

Enrolled
House Bill 3077

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)

CHAPTER

AN ACT

Relating to elective share of surviving spouse; creating new provisions; amending ORS 114.555 and 116.133; repealing ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 20 of this 2009 Act are added to and made a part of ORS chapter 114.

ELECTIVE SHARE

SECTION 2. Elective share generally. (1) If a decedent is domiciled in this state on the decedent's date of death, and the decedent is survived by a spouse, the surviving spouse of the decedent may elect to receive the elective share provided by sections 2 to 20 of this 2009 Act. An election under sections 2 to 20 of this 2009 Act must be made before the death of the surviving spouse by the filing of a motion or petition in the manner described in section 4 of this 2009 Act. If a motion or petition is filed within the time specified in section 4 of this 2009 Act, and the surviving spouse dies before payment of the elective share, the personal representative for the estate of the surviving spouse may take all steps necessary to secure payment of the elective share under sections 2 to 20 of this 2009 Act.

(2) Any amounts received under ORS 114.015 are in addition to the elective share provided for in sections 2 to 20 of this 2009 Act.

(3) If a decedent dies while domiciled outside this state, any right of a surviving spouse of the decedent to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

SECTION 3. Amount of elective share. (1) Except as otherwise provided in sections 2 to 20 of this 2009 Act, the amount of the elective share is a dollar amount determined by multiplying the augmented estate by the percentage provided in this section. All properties included in the augmented estate shall be determined as provided in sections 2 to 20 of this 2009 Act. A court of this state has authority to order distribution under sections 2 to 20 of this 2009 Act of all properties included in the augmented estate under sections 2 to 20 of this 2009 Act.

(2) The elective share of a surviving spouse is determined by the length of time the spouse and decedent were married to each other, in accordance with the following schedule:

If the decedent	The elective-share
and the spouse	percentage is:

were married to each other:	
Less than 2 years	5% of the augmented estate
2 years but less than 3 years	7% of the augmented estate
3 years but less than 4 years	9% of the augmented estate
4 years but less than 5 years	11% of the augmented estate
5 years but less than 6 years	13% of the augmented estate
6 years but less than 7 years	15% of the augmented estate
7 years but less than 8 years	17% of the augmented estate
8 years but less than 9 years	19% of the augmented estate
9 years but less than 10 years	21% of the augmented estate
10 years but less than 11 years	23% of the augmented estate
11 years but less than 12 years	25% of the augmented estate
12 years but less than 13 years	27% of the augmented estate
13 years but less than 14 years	29% of the augmented estate
14 years but less than 15 years	31% of the augmented estate
15 years or more	33% of the augmented estate

SECTION 4. Manner of making election. (1) A surviving spouse may claim the elective share only by:

(a) Filing a petition for the appointment of a personal representative for the estate of the deceased spouse, and a motion for the exercise of the election as described in paragraph (b) of this subsection, within nine months after the spouse dies.

(b) Filing a motion for the exercise of the election in a probate proceeding commenced for the estate of the deceased spouse under ORS 113.035. The motion must be filed not later than nine months after the death of the decedent. A copy of the motion must be served on the personal representative, on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate known to the surviving spouse who can be located with reasonable efforts. A surviving spouse may withdraw a motion for an election filed under this subsection at any time before the court enters an order granting the motion.

(c) Filing a petition for the exercise of the election under section 19 (1) of this 2009 Act within nine months after the death of the decedent.

(2) If a court determines that the elective share is payable, the court shall determine the amount of the elective share and shall order its payment pursuant to the priorities established under section 16 of this 2009 Act. If it appears that property has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the property or who has possession thereof, whether as trustee or otherwise.

SECTION 5. Payment of elective share. In determining whether any payment is required to a surviving spouse in satisfaction of the elective share provided for in section 3 of this 2009 Act, the court shall consider the values of the decedent's probate estate, the decedent's nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the surviving spouse and the decedent's nonprobate transfers to the surviving spouse. If the court determines that the aggregate value of the surviving spouse's estate, the decedent's probate transfers to the surviving spouse and the decedent's nonprobate transfers to the surviving spouse do not satisfy the amount of the elective share, any additional amount required to satisfy the elective share shall be paid out of the decedent's probate estate and the decedent's nonprobate estate in the manner provided by section 16 of this 2009 Act.

SECTION 6. Waiver of right to elect and other rights. (1) The right of election under sections 2 to 20 of this 2009 Act may be waived, wholly or partially, before or after marriage by a written contract, agreement or waiver signed by the surviving spouse.

(2) Unless specifically provided otherwise, a written agreement that waives all rights in the property or estate of a present or prospective spouse, using the phrase "all rights" or other equivalent language, or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to an elective share under sections 2 to 20 of this 2009 Act by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to each spouse from the other by intestate succession or by virtue of any will executed before the written agreement or property settlement.

SECTION 7. Who may exercise right of election. The elective share may be personally claimed by a surviving spouse, or may be claimed on the surviving spouse's behalf by a conservator, guardian or agent under the authority of a power of attorney.

AUGMENTED ESTATE (Generally)

SECTION 8. Augmented estate. (1) Except as otherwise provided in sections 2 to 20 of this 2009 Act, the augmented estate consists of all of the following property, whether real or personal, movable or immovable, or tangible or intangible, wherever situated:

- (a) The decedent's probate estate as described in section 10 of this 2009 Act.
- (b) The decedent's nonprobate estate as described in sections 11 and 12 of this 2009 Act.
- (c) The surviving spouse's estate, as described in section 13 of this 2009 Act.
- (d) The decedent's probate transfers to the surviving spouse, as described in section 14 of this 2009 Act.
- (e) The decedent's nonprobate transfers to the surviving spouse, as described in section 15 of this 2009 Act.

(2) The value attributable to any property included in the augmented estate under sections 2 to 20 of this 2009 Act must be reduced by the amount of all enforceable claims against the property and all encumbrances on the property. Any exemption or deduction that is allowed for the purpose of determining estate or inheritance taxes on the augmented estate and that is attributable to the marriage of the decedent and the surviving spouse inures to the benefit of the surviving spouse as provided in ORS 116.343 (2).

(3) The value attributable to any property included in the augmented estate includes the present value of any present or future interest and the present value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security Act.

(4) The value attributable to property included in the augmented estate is equal to the value that would be used for purposes of federal estate and gift tax laws if the property had

passed without consideration to an unrelated person on the date that the value of the property is determined for the purposes of sections 2 to 20 of this 2009 Act.

(5) In no event may the value of property be included in the augmented estate more than once.

SECTION 9. Exclusions from augmented estate. (1) The augmented estate does not include any value attributable to future enhanced earning capacity of either spouse.

(2) The augmented estate does not include any property that was irrevocably transferred before or after the death of the decedent spouse with the written joinder or written consent of the surviving spouse.

(3) The augmented estate does not include any property that is community property under ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located.

(Decedent's Probate Estate)

SECTION 10. Decedent's probate estate. For purposes of sections 2 to 20 of this 2009 Act, a decedent's probate estate is the value of all estate property that is subject to probate and that is available for distribution after payment of claims and expenses of administration. A decedent's probate estate includes all property that could be administered under a small estate affidavit pursuant to ORS 114.505 to 114.560. A decedent's probate estate does not include any property that constitutes a probate transfer to the decedent's surviving spouse under section 14 of this 2009 Act.

(Decedent's Nonprobate Estate)

SECTION 11. Decedent's nonprobate estate. For purposes of sections 2 to 20 of this 2009 Act, a decedent's nonprobate estate consists of the property described in section 12 of this 2009 Act that is not included in the decedent's probate estate and that does not constitute a probate transfer to the decedent's surviving spouse.

SECTION 12. Decedent's nonprobate estate; property owned immediately before death. (1) A decedent's nonprobate estate includes the decedent's fractional interest in property held by the decedent in any form of survivorship tenancy immediately before the death of the decedent. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's fractional interest, to the extent the fractional interest passes by right of survivorship at the decedent's death to a surviving tenant other than the decedent's surviving spouse.

(2) A decedent's nonprobate estate includes the decedent's ownership interest in property or accounts held immediately before death under a payable on death designation or deed, under a transfer on death registration or in co-ownership registration with a right of survivorship. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to any person other than the decedent's estate or surviving spouse or for the benefit of any person other than the decedent's estate or surviving spouse.

(3) A decedent's nonprobate estate includes any property owned by the decedent immediately before death for which the decedent had the power to designate a beneficiary.

(4) A decedent's nonprobate estate includes any property that immediately before death the decedent could have acquired by the exercise of a revocation, without regard to whether the revocation was required to be made by the decedent alone or in conjunction with other persons.

(5) A decedent's nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent.

(Surviving Spouse's Estate)

SECTION 13. Surviving spouse's estate. (1) For purposes of sections 2 to 20 of this 2009 Act, a surviving spouse's estate is:

(a) All property of the spouse other than decedent's probate transfers to the surviving spouse under section 14 of this 2009 Act, as determined on the date of the decedent's death.

(b) The decedent's probate transfers to the spouse, as described in section 14 of this 2009 Act.

(c) Any property that would have been included under paragraph (a) or (b) of this subsection except for the exercise of a disclaimer by the spouse after the death of the decedent.

(2)(a) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of any trust or portion of a trust from which all income must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse, and for which the surviving spouse has a general power of appointment that the surviving spouse, acting alone, may exercise, during the surviving spouse's lifetime or at death of the surviving spouse, to or for the benefit of the surviving spouse or the surviving spouse's estate.

(b) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 100 percent of the corpus of a trust or portion of a trust, if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and the trust principal may be accessed only by the trustee or the spouse and only for the purpose of providing for the health, education, support or maintenance of the spouse.

(c) For the purpose of establishing the value of the surviving spouse's estate under this section, the estate includes 50 percent of the corpus of a trust or portion of a trust if all income from the trust or portion of a trust must be distributed to or for the benefit of the surviving spouse during the life of the surviving spouse and neither the trustee nor the spouse has the power to distribute trust principal to or for the benefit of the surviving spouse or any other person during the spouse's lifetime.

(d) For the purposes of this section, all amounts distributed to a surviving spouse from a unitrust that meets the requirements of ORS 129.225 (4) shall be considered income.

(Decedent's Probate Transfers to Spouse)

SECTION 14. Decedent's probate transfers to surviving spouse. The decedent's probate transfers to the decedent's surviving spouse include all estate property that is subject to probate, that passes to the surviving spouse by testate or intestate succession, and that is available for distribution to the surviving spouse after payment of claims and expenses of administration.

(Decedent's Nonprobate Transfers to Spouse)

SECTION 15. Decedent's nonprobate transfers to surviving spouse. (1) Except as provided in subsection (2) of this section, the decedent's nonprobate transfers to the decedent's surviving spouse include all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

(a) The decedent's fractional interest in property held in any form of survivorship tenancy, as described in section 12 (1) of this 2009 Act, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving tenant;

(b) The decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent that the decedent's ownership interest passed to the surviving spouse as surviving co-owner;

(c) Insurance proceeds payable to the surviving spouse by reason of the death of the decedent; and

(d) All other property that would have been included in the decedent's nonprobate estate under sections 11 and 12 of this 2009 Act had it passed to or for the benefit of a person other than the decedent's spouse.

(2) The decedent's nonprobate transfers to the decedent's surviving spouse do not include any property passing to the surviving spouse under the federal Social Security Act.

PAYMENT OF ELECTIVE SHARE

SECTION 16. Priority of sources from which elective share payable. (1) The following amounts are applied first to satisfy the dollar amount of the elective share and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(a) The surviving spouse's estate as described in section 13 of this 2009 Act.

(b) The amount of all of the decedent's probate transfers to the surviving spouse described in section 14 of this 2009 Act.

(c) The amount of all of the decedent's nonprobate transfers to the surviving spouse described in section 15 of this 2009 Act.

(2) If after application of the amounts specified in subsection (1) of this section the elective share amount is not fully satisfied, the following amounts shall be applied to the extent necessary to satisfy the balance of the elective share amount:

(a) Amounts included in the decedent's probate estate.

(b) Amounts included in the decedent's nonprobate estate under sections 2 to 20 of this 2009 Act.

(3) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section shall be collected from both the probate and nonprobate estates of the decedent in a manner that ensures that the probate and nonprobate estates bear proportionate liability for the amounts necessary to pay the elective share amount.

(4) Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the probate estate of the decedent must be apportioned among all recipients of the decedent's probate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's probate estate. Amounts applied against the unsatisfied balance of an elective share amount under subsection (2) of this section out of the nonprobate estate of the decedent must be apportioned among all recipients of the decedent's nonprobate estate in a manner that ensures that each recipient bears liability for a portion of the payment that is proportionate to the recipient's interest in the decedent's nonprobate estate.

(5) All apportionments required under this section between the probate and nonprobate estates of the decedent and among the recipients of those estates shall be based on the assets of each estate that are subject to distribution by the court under the provisions of sections 2 to 20 of this 2009 Act.

(6) In any proceeding described in section 4 of this 2009 Act, the court may allocate the cost of storing and maintaining property included in the augmented estate pending distribution of the property.

SECTION 17. Liability of recipients of decedent's nonprobate estate. (1) The following recipients of the decedent's nonprobate estate are the only persons who may be required to make a proportional contribution toward the satisfaction of the surviving spouse's elective share under the provisions of sections 2 to 20 of this 2009 Act:

(a) An original recipient of all or part of the decedent's nonprobate estate.

(b) A person who has received all or part of the decedent's nonprobate estate for less than fair consideration from an original recipient of the property, to the extent the person has the property or proceeds of the property.

(2) A recipient of all or part of the decedent's nonprobate estate who is required to make a proportional contribution toward the satisfaction of the surviving spouse's elective share may elect to make the contribution by returning property determined to be adequate to satisfy the recipient's obligation or by paying money equal to the value of that property.

SECTION 18. Protective order. (1) If a surviving spouse has filed a motion or petition described in section 4 of this 2009 Act, the surviving spouse or any person who has received any part of the decedent's probate or nonprobate estate may request, at any time after the filing, that the court issue a protective order. The protective order shall prohibit or impose conditions on the transfer of property included in the augmented estate. The protective order may be served on any person holding property included in the augmented estate.

(2) Upon the filing of a motion or petition under section 4 of this 2009 Act, any person who has received any part of the decedent's probate or nonprobate estate and who is required to make a contribution toward the satisfaction of the elective share may file a motion or petition with the court requesting a determination of the amount of the person's proportionate contribution toward the satisfaction of the elective share. Upon that determination being made, the person may deposit with the court the amount so determined in the form of money or a bond or other security. The deposit discharges the person from all claims relating to the satisfaction of the elective share. In lieu of deposit with the court under this subsection the court may require that the money or security be deposited with a person designated by the court.

(3) If a surviving spouse has filed a motion or petition described in section 4 of this 2009 Act, and a notice of pendency of action under ORS 93.740 is recorded, a temporary restraining order is issued under ORCP 79, or provisional process is issued under ORCP 83, an owner of the property that is subject to the notice, order or process may seek relief from the notice, order or process by providing a bond or other security to the court in such amount as the court may determine adequate to satisfy the person's proportionate contribution toward the satisfaction of the elective share.

PROCEDURE

SECTION 19. Proceedings to claim elective share. (1) A surviving spouse may claim the elective share by filing a petition for the exercise of the election in a circuit court within the time allowed by section 4 (1)(c) of this 2009 Act. Venue for the proceeding is as provided in ORS 113.015. A copy of the petition must be served on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate known to the surviving spouse who can be located with reasonable efforts. The fee for filing a petition under this subsection shall be the amount prescribed in ORS 21.310, based on the value of the nonprobate estate. The Oregon Rules of Civil Procedure apply to proceedings under this section. Any party to a proceeding under this section may request that the pleadings and records in the proceeding be sealed.

(2) A surviving spouse may withdraw a petition filed under this section at any time before entry of a judgment on the petition.

(3) If a probate proceeding is commenced for the estate of the deceased spouse under ORS 113.035 either before or after a petition is filed under this section, the court shall consolidate the proceedings under this section with the probate proceedings.

SECTION 20. Effect of separation. If the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there was a judgment of legal separation, the court may deny any right to an elective share or may reduce the elective share to such amount as the court determines reasonable and proper. In deciding if all or

part of the elective share should be denied, the court shall consider whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other relevant circumstances.

MISCELLANEOUS

SECTION 21. ORS 114.555 is amended to read:

114.555. If a personal representative is not appointed within four months after the filing of the affidavit authorized by ORS 114.515, the interest of the decedent in all of the property described in the affidavit is transferred to the person or persons shown by the affidavit to be entitled thereto, and any other claims against the property are barred, except:

(1) As provided in ORS 114.540, 114.545 and 114.550; and

(2) **For the purposes of a surviving spouse's claim for an elective share in the manner provided by sections 2 to 20 of this 2009 Act.**

SECTION 22. ORS 116.133 is amended to read:

116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [ORS 114.105 as to the share of the surviving spouse who elects to take against the will] **sections 2 to 20 of this 2009 Act relating to the elective share of the surviving spouse**, shares of distributees abate without any preference or priority as between real and personal property in the following order:

- (a) Property not disposed of by the will.
- (b) Residuary devises.
- (c) General devises.
- (d) Specific devises.

(3) A general devise charged on any specific property or fund is considered, for purposes of abatement, property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is considered a general devise to the extent of the failure or insufficiency.

(4) Abatement within each classification is in proportion to the amounts of property each of the distributees would have received had full distribution of the property been made in accordance with the terms of the will.

(5) Persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from that property unless the particular devise forms a substantial amount of the total estate and the court specifically orders contribution because of the devise.

(6) When the subject matter of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

SECTION 23. Sections 2 to 20 of this 2009 Act and the amendments to ORS 114.555 by section 21 of this 2009 Act apply only to the surviving spouses of decedents who die on or after the effective date of this 2009 Act. Notwithstanding the repeal of ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 by section 25 of this 2009 Act, the rights of a surviving spouse of a decedent who dies before the effective date of this 2009 Act shall continue to be governed by the law in effect immediately before the effective date of this 2009 Act.

SECTION 24. A written contract, agreement or waiver entered into before the effective date of this 2009 Act, whether prenuptial or post-nuptial, that waives in whole or in part the

elective share of a surviving spouse is effective as a waiver under section 6 of this 2009 Act unless a court determines that the contract, agreement or waiver is not enforceable under the standards of section 6 of this 2009 Act. Section 6 (2) of this 2009 Act applies to contracts, agreements or waivers entered into before, on or after the effective date of this 2009 Act.

SECTION 25. ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 are repealed.

SECTION 26. The unit and section captions used in this 2009 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2009 Act.

EFFECTIVE DATE

SECTION 27. This 2009 Act takes effect on January 1, 2011.

Passed by House April 20, 2009

Received by Governor:

Repassed by House June 9, 2009

.....M.,....., 2009

Approved:

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Chief Clerk of House

.....M.,....., 2009

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Speaker of House

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Governor

Passed by Senate June 5, 2009

Filed in Office of Secretary of State:

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President of Senate

.....M.,....., 2009

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Secretary of State