BUSINESS BRIEFS

Legal Developments Affecting Business

Saalfeld Griggs PC

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The Family Meeting: An Integral Part of the Estate Planning Process
By Robert J. Saalfeld

You have signed all your estate plan documents. They are even up to date. Congratulations, you have completed everything. Or have you?

Have you explained at least the basics of your estate plan to your family? Do they know what they may need to do if you become incapacitated or die? Do they know who you have named to administer your estate? Will they forever ponder or even misunderstand why you made certain decisions? Will that misunderstanding cause strife among your children when you are gone?

A family meeting can provide answers to these questions, reduce family squabbles, and make the process smoother. In the olden days of estate planning, parents typically didn't tell their children anything about what was in the will. Rather, they just let it be a surprise after their death. Now days, many families are using the family meeting as a valuable part of the estate planning process. Consider the following tips to have a successful family meeting:

1. Select an appropriate place. Probably not a restaurant, for instance.
2. Have an agenda of topics and send it out beforehand. Most clients do not invite the in-laws to this meeting.
3. Consider having your key advisors present so they can be introduced to your children.
4. Although there may be some initial anxiety, encourage open communication and questions.
5. Tell everyone who you have named as successor trustee and/or personal representative. Go over the duties of this person or corporate trustee, as the case may be. Inform the trustee/personal representative where you keep important documents.
6. Tell everyone who you have named as your health care representative. This is the person who will make health care decisions if you are unable to do so. Discuss your wishes regarding issues like life support decisions.
7. Tell the children you love them all equally. Some folks forget this part, but I think it is important. Your estate planning documents are important documents, but they don't always convey information such as this.
8. You don't necessarily need to tell your children exactly how much to expect, but provide a general outline of how your assets will be divided.
9. Be prepared to explain why you may have made any unequal distributions, such as the family business going to the child working in the business, or why one child's share is to be managed for them in a trust. This can be a hard conversation to have, but it can reduce the chance of litigation later.
10. Address how outstanding loans to children will be handled, such as being treated as an advance on the borrowing child's inheritance.
11. Discuss how any death tax will be paid. Discuss your suggestions as to which assets might be sold first. The family meeting may highlight a need to do further planning to reduce death tax.
12. Discuss how ownership of any vacation home will be handled. Sometimes this goes to one child as part of their share, and sometimes it goes to multiple children and they co-own it, either as tenants in common or in an LLC. The

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views children express regarding the vacation home ownership may influence how you ultimately decide to deal with this asset.
13. Discuss the mechanics of how tangible personal property will be distributed.
14. Take the opportunity with all the children present to provide some moral guidance and reiterate what family values you hope the children will embrace as they continue with their lives after you have gone.
15. Ultimately, you have to tell the children you love them all, it is your money, you have done what you should do, and you hope they accept it and get along.

You've spent time, energy, and money developing your estate plan. Having a family meeting can help ensure that your loved ones understand the key information so that your plan can be carried out successfully. If you are interested in discussing a family meeting, please call our estate planning group.

An Employment Law Perspective on Measure 91: It's Still Illegal
By David M. Briggs

In the waning days of the election, we were frequently asked by employers what the passage of Measure 91 would mean for their business and their drug policies. With the election night results, the issue hits home with a bit more impact. Many employers have adopted a zero tolerance drug and alcohol policy, which prohibits employees from the illegal use of drugs, including marijuana (even when prescribed). Many workers are under the impression that Measure 91 will force employers to change those policies. Are they right?

There is good news for employers. Measure 91 specifically provides that the law shall not be construed: "To amend or affect in any way any state or federal law pertaining to employment matters." Given that the measure does not change existing law, the existing law in Oregon is quite favorable for employers who wish to enforce their zero tolerance policies. In 2010, the Oregon Supreme Court looked at whether an employer was required to continue to accommodate a worker who tested positive for marijuana, which the employee was using for medicinal purposes per a medical marijuana card. In that case, a steel company fired an employee who tested positive for marijuana. The employee sued, arguing that the company was required to accommodate his disability by making an exception to its drug and alcohol policy. In upholding the company's zero tolerance policy, the Court reasoned that marijuana is still a Schedule I controlled substance under the Federal Controlled Substance Act, along with cocaine, heroin and other drugs that have no medical use. In other words, use of marijuana, even if used for medicinal purposes, remains illegal under federal law.

The Court's 2010 decision allows employers to enforce their zero tolerance policy even though medical marijuana is legal in Oregon. In the steel company case, the Court could have held that an employer's obligation to accommodate an employee's disability supersedes the employer's right to impose a zero tolerance drug policy (in fact, the Oregon Court of Appeals did just that prior to the Supreme Court's decision). Instead, the Court upheld the zero tolerance policy, because the use of medical marijuana is illegal under federal law. The same analysis should apply to recreational marijuana, where there is an even weaker justification for tolerating an employee's use of marijuana. Moreover, in some industries, such as for certain federal contractors, you may be required to certify that certain employees or your entire workforce is drug free, including marijuana.

Another way to think about employee's use of marijuana is that there are many activities that are perfectly legal, but might still result in an employee getting terminated, if the employer can show a reasonable business justification. After passage of Measure 91, recreational use of marijuana will be lawful under state law. But, employees may still be fired for using it, even if the use is on the employee's own time, because employers have an interest in requiring employees to follow federal drug laws and are rightfully concerned about safety, productivity and other job requirements that may be affected by employee drug use.

Employers should have their drug and alcohol policies regularly reviewed and discuss the risks of enforcing those policies with legal counsel. But, the good news is that because marijuana use remains illegal under federal law, at least for now, employers can continue to enforce their zero tolerance drug and alcohol policies. For questions about these legal developments or other issues of interest, please contact our Employment Law Team. The information contained in this report is current as of December 31, 2014, and is not intended as legal advice. This information is considered accurate but is not guaranteed.

Conservation Easements
By Stephanie Schuyler

Conservation easements offer landowners the opportunity to maintain the natural characteristics of their land without foregoing income. Landowners who own natural, open space, agricultural, forest, recreational or historical land may be able to obtain a conservation easement and receive tax benefits both now and in the future.

Overview of Conversation Easements
A conservation easement is a legal agreement between a landowner (the "grantor") and a public agency or nonprofit corporation, typically a land trust (the "grantee"), that permanently limits uses of the land in order to protect its conservation values. Conservation easements allow landowners to continue to own, live on, and use their land while protecting important natural resources.

A conservation easement restricts the type and degree of future development on the property. For example, an easement on farmland may prohibit the construction of new buildings while preserving the right to grow crops, and an easement on land that includes wildlife habitat might exclude any type of development whatsoever. An easement may or may not provide for public access to the property. Land covered by a conservation easement can be sold or passed on to heirs, but future owners will be bound by the terms of the easement. The easement is recorded in the local land records and becomes a part of the chain of title for the property.

Conservation easements are not one-size-fits-all, and each one is constructed to fit the characteristics of the natural resources being conserved, the needs of the landowner, and the objectives of the grantee. Easements can be designed to apply to just a portion of the property. It is important that the landowner reveal any future development intentions to a potential grantee to ensure that the easement can be appropriately crafted to take these goals into consideration.

Conservation easements are usually donated. However, certain grantees (like Ducks Unlimited or the Nature Conservancy) will occasionally purchase easements if the reasons are compelling enough. The grantee is responsible for making sure the easement's terms are followed. Typically, monitoring visits occur once a year, but they may occur more frequently when the easement is vulnerable to frequent violations (e.g. sensitive natural areas). Monitoring procedures are established during easement negotiations and should not result in surprise or intrusive site visits.

Special Assessment/Tax Benefits
Depending on the terms of the easement, the landowner may receive a variety of tax benefits, ranging from lower property taxes to a deduction for the charitable donation. Once a conservation easement is granted, the grantor can apply for Conservation Easement Special Assessment. In order to qualify, the land must have a recorded conservation easement that demonstrates the land is capable of meeting the requirements for being considered exclusively for conservation purposes under section 170(h) of the Internal Revenue Code. The easement must be granted in perpetuity. A written certification must be filed with the county assessor stating that the easement satisfies these requirements. An additional tax may be extended for any land removed from Conservation Easement Special Assessment and added to the next general property tax roll. A landowner considering granting a conservation easement should seek the advice of legal and tax counsel to

determine the possible income, estate, and property tax benefits of such a donation.

Overview of Some Oregon Grantees
Because conservation easements lead to a long-term relationship between the landowner and the grantee, it is important that the landowner find a grantee with conservation goals similar to his or her own. For example, some land trusts specialize in particular land types, such as rangeland, agriculture, natural or historical areas. Landowners may wish to research and meet with several land trusts to determine their options and find the best fit for them and their family prior to making any legal commitments.

Below is an overview of some accredited land trusts in Oregon. A nationwide list of land trusts can be found at: www.landtrustalliance.org.

The Wetlands Conservancy
Conservation Goals: Promoting community and private partnerships to permanently protect and conserve Oregon's greatest wetlands.
Geographic Scope: Oregon

Oregon Rangeland Trust
Conservation Goals: Preservation and protection of land in its natural, scenic, historical, agricultural, rangeland, wildlife habitat, recreational and/or open space condition. Geographic Scope: Oregon

Greenbelt Land Trust
Conservation Goals: Conservation of properties of ecological significance in the mid-Willamette Valley and the protection of properties of community-wide value, particularly scenic properties in and near Corvallis and Philomath.
Geographic Scope: Benton County and mid-Willamette Valley

Conservation easements can be an effective tool for conserving private land, and they are increasingly being used to protect working farms and forests while managing growth. If you would like assistance in analyzing whether a conservation easement might be right for you, contact an attorney in our Real Estate and Land Use Group.

Social Media Use Policies Can Provide Unexpected Benefits to Small Businesses
By Eric J. Tweed

For many businesses, social media is a relatively easy and inexpensive way to reach and engage with customers. In minutes a business can be off and running in the social media world with Twitter, Facebook and other similar "free" services. Given the ease of signing up for these services, many businesses see social media as an afterthought to their day-to-day operations. Here are a few important issues to consider before your business delegates its social media presence to an employee.

Who Owns the Social Media Account?
One might think that an employer would own a social media account created by an employee on work time and for work purposes. It may not, however, be that simple.

In a recent case that eventually settled out of court, an employee of a business was tasked with managing the company's Twitter account. The Twitter handle represented the company and the employee engaged over 17,000 followers. Unfortunately for the company, the employee soon severed the employment relationship. The employee changed the Twitter handle and password, and took with him the account and the 17,000 followers, which the company viewed as a valuable customer list.

Motions to dismiss the case were denied because, in the absence of an agreement, ownership of the account was unclear. The details of the settlement were not released, but the former employee is still using the Twitter account.

Situations like this can be avoided with clear social media use policies and/or agreements. These policies should require employees to acknowledge that any social media accounts created for work purposes are owned by the company and that use by the employee will cease if the employment relationship terminates. Additionally, polices should require that social media passwords be maintained by the company.

Consider "Work-For-Hire" Agreements for Content Creators
Along with user generated content like Twitter or Facebook, many companies also host blogs. Whether content is created in-house or by third parties, a business should consider if it is important to own the content on the blog. It is likely that the business is incurring some cost to create and maintain the blog. Owning the copyright to the blog post will ensure that the writer cannot take the work and publish it elsewhere.

To ensure a blog post is owned by the business, all non-employee contributors must sign a "work-for-hire" agreement. These agreements transfer ownership of the work to the business, giving the business all of the rights associated with ownership.

Remember that even if content is created as "work-for-hire" you may attribute the work to the creator or author while still owning all the rights. A clear agreement with the contributor is the key to establish ownership and attribution rights.

Mandatory Disclosures
It is hard to say a lot with 140 characters. Still, consumer protection laws apply to social media just as they do any other advertisements. Generally, advertising must be truthful and not misleading, any claims must be backed by evidence, and advertisements must not be unfair to consumers.

For example, any necessary disclosures that are required on other forms of advertising are required in social media advertising as well. Additionally, disclosures must be clear and conspicuous. For instance, if someone is paid to promote your product on social media or a blog post and it is not clear that the spokesperson is paid to make certain claims, then you might consider disclosing this fact in the space available.

Social Media and Your Trademark
The purposes of a trademark are to protect consumers by making the source of a product clear and protecting a producer's investment in its reputation and goodwill. The social media landscape is vast. As a result, preventing trademark infringement can be difficult. Moreover, enforcing trademark rights is largely up to the trademark owner. The rights associated with a trademark are only applicable if they are enforced. If they are not, the trademark owner risks the possibility of losing the rights associated with the registered mark.

Consider a situation where a disgruntled customer creates a Twitter account that could easily be mistaken as your own. In theory, Twitter has the ability to shut these accounts down, but in reality this is unlikely to happen except in the most egregious cases. Accordingly, it is best practice to regularly patrol social media for potential trademark infringement. Our attorneys are available to help your business develop social media use and enforcement policies.

Surprise! Secured Creditors Own Real Property Surrendered in Bankruptcy
By Stephanie B. Schilling

Secured creditors are in for a surprise when they read In Re Watt from the US Bankruptcy Court for the District of Oregon. The Court held that USC Sec. 1322(b)(9) of the Bankruptcy Code does not restrict a court from vesting real property in a bank's name when it is the primary secured creditor, even if the bank does not consent. Essentially the court found that there is no difference between surrender by the debtor and surrender with vesting. While the case ruling is broad, Judge Brown found an exception applies if the borrower/debtor surrenders the real property in bad faith. Bad faith is present, for example, in cases of nuisance or environmental problems.

Judge Brown's view of public policy relating to Home Owners Associations (HOAs) and maintenance of properties drove her decision. When a property remains vacant it can fall into disrepair and may be vandalized, which drives down property values. In addition, under Oregon law until the property is out of the borrower/debtors name, they will remain liable for all post-petition bankruptcy HOA dues. The costs of maintenance and unpaid assessments are passed on to other members of

the HOA who have remained in their homes. By forcing vesting upon the secured creditor, the court appears to believe it is helping a debtor obtain the "fresh start" sought by the debtor when filing bankruptcy and helping the HOA by forcing a secured creditor to assume liability for the HOA dues and maintenance of the property.

The case ruling is intended to deter delayed foreclosures by secured creditors. To avoid unwelcome surprises, carefully assess whether you wish to obtain title to the real property before seeking relief in the bankruptcy case. Obtaining relief early in the case may have been a factor that supported forced vesting in Judge Brown's opinion. In addition, you should communicate any reasons for a delay with debtors in default, and bankruptcy counsel, if applicable.

As a result of the ruling, a secured creditor must more carefully evaluate Chapter 13 bankruptcy petitions of debtors under the bankruptcy code. If a borrower/debtor seeks to surrender real property and force vesting in the Chapter 13 plan, a secured creditor could find itself with a surprise gift of title to the surrendered real property, together with all the legal and regulatory ramifications that may follow. If you need help, our Creditors' Rights and Bankruptcy team would be happy to advise you.

FIRM FEATURE: Winery, Brewery & Cidery Industry Group

Crisp apples. Fragrant aromas. Warm people. This is Cider season. And these are the things we like about the work we do with clients in the Winery, Brewery & Cidery industries. Our team has blended a knowledge of legal issues with the intricacies of doing business in both the cider industry and the agri-business industry. Our work with many established and respected clients has given us insights other attorneys don't enjoy.

During our recent work with EZ Orchards Cidre brand, cider maker Kevin Zielinski, generously gave us a tour of the production facilities and shared about the increase in demand of his "artisanal" ciders made in the old world tradition (think "fruit wine – apple or pear – with a touch of effervescence").

Kevin Zielinski, cider maker, near one cider apple orchard.

"We started experimenting with artisanal cidermaking in 2003. By 2009, we produced and sold 450 cases. This year we're on target to produce 8000 cases to sell in 15 states," said Zielinski. "The demand is greater than ever because of an increased knowledge about artisanal cider, and the desire for alternatives to beer and wine."

Zielinski discusses his Cidre, Hawk Haus, and Poire offerings.

We assist clients in navigating the legal landscape that cideries, wineries, and breweries experience from start-up through a sale or generational transfer. Whether this involves entity selection, trademark registration, contract negotiation, or real estate acquisitions, sales, or leasing, we have the experience and professional contacts to guide businesses in this industry.

Firm Announcements & Seminars

Our firm has officially moved into **a new reception and meeting room space** on the second floor of our building. This expanded space allows our clients and guests easier access to meeting rooms, a comfortable lounge space, and a hospitality room for breaks during lengthier meetings or depositions. We also have a larger conference room for in-house client seminars and events, as well as in-house training.

We will host an open house of our new space on Thursday, January 22 from 4pm – 6pm. We hope you'll plan to join us!

The Employment Law group will present to various groups on the following topics:

- Drug Policies, in-house seminar, January 7. Call Kayla if you'd like to attend.
- Workplace Investigations, Marion Polk Medical Society, January 14
- How to Avoid Wrongful Termination Lawsuits, Oregon Farm Bureau, January 20 and 21
- Legislative Update, Mid-Willamette Human Resources Association, Albany, February 11

Caleb Williams will present at **CiderCon 2015**, the annual conference of the US Association of Cidermakers, in Chicago, Feb 3-6. The topic is key legal issues from start-up to exit planning.

The attorneys of the **Estate Planning** group will host a presentation on February 18 for current clients and their Successor Trustees. If you are a client and would like to attend, please contact your attorney.

We would like to extend a warm welcome to our new associate attorneys.

Stephanie Schuyler joined the Real Estate & Land Use group this past summer. She recently graduated from Willamette University College of Law. Stephanie assists the partners in the group with the representation of clients — including commercial, agricultural, and residential – with leases, sale agreements, options to purchase, easements, development agreements, and the drafting, recording, and assigning of CC&Rs.

Eric Tweed joined the Corporate Law group, after graduating from Willamette University College of Law. He assists clients of all types with entity selection and formation, mergers and acquisitions, restructuring and reorganization of corporate and partnership enterprises, contract negotiation and drafting, and matters involving intellectual property.

Catherine Trottman joined the Employee Benefits group this fall after graduating from University of Oregon School of Law. She assists public and private sector employers in establishing and operating qualified retirement plans, including 401(k) plans, 403(b) plans, traditional defined benefit plans and cash balance plans. Her practice area also includes preparation and administration of Qualified Domestic Relations Orders (QDROs).

Stephanie Schilling is a welcome addition to the Litigation group's Creditors' Rights & Bankruptcy practice. After graduating cum laude from Thomas M. Cooley Law School in Michigan, she has worked in public and private positions in the Portland area for the past four years. Stephanie assists partners in the representation of businesses, individuals, and financial institutions in creditor's rights matters ranging from foreclosure of both real and personal property interests to bankruptcy and enforcement of liens.

The firm is proud to support many organizations in the mid-Willamette Valley and their activities.

- **SAIF's Agri-Business Banquet** –
  Join us on January 23 at the Salem Convention Center for the annual celebration of the continued contribution of agriculture to a strong local economy in the mid-Willamette Valley. For information, please contact the Chamber of Commerce or visit www.salemchamber.com.
- **Home Builders Association of Marion & Polk Counties "Off the Clock" Dinner** –
  On February 10, Saalfeld Griggs will host this networking event. Connect with your fellow association members; register at www.homebuildersassociation.org.

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