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Oregon Stewardship Trusts

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I. Introductory Summary

The goal of the proposed legislation is to create a structure in the Oregon Uniform Trust Code for a type of purpose trust to be called a stewardship trust. Although the Oregon Uniform Trust Code already provides for purpose trusts, some of the restrictions on purpose trusts limit their usefulness in business succession planning. In addition, providing statutory default rules for stewardship trusts will help guide businesses that can benefit from this new form for holding business property.

II. History of the Project

The idea for this bill grew out of a perceived need for a new structure for businesses engaged in succession planning. The founders of a mission-driven, for-profit company might want to ensure that its mission will continue along with its business activities, even after the founders retire. The owners of a family business might want to sustain the business's connections with employees and the community into the future. No existing form of business structure will protect a company's mission indefinitely, because future owners can change the structure. Even a Benefit Corporation, which a for-profit business can use to incorporate a non-financial purpose into its business purposes, can be changed by future owners to the regular corporate form.

Some companies focus solely on financial returns, but other companies want to produce both financial benefits and mission benefits. These companies may also want to allow those who are actively engaged in the business to have decision making authority. Founders may not want the company to lose the non-financial benefits and may not want distant shareholders and managers to take control of the business. These concerns over protecting mission and maintaining local control led to the development of a proposal for a new structure.

The bill creates a new trust structure for Oregon. The structure uses a purpose trust, called a stewardship trust, to hold the business, for the purpose of carrying on the business for both financial and non-financial purposes. The structure involves a trust (holding the business as trust corpus), a trustee (with legal title to the assets in the trust), a trust stewardship committee (to run the business and advise the trustee), and a trust enforcer (to enforce the trust). The profit of the company is reinvested in the company and distributed to stakeholder groups at the direction of the trust stewardship committee. Depending on the business, distributions could be made to employees, customers, the community, or investors holding non-voting preferred stock. Income tax consequences are kept at the company level, and

should not flow up to the trust level. The goal is to create a structure that will allow a business to be successful commercially while being responsible to employees, local communities, and the overall mission of the business. The long-term success of the business may involve non-financial as well as financial values.

When Oregon enacted the Uniform Trust Code (UTC), Oregon adopted a provision authorizing a purpose trust, ORS 130.190. A purpose trust is a noncharitable trust without identified or identifiable beneficiaries. Traditionally a trust must have beneficiaries, unless the trust is a charitable trust created for a charitable purpose. Some purposes are not charitable, but are desirable for other reasons. For example, perpetual care of a cemetery plot is a beneficial purpose, but not a charitable one. Buying ice cream for children on the last day of school is a benevolent purpose, but not a charitable one. The UTC drafters permitted the use of purpose trusts to address the gap between charitable trusts and trusts with beneficiaries.

A trust usually must have beneficiaries because the beneficiaries enforce the trust. The trustee holds legal title to trust assets, and the beneficiaries hold beneficial title. The beneficiaries keep an eye on the trustee and can challenge the trustee if the trustee mismanages the trust or otherwise breaches the trustee's fiduciary duties. In a charitable trust, the Attorney General enforces the charitable purposes of the trust, on behalf of the public. Thus, for a purpose trust someone must have the authority to enforce the trust. ORS 130.190(2) provides that the trust instrument can name this enforcer, or if trust instrument does not name someone, a court will name an enforcer. Other than the requirement that a purpose trust have a purpose and an enforcer, the statutes provide no guidance about how a purpose trust should be structured.

A purpose trust can be used for any noncharitable purpose, so it can be used for a business purpose. However, a purpose trust created under ORS 130.190 is not attractive as a structure for holding a company. First, ORS 130.190 forces termination of the trust after 90 years. This provision follows Oregon's rule against perpetuities, which allows a trust to continue for only 90 years, unless the trust could continue longer under the common law rule against perpetuities. The common law rule would not apply to a purpose trust, so the statute requires the trust to terminate after 90 years. Second, ORS 130.190, like its UTC counterpart, gives a court the right to reduce the amount of property in a purpose trust. The UTC may have included that provision because the UTC drafters had in mind purpose trusts created for modest purposes such as the maintenance of cemetery plots.

Although a purpose trust could be created in Oregon, a large company considering the use of a purpose trust for succession planning would likely look to another state to avoid the two undesirable aspects of Oregon's purpose trust statute. An Oregon company could end up working with an out-of-state trustee, and trust business would be lost from Oregon. Representative Fahey agreed to sponsor a bill to try to create better rules in Oregon so that businesses that want to use this structure can keep their trust business within the state.

The group that created the proposal for an Oregon stewardship trust wanted to do more than just remove the two obstacles identified in ORS 130.190. The group wanted to create a

statutory structure that could guide companies considering this new form of ownership. The proposal creates a structure for a stewardship trust that protects the mission of a company using this structure, provides adequate mechanisms for enforcement of the purposes, and creates enough flexibility so that the managers of the business can adapt to changes over time. A business creating a stewardship trust can set its own rules in the trust instrument, providing additional instructions and directions. Most of the provisions in the statute can be changed, but a few provisions are mandatory for a trust to qualify as a stewardship trust and get the benefits of being a stewardship trust.

The bill does not change Oregon's purpose trust statute, ORS 130.190, and some trusts will still be created under that statute. A purpose trust will be subject to termination after 90 years and will be subject to reduction in size at the discretion of the court. For some trusts the purpose trust structure will be more appropriate than the stewardship trust structure.

The stewardship trust structure will enable mission-driven companies to protect their missions into the future, and the structure may be attractive to other companies concerned about succession planning. A family-owned company may want the business to continue past the death or retirement of an owner, but the owner may have no children or other family members who want to work in the business. The owner could sell the company, but if the company has ties to a community and valued employees, the owner may not want to sell, especially to a buyer from outside the community. The owner may instead want the company to continue operating as an independent company, providing jobs to the employees and valued goods and services to the community. The owner might consider creating an employee stock ownership plan, but that option can be complex and expensive to manage and may not provide the assurance of continuity the owner seeks.

I helped draft the proposal for this bill, working with Natalie Reitman-White, Vice President of Organizational Vitality and Trade Advocacy for Organically Grown Company, and Steven G. Bell and Penny Serrurier, attorneys with Stoel Rives LLP. Steven G. Bell, Penny Serrurier, and Natalie Reitman-White worked together to create a trust structure for Organically Grown Company to protect its mission and allow its founders to retire. Ms. Reitman-White is involved nationally and internationally with companies developing structures like the stewardship trust. I am a professor at the University of Oregon School of Law, where I focus on trust law and have done research work involving mission-driven businesses as investments. After Representative Julie Fahey indicated her interest in this idea, I joined with the others to help draft the proposal. We have sought input from the Estate Planning Section of the Oregon State Bar and from the Oregon Bankers Association. We have also benefitted from comments from Alexander Bove and Melissa Langa, lawyers in Massachusetts who use the purpose trust form to assist clients in business planning. Katherine Ryan, Legislative Director for Representative Julie Fahey, has been integral to this project.

In my opinion this legislation can put Oregon at the forefront for companies that want this type of structure. Companies in Europe are already using a trust structure to preserve mission, but the idea is not yet well understood in the United States. Oregon can become a leader in this

type of succession planning, for mission-driven businesses and for family businesses. The benefits are significant: an Oregon business will be able to create the structure under Oregon law and not rely on an out-of-state trust company to manage the trust; corporate fiduciaries in Oregon can develop a new source of business; and Oregon employees and communities will retain control of businesses that provide important goods and services in those communities.

III. HB 2598

The bill creates a stewardship trust as a new form of trust in Oregon. The other rules of Chapter 130, the Oregon Uniform Trust Code, will continue to apply to the trust and to the trustee of the trust, with additional rules specific to a stewardship trust set forth in the new provisions.

A stewardship trust will be a trust established for a business purpose, and the purpose can include both economic and non-economic benefits. The trust may hold interests in a business as a way of pursuing that purpose. The expectation is that the stewardship trust form will be used to hold a business that is, itself, organized as a corporation, partnership, or in some other legal form. The trustee of the stewardship trust will have legal title to the shares or partnership interests.

The trustee will have the usual duties of a trustee. In addition, the duty to inform and report that is owed to beneficiaries of a trust will be owed to the trust enforcer and the trust stewardship committee, because a stewardship trust has no beneficiaries.

A trust enforcer will enforce the purposes of a stewardship trust. The terms of the trust may name a trust enforcer and may set forth a process for naming successor trust enforcers. If at any time no person is acting as a trust enforcer, a court will name someone. The trust enforcer is necessary to the functioning of the stewardship trust.

A trust stewardship committee is also essential to a stewardship trust. The trust stewardship committee must have at least three members. The committee will be responsible for the oversight of the business held by the trust and is authorized to exercise all rights belonging to the trustee. The committee will also be responsible for directing distributions from the trust, if there are any. The expectation is that any profits from the business will be distributed or reinvested at the company level and will not flow through to the trust.

The trust stewardship committee has the authority to remove a trustee and appoint one or more successor trustees. The trust stewardship committee also has the authority to remove a trust enforcer. A successor trust enforcer will be appointed as provided in the terms of the trust, or if no trust enforcer is available and able to act, by a court.

The trust stewardship committee will guide the management of the business and will have more direct control than the trustee. For that reason, the trust stewardship committee must provide the trustee and the trust enforcer with annual reports and other information necessary for them to carry out their duties.

A stewardship trust is similar to a directed trust, and the trustee is authorized to follow directions from the trust stewardship committee. The trust enforcer and each member of the trust stewardship committee exercise authority as fiduciaries.

A stewardship trust can continue indefinitely, and the 90-year limit on trusts does not apply to a stewardship trust. Although the difficulty to amend the trust is an attractive feature of this new structure, if a modification becomes necessary, the trust enforcers and the trust stewardship committee, acting unanimously, can modify the trust. If the trust terminates, the terms of the trust can provide for the final distribution. If they do not, a court can order the distribution, consistent with the purposes for which the trust was created.