

# SUPREME COURT

## Media Release



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Cases decided July 29, 2021.

*In re Complaint as to the Conduct of Andrew Long*, (OSB 1779, 1786, 1787, 1788, 1809, 1831, 1832, 1833, 1864, 1875, 1876, 1877, 1886, 1887, 1888, 18129, 18170) (SC S067095)

On review from a trial panel of the Oregon State Disciplinary Board. Respondent is disbarred from the practice of law, effective 60 days from the date of the decision. Opinion of the Court Per Curiam.

Today, the Oregon Supreme Court affirmed the conclusion reached by the trial panel disbarring respondent. In a unanimous per curiam opinion, on *de novo* review, the Court concluded that respondent committed 44 violations of the Rules of Professional Conduct (RPC) by, among other things, intentionally converting client funds, failing to refund unearned fees, collecting illegal fees, failing to communicate with clients, neglecting matters, and failing to cooperate with the Oregon State Bar's investigations. After reviewing relevant case law involving similar misconduct and concluding that the aggravating circumstances substantially outweighed any mitigating factors, the Court determined that the appropriate sanction is disbarment.

*Estate of Evans v. Department of Revenue*, (TC 5335) (SC S067899)

On appeal from the Oregon Tax Court. Unpublished decision issued May 8, 2020. The judgment of the Tax Court is affirmed. Opinion of the Court by Justice Meagan A. Flynn.

Today, the Oregon Supreme Court held that the Department of Revenue did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it included the principal assets of a Montana trust in the taxable estate of a deceased Oregon resident who had interests in the trust that terminated upon her

death. The Court concluded that, given the decedent's status as an Oregon resident and the particulars of the decedent's rights under the trust, Oregon's taxation of the trust assets did not offend due process.

In the Oregon Tax Court case underlying the Court's decision, the estate of a deceased Oregon resident, Helene J. Evans, challenged the department's determination that the principal assets of a Montana trust must be included in Evan's taxable estate in Oregon. The trust had been created upon the death and under the will of Evans's husband, Donald Gillam, a Montana resident. Its principal assets were stocks and other intangible property held in Montana banks and investment firms. The trust terms, which had been judicially modified to allow Gillam's estate to designate the trust principal as "Qualified Terminable Interest Property" (QTIP) and use the marital deduction for QTIP property provided under the federal estate tax statutes, directed the trustee (also a Montana resident) to pay to Evans, during her lifetime, all of the income generated by the trust principal as well as such amounts of the principal that he, in his sole discretion, determined that Evans needed to live in her accustomed manner, and to pay whatever remained of the trust principal to Gillam's children when Evans died. At some point, Evans and the trustee entered into a settlement agreement under which Evans ceded her right to payments from the trust principal to support her accustomed lifestyle and certain other rights regarding the trust principal that she enjoyed under Montana law in exchange for a one-time payment of \$750,000 from the trust principal and stipulated monthly payments of \$10,833.33 for her lifetime. Evans moved from Montana to Oregon around the time of her husband's death in 2012 and remained an Oregon resident until her own death in 2015.

Because the trust assets had been deducted from Gillam's estate as QTIP, federal law, 26 USC § 2044, required that those assets be included in Evans's federal estate -- and they were. And because Oregon law directs that the value of a decedent's Oregon taxable estate is the same as his or her federal estate, ORS 118.010(3), Evans's estate (plaintiff) initially filed an Oregon estate tax return that included the value of those trust assets. However, plaintiff subsequently sought to revise the tax return to exclude the trust's principal assets, arguing that Oregon was precluded from taxing those assets because the state lacked the "minimum connection" to the assets that the Due Process Clause requires. In particular, plaintiff argued that a state may rely on a trust beneficiary's status as a resident of the state to tax the assets of an out-of-state trust only if the resident-beneficiary had some actual control over the management or disposition of the trust assets, and that Evans had not had any such control over the assets of the trust that was at issue. The Department of Revenue rejected that argument, and the Oregon Tax Court affirmed. Plaintiff then appealed to the Oregon Supreme Court.

In a unanimous opinion authored by Justice Meagan A. Flynn, the Supreme Court affirmed. The Court began by noting that, under the federal cases, a state must satisfy two due process requirements before it may impose its taxes on a person, property, or transaction. The Court explained that that requirement -- that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" -- is assessed in accordance with an overriding principle that a state may exercise its taxing power only in relation to the benefits and protections that it has conferred. The Court then observed that, with respect to the taxation of intangible property that exists outside of the taxing state, the relevant benefits and protections are those that the state offers to its residents who own or have similarly substantial interests in the property -- and that, in the specific context of an out-of-state trust whose beneficiary is a state resident, due process requires that the resident-beneficiary have "some degree of possession, control or enjoyment of the trust property or a right to receive that property" before the state can tax that trust property. *North Carolina Dept. of Rev. v. The Kimberley Rice Kaestner 1992 Family Trust*, \_\_ US \_\_, 139 S Ct 2213, 2222, 204 L Ed 2d 621 (2019)).

The Court then considered plaintiff's contention that, under the federal cases, a trust beneficiary in fact must have some actual control over the management or disposition of intangible trust assets before a state may use the beneficiary's status as a resident as a basis for taxing the trust assets. The Court rejected that contention, noting that the required minimum connection may also be based on the resident-beneficiary's possession or enjoyment or right to receive the property -- and holding that, in the case before it, Evans had had a large degree of *enjoyment* of the trust property by virtue of her exclusive rights under the terms of the trust. The Court therefore concluded that Oregon had the minimum connection to the trust assets that due process requires before Oregon may tax the assets and that the Tax Court had not erred in holding that including the trust assets in Evans's Oregon estate had not violated due process.

*Janae Sherman v. State of Oregon*, (CC 17CV35975) (CA A167156) (SC S067742)

On review from the Court of Appeals in an appeal from the Multnomah County Circuit Court, Kelly Skye, Judge. 303 Or App 574, 464 P3d 144 (2020). The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Chief Justice Martha L. Walters. Justice Christopher L. Garrett filed a dissenting opinion, in which Justices Thomas A. Balmer and Rebecca A. Duncan joined.

Today, the Oregon Supreme Court held that ORS 30.275(9) provides a uniform two-year statute of limitations for claims against public bodies and does not supersede other statutes that provide limitations on the commencement of actions or

render them ineffective under ORS 30.265(6)(d). Further, ORS 12.117 applies to all claims of child abuse, and ORS 30.265(6)(d) does not provide defendant with immunity from liability for such child abuse claims.

Plaintiff was in foster care until 2006 and alleges that she experienced various forms of abuse while in foster care. In 2016, she received a copy of her DHS file. Within two years after receiving her DHS file -- but more than 10 years after the abuse is alleged to have occurred -- plaintiff sued the Department of Human Services (defendant), asserting that she discovered from her DHS file that defendant had known about the abuse and negligently failed to protect plaintiff. Defendant filed a motion to dismiss plaintiff's claims, asserting that plaintiff's claims were barred by ORS 12.115, a statute of ultimate repose that bars all negligence claims brought more than 10 years after the negligent act occurred. Plaintiff argued that ORS 12.117 exempted her claims from the 10-year statute of ultimate repose because her claims involved child abuse. Defendant responded that ORS 30.275(9) -- which imposes a two-year statute of limitations from the date of the alleged injury for all claims involving public bodies -- superseded all other statutes that provide limitations on the commencement of actions, including ORS 12.117, so ORS 12.115 still barred plaintiff's claims. The circuit court agreed with defendant and dismissed plaintiff's claims as untimely. Plaintiff appealed, and the Court of Appeals concluded that the circuit court erred in dismissing plaintiff's claims. The Court of Appeals explained that ORS 12.115 does not apply to child abuse claims as defined in ORS 12.117, and, based on the text and context of each statute, ORS 30.275(9) does not supersede the exception to the statute of ultimate repose established in ORS 12.117. The Court of Appeals reversed and remanded. Defendant petitioned for review in the Supreme Court.

In an opinion authored by Chief Justice Martha L. Walters, the Supreme Court affirmed. As an initial matter, the Court recognized that ORS 30.275(9) establishes a uniform two-year statute of limitations that applies to all claims brought against public bodies under the Oregon Tort Claims Act (OTCA). The Court then considered whether ORS 30.275(9) serves an additional function and completely displaces other statutes that provide limitations to the commencements of actions. After examining the text, context, and legislative history of ORS 30.275(9), the Court concluded that the legislature intended ORS 30.275(9) to give effect to other statutes, such as ORS 30.265(6)(d), so ORS 30.275(9) does not supersede or render any other statute a nullity. Second, the Court examined whether ORS 30.265(6)(d) provides defendant with immunity so that ORS 12.117 does not apply to claims of child abuse against public bodies. The Court noted that the OTCA waives the state's immunity for civil tort claims, so no additional express waiver of immunity is required when a plaintiff brings a claim under the OTCA against a public body. Further, the Court reasoned that, given the text and context of ORS 12.117, the legislative history does not permit a reading of the statute that creates an exception for public bodies when the text of the statute does not create such an exception. Thus, the Court concluded that ORS 12.117 applies to all child abuse claims and that

ORS 30.265(6)(d) does not provide defendant with immunity.

Justice Christopher L. Garrett filed a dissenting opinion, in which Justices Thomas A. Balmer and Rebecca A. Duncan joined. Relying on the history of ORS 12.117(1) from its enactment in 1989 through several subsequent amendments, the dissent concluded that the legislature has intended ORS 12.117(1) to be a special statute of limitations for claims alleging child abuse. Because tort claims against state and local governments are governed exclusively by the statute of limitations in the Oregon Tort Claims Act, ORS 30.275(9), the dissent reasoned, the legislature would naturally have understood that ORS 12.117(1) would not apply to such claims, a conclusion supported by the legislative history and by the Court's decisions holding that statutes of limitations other than ORS 30.275(9) are superseded in claims against public bodies.