Judgment Approving the Final Account and Authorizing Final Distribution is subject to the right of appeal; to the power of the Court to vacate final orders and to the provisions of ORS 116.213 relating to discharge obtained by fraud or misrepresentation of the Personal Representative.

III. STATEMENT IN LIEU OF FINAL ACCOUNT

A. Time and Method for Filing

Provided all claims against the estate have been resolved or paid and all creditors of the Decedent or of the estate have been paid in full, other than creditors owed administrative expenses that require court approval, and further provided that all distributees of the estate consent in writing, the Personal Representative may file a Statement in Lieu of a Final Account. ORS 116.083(4). This Statement was commonly referred to by practitioners as a “Short-Form Final Account.” Prior to 2008 it was also referred to as a “Verified Statement.”

PRACTICE TIP: Do not call it a “Short-Form Final Account” unless you are prepared to pay the filing fee required when filing an accounting.

Practitioners please note, the following counties now require electronic filing of the accounting: Benton, Clackamas, Clatsop, Columbia, Coos, Crook, Curry, Deschutes, Douglas, Gilliam, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Sherman, Tillamook, Wasco, Wheeler, and Yamhill circuit courts. Washington County will require e-filing beginning May 31, 2016. Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, and Wallowa counties will require electronic filing beginning August 29, 2016.

B. Statutory Requirements

Under ORS 116.083(4), the Statement must include the following:

1. The period of time covered by the statement;
2. A statement that all creditors have been paid in full (except administrative expenses which require prior court approval, including tax returns not yet due);
3. A statement that all Oregon income, inheritance and personal property taxes, if any, have been paid, or if not so paid, that payment of those taxes has been secured by bond, deposit or otherwise and that all required tax returns have been filed; and
4. A Petition for a General Judgment authorizing the Personal Representative to distribute the estate to the persons and in the portions specified in the Petition.
5. A declaration under penalty of perjury in the form required by ORCP 1E.
6. All devisees consent in writing.

C. Practice Tips on Form and Contents

A Statement in Lieu of Final Account reduces the amount of work the practitioner must perform in order to close a probate estate. No accounting, narrative or exhibits (including vouchers) need to be filed. In addition, the Personal Representative is not required to provide notice of time for filing objections to the Statement.

There are several requirements, however. First, make sure that all distributees agree. You cannot use a Statement in Lieu of Final Account if all heirs or devisees do not consent in writing. This is easier to do when the personal representative is also the sole devisee. It may be risky to do when there are devisees who are not aware of bills, claims, payments made and other steps taken in administration that would only be disclosed in a full accounting.

PRACTICE TIP: Some attorneys have a meeting with the heirs or devisees and make full disclosure of all transactions before obtaining written consent. Note that if the estate is insolvent, you cannot use a Statement in Lieu of Final Account but must instead file a full final account and provide notice to all unpaid creditors.

The Statement should include a statement of the Personal Representative's fee and any expenses, including attorney's fees which are requested. As is true in a regular Final Account, attorney's fees requested must be supported by affidavit or statement of the attorney. If the Personal Representative's fee is waived, such waiver should be noted. If the fee requested by the Personal Representative exceeds the statutory schedule, support for the additional amount claimed including justification for any extraordinary fee must be provided by way of a Personal Representative's Affidavit and noted in the Statement.

If final distribution is to be made according to a settlement agreement, rather than according to decedent's Will or pursuant to intestate succession, those facts should be noted and the agreement attached to the Statement. As noted above, filing a Statement eliminates the 20 day waiting period otherwise required under ORS 116.093, since the beneficiaries are waiving their right to notice. Remember to obtain the beneficiary or devisee's consent and waiver of the right to file objections in the Statement itself or by separate waiver document. A General Judgment Approving Final Account and Authorizing Final Distribution should be filed at the same time as the Statement, since no waiting period is required.

IV. RECEIPTS AND CLOSING THE PROBATE ESTATE

A. When to Obtain

After the practitioner has prepared and filed the Final Account and obtained a General Judgment Approving Final Account and Authorizing Final Distribution, it is appropriate for the practitioner to begin the process of paying approved administrative expenses and distributing estate assets to the beneficiaries entitled thereto according to the terms of the Court's Judgment. In making any and all distributions from a probate estate the practitioner should be careful to obtain receipts, or receipts and releases (as necessary) signed by the distributees or creditors entitled to the property. As is indicated above, this is true at the time of final distribution of estate assets, however, please note that receipts should be obtained whenever distributions of property or assets are made from an estate.

PRACTICE TIP: A letter should accompany distribution checks, which shows any receipt and disbursement transactions which occurred after filing of the final account and shows how the final distribution was calculated.

B. Form to Use

Each beneficiary of a probate estate should sign a receipt stating that the beneficiary acknowledges receipt of his or her distributive share from the estate. In addition, the Personal Representative of the estate should sign a receipt indicating payment of Personal Representative's fees and the attorney for the Personal Representative should sign a receipt indicating payment of attorney's fees and costs. If creditors are paid, they should also sign receipts acknowledging full payment of their claims.

While the receipts to be signed by the Personal Representative and his or her attorney may be relatively simple and only need contain language acknowledging the specific payment received, the author believes that the form of receipt to be signed by estate beneficiaries and creditors should also include release language.

Since the attorney conducting the probate represents the Personal Representative in his or her fiduciary capacity, it is important for the attorney to seek protection for the client. Properly drafted Receipts and Releases help to insulate and protect the Personal Representative from future claims of beneficiaries or creditors.

Because it is no longer possible to obtain an income tax release from the State of Oregon or obtain a statement from the taxing authorities that all required taxes have been paid, it may also be

important to obtain indemnification from estate beneficiaries which is specific as to the decedent's or estate's unpaid income tax liability, if any. The Personal Representative may be personally liable for failure to file returns and pay taxes. *See* ORS 116.063; 118.210. Indemnification in a Receipt and Release can help to spread the risk assumed by Personal Representatives in making distributions prior to expiration of the applicable statute of limitations or where returns may not have been filed due to a mistake or incorrect information regarding income earned by a decedent.

C. Effect of Signed Receipt

Signed receipts evidence the beneficiaries', Personal Representative's, attorney's, creditor's, or other parties' receipt of the property, assets or payment to which they are entitled pursuant to approval and allowance by the Personal Representative, or Court Judgment. In addition, indemnification and release language will limit or prohibit a distributee who has accepted payment of a claim, or their distributive share from making additional claims or demands on the Personal Representative.

Where the distributee fails to sign the receipt, or receipt and release, other evidence of the distributee's receipt may be submitted to the court as evidence of the distribution. With respect to distributions made by check, the Personal Representative may file the distributee's canceled check with the court. With respect to real property, a copy of the recorded deed or assignment may be used in place of a receipt. Finally, the court may require an affidavit from the Personal Representative, or his or her attorney setting forth any and all unsuccessful attempts to obtain a receipt from a distributee.

D. Supplemental Judgment Closing the Estate

Once receipts or other evidence showing that all distributions (and payments) have been made in accordance with the terms of the General Judgment of Final Distribution have been obtained and filed, the Court shall order that the estate be closed and the Personal Representative be discharged from further duty. The Supplemental Judgment Closing the estate and discharging the Personal Representative operates as a release of the Personal Representative from further duties and as a bar to any action against the Personal Representative and the Personal Representative's surety. ORS 116.213. There are exceptions, however, to the discharge granted by the Court. The Personal Representative is not relieved from the duty to file the estate's final fiduciary income tax return. Other exceptions are noted in ORS 116.213 and ORS 115.004.

The Supplemental Judgment discharging the Personal Representative is a bar to any action against the Personal Representative or the Personal Representative's surety unless the Discharge was taken through fraud or misrepresentation of the Personal Representative or the surety, or through mistake, inadvertence, surprise, or excusable neglect of the claimant. ORS 116.213. In addition, the Supplemental Judgment discharging the Personal Representative is not a bar to an action against the Personal Representative or the Personal Representative's surety where a creditor's claim or any part thereof has not been paid as a result of a breach of the duty imposed by ORS 115.003 on the Personal Representative.

After a probate estate has been closed, the Court is empowered to reopen the estate upon the Petition of any interested person, if other property is discovered, if any necessary act remains unperformed or for any other proper cause. The Court may reappoint the former Personal Representative, or appoint another Personal Representative to administer any additional property or perform such other and additional acts as are considered necessary. A claim that has already been adjudicated or barred may not be asserted in the reopened administration. ORS 116.233.

PRACTICE TIP: As with the general judgment of distribution, a certificate of compliance with UTCR 5.100 must now be attached to the supplemental judgment

when it is submitted to a court for the judge's signature.

©2016 The Elder Law Firm

Important Notice: *This article or outline contains general information. It does not provide legal advice about a particular situation. Unless otherwise noted, this article or outline has not been updated or revised to reflect changes in statutes, administrative rules, or case law following the date when it was first published.*