

A-Engrossed
House Bill 3077

Ordered by the House April 14
Including House Amendments dated April 14

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

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Establishes new elective share for surviving spouses. Provides that elective share is percentage of augmented estate based on number of years of marriage.

Describes assets to be considered by court in establishing augmented estate. Establishes priorities for sources of payment of elective share. Creates procedure for filing motion or petition seeking payment of elective share.

Takes effect January 1, 2011.

A BILL FOR AN ACT

1
2 Relating to elective share of surviving spouse; creating new provisions; amending ORS 114.545,
3 114.555 and 116.133; repealing ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and
4 114.165; and prescribing an effective date.

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

6 **SECTION 1. Sections 2 to 22 of this 2009 Act are added to and made a part of ORS**
7 **chapter 114.**

ELECTIVE SHARE

8
9
10
11 **SECTION 2. Elective share generally. (1) If a decedent is domiciled in this state on the**
12 **decedent's date of death, and the decedent is survived by a spouse, the surviving spouse of**
13 **the decedent may elect to receive the elective share provided by sections 2 to 22 of this 2009**
14 **Act. An election under sections 2 to 22 of this 2009 Act must be made before the death of the**
15 **surviving spouse by the filing of a motion or petition in the manner described in section 4**
16 **of this 2009 Act. If a motion or petition is filed within the time specified in section 4 of this**
17 **2009 Act, and the surviving spouse dies before payment of the elective share, the personal**
18 **representative for the estate of the surviving spouse may take all steps necessary to secure**
19 **payment of the elective share under sections 2 to 22 of this 2009 Act.**

20 **(2) Any amounts received under ORS 114.015 are in addition to the elective share provided**
21 **for in sections 2 to 22 of this 2009 Act.**

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

25 **SECTION 3. Amount of elective share. (1) Except as otherwise provided in sections 2 to**
26 **22 of this 2009 Act, the amount of the elective share is a dollar amount determined by**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 multiplying the augmented estate by the percentage provided in this section. All properties
 2 included in the augmented estate shall be determined as provided in sections 2 to 22 of this
 3 2009 Act. A court of this state has authority to order distribution under sections 2 to 22 of
 4 this 2009 Act of all properties included in the augmented estate under sections 2 to 22 of this
 5 2009 Act.

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

8 If the decedent 9 and the spouse 10 were married to 11 each other:	The elective-share percentage is:
12 Less than 2 years	5% of the augmented estate
13 2 years but less 14 than 3 years	7% of the augmented estate
15 3 years but less 16 than 4 years	9% of the augmented estate
17 4 years but less 18 than 5 years	11% of the augmented estate
19 5 years but less 20 than 6 years	13% of the augmented estate
21 6 years but less 22 than 7 years	15% of the augmented estate
23 7 years but less 24 than 8 years	17% of the augmented estate
25 8 years but less 26 than 9 years	19% of the augmented estate
27 9 years but less 28 than 10 years	21% of the augmented estate
29 10 years but less 30 than 11 years	23% of the augmented estate
31 11 years but less 32 than 12 years	25% of the augmented estate
33 12 years but less 34 than 13 years	27% of the augmented estate
35 13 years but less 36 than 14 years	29% of the augmented estate
37 14 years but less 38 than 15 years	31% of the augmented estate
39 15 years or more	33% of the augmented estate

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

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

45 (b) Filing a motion for the exercise of the election in a probate proceeding commenced

1 for the estate of the deceased spouse under ORS 113.035. The motion must be filed not later
2 than nine months after the death of the decedent. A copy of the motion must be served on
3 the personal representative, on all persons who would be entitled to receive information un-
4 der ORS 113.145 and on all distributees and recipients of portions of the augmented estate
5 known to the surviving spouse who can be located with reasonable efforts. A surviving
6 spouse may withdraw a motion for an election filed under this subsection at any time before
7 the court enters an order granting the motion.

8 (c) Filing a petition for the exercise of the election under section 21 (1) of this 2009 Act
9 within nine months after the death of the decedent.

10 (2) If a court determines that the elective share is payable, the court shall determine the
11 amount of the elective share and shall order its payment pursuant to the priorities estab-
12 lished under section 18 of this 2009 Act. If it appears that property has not come into the
13 possession of the personal representative, or has been distributed by the personal represen-
14 tative, the court nevertheless shall fix the liability of any person who has any interest in the
15 property or who has possession thereof, whether as trustee or otherwise.

16 SECTION 5. Payment of elective share. In determining whether any payment is required
17 to a surviving spouse in satisfaction of the elective share provided for in section 3 of this 2009
18 Act, the court shall consider the values of the decedent's probate estate, the decedent's
19 nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the
20 surviving spouse and the decedent's nonprobate transfers to the surviving spouse. If the
21 court determines that the aggregate value of the surviving spouse's estate, the decedent's
22 probate transfers to the surviving spouse and the decedent's nonprobate transfers to the
23 surviving spouse do not satisfy the amount of the elective share, any additional amount re-
24 quired to satisfy the elective share shall be paid out of the decedent's probate estate and the
25 decedent's nonprobate estate in the manner provided by section 18 of this 2009 Act.

26 SECTION 6. Waiver of right to elect and other rights. (1) The right of election under
27 sections 2 to 22 of this 2009 Act may be waived, wholly or partially, before or after marriage
28 by a written contract, agreement or waiver signed by the surviving spouse.

29 (2) A surviving spouse's waiver under this section is not enforceable if the surviving
30 spouse proves by clear and convincing evidence that the surviving spouse did not execute the
31 waiver voluntarily.

32 (3) A surviving spouse's waiver under this section is not enforceable if the surviving
33 spouse proves by clear and convincing evidence that the waiver was unconscionable when the
34 waiver was executed and that before execution of the waiver the surviving spouse:

35 (a) Was not provided a fair and reasonable disclosure of the property or financial obli-
36 gations of the decedent;

37 (b) Did not voluntarily and expressly waive, in writing, any right to disclosure of the
38 property or financial obligations of the decedent beyond the disclosure provided; and

39 (c) Did not have, or reasonably could not have had, an adequate knowledge of the prop-
40 erty or financial obligations of the decedent.

41 (4) The court shall decide as a matter of law whether a waiver is unconscionable under
42 subsection (3) of this section.

43 (5) Unless specifically provided otherwise, a written agreement that waives all rights in
44 the property or estate of a present or prospective spouse, using the phrase "all rights" or
45 other equivalent language, or a complete property settlement entered into after or in antic-

1 ipation of separation or divorce is a waiver of all rights to an elective share under sections
2 2 to 22 of this 2009 Act by each spouse in the property of the other and a renunciation by
3 each of all benefits that would otherwise pass to each spouse from the other by intestate
4 succession or by virtue of any will executed before the written agreement or property
5 settlement.

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

9
10 **AUGMENTED ESTATE**

11 (Generally)

12
13 **SECTION 8. Augmented estate.** (1) Except as otherwise provided in sections 2 to 22 of
14 this 2009 Act, the augmented estate consists of all of the following property, whether real
15 or personal, movable or immovable, or tangible or intangible, wherever situated:

16 (a) The decedent's probate estate as described in section 10 of this 2009 Act.

17 (b) The decedent's nonprobate estate as described in sections 11 to 13 of this 2009 Act.

18 (c) The surviving spouse's estate, as described in section 14 of this 2009 Act.

19 (d) The decedent's probate transfers to the surviving spouse, as described in section 16
20 of this 2009 Act.

21 (e) The decedent's nonprobate transfers to the surviving spouse, as described in section
22 17 of this 2009 Act.

23 (2) The value attributable to any property included in the augmented estate under
24 sections 2 to 22 of this 2009 Act must be reduced by the amount of all enforceable claims
25 against the property and all encumbrances on the property. Any exemption or deduction that
26 is allowed for the purpose of determining estate or inheritance taxes on the augmented es-
27 tate and that is attributable to the marriage of the decedent and the surviving spouse inures
28 to the benefit of the surviving spouse as provided in ORS 116.343 (2).

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

34 (4) The value attributable to property included in the augmented estate is equal to the
35 value that would be used for purposes of federal estate and gift tax laws if the property had
36 passed without consideration to an unrelated person on the date that the value of the prop-
37 erty is determined for the purposes of sections 2 to 22 of this 2009 Act.

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

40 **SECTION 9. Exclusions from augmented estate.** (1) The augmented estate does not in-
41 clude any value attributable to future enhanced earning capacity of either spouse.

42 (2) The augmented estate does not include any property that was irrevocably transferred
43 before or after the death of the decedent spouse with the written joinder or written consent
44 of the surviving spouse. For purposes of this subsection, consent by the surviving spouse to
45 split-gift treatment under the federal gift tax laws does not constitute consent to a transfer

1 made by the decedent.

2 (3) The augmented estate does not include any real property that is community property
3 under the laws of the jurisdiction where the property is located.

4
5 (Decedent's Probate Estate)

6
7 **SECTION 10. Decedent's probate estate.** For purposes of sections 2 to 22 of this 2009 Act,
8 a decedent's probate estate is the value of all estate property that is subject to probate and
9 that is available for distribution after payment of claims and expenses of administration. A
10 decedent's probate estate includes all property that could be administered under a small es-
11 tate affidavit pursuant to ORS 114.505 to 114.560. A decedent's probate estate does not in-
12 clude any property that constitutes a probate transfer to the decedent's surviving spouse
13 under section 16 of this 2009 Act.

14
15 (Decedent's Nonprobate Estate)

16
17 **SECTION 11. Decedent's nonprobate estate.** For purposes of sections 2 to 22 of this 2009
18 Act, a decedent's nonprobate estate consists of the property described in sections 11 to 13
19 of this 2009 Act that is not included in the decedent's probate estate and that does not con-
20 stitute a probate transfer to the decedent's surviving spouse.

21 **SECTION 12. Decedent's nonprobate estate; property owned immediately before death.**

22 (1) A decedent's nonprobate estate includes the decedent's fractional interest in property
23 held by the decedent in any form of survivorship tenancy immediately before the death of
24 the decedent. The amount included in the decedent's nonprobate estate under the provisions
25 of this subsection is the value of the decedent's fractional interest, to the extent the frac-
26 tional interest passes by right of survivorship at the decedent's death to a surviving tenant
27 other than the decedent's surviving spouse. For the purposes of this subsection, the
28 decedent's fractional interest in property held by the decedent in a survivorship tenancy is
29 determined by multiplying the value of the property by a fraction, the numerator of which
30 is one and the denominator of which is one plus the number of tenants who survive the
31 decedent.

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

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

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

1 (5) A decedent's nonprobate estate does not include the present value of any life insur-
2 ance policy payable on the death of the decedent.

3 **SECTION 13. Decedent's nonprobate estate; property transferred within one year of**
4 **death.** (1) The decedent's nonprobate estate includes property of the decedent not otherwise
5 included in the decedent's nonprobate estate under section 11 or 12 of this 2009 Act that
6 passed during the decedent's marriage to the surviving spouse and during the one-year pe-
7 riod immediately before the decedent's death, to or for the benefit of a person other than the
8 decedent's surviving spouse, whether by means of transfer or disclaimer.

9 (2) Except as provided in subsection (3) of this section, the amount included in the
10 decedent's nonprobate estate under the provisions of this section is the value of the trans-
11 ferred property to a donee to the extent that the value of the aggregate transfers to the
12 donee during the year immediately before the decedent's death exceeds the amount that
13 qualifies for exclusion from federal gift tax under 26 U.S.C. 2503(b) or (c), as in effect on the
14 effective date of this 2009 Act.

15 (3) The amount included in the decedent's nonprobate estate under the provisions of this
16 section does not include any transfer of property for medical or education expenses to the
17 extent the transfer qualifies for exclusion from federal gift tax under 26 U.S.C. 2503(e), as in
18 effect on the effective date of this 2009 Act.

19 (4) A decedent's nonprobate estate does not include any property transferred or dis-
20 claimed by the decedent for which the decedent received fair consideration.

21
22 (Surviving Spouse's Estate)

23
24 **SECTION 14. Surviving spouse's estate.** (1) For purposes of sections 2 to 22 of this 2009
25 Act, a surviving spouse's estate is:

26 (a) All property of the spouse other than decedent's probate transfers to the surviving
27 spouse under section 16 of this 2009 Act, as determined on the date of the decedent's death.

28 (b) Property of the spouse transferred within one year before the death of the decedent
29 spouse, as described in section 15 of this 2009 Act.

30 (c) The decedent's probate transfers to the spouse, as described in section 16 of this 2009
31 Act.

32 (d) Any property that would have been included under paragraph (a) or (c) of this sub-
33 section except for the exercise of a disclaimer by the spouse after the death of the decedent.

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

41 (b) For the purpose of establishing the value of the surviving spouse's estate under this
42 section, the estate includes 50 percent of the corpus of a trust or portion of a trust, if all
43 income from the trust or portion of a trust must be distributed to or for the benefit of the
44 surviving spouse during the life of the surviving spouse and the trust principal may be ac-
45 cessed only by the trustee or the spouse and only for the purpose of providing for the health,

1 education, support or maintenance of the spouse.

2 (c) For the purpose of establishing the value of the surviving spouse's estate under this
3 section, the estate includes 35 percent of the corpus of a trust or portion of a trust if all
4 income from the trust or portion of a trust must be distributed to or for the benefit of the
5 surviving spouse during the life of the surviving spouse and neither the trustee nor the
6 spouse has the power to distribute trust principal to or for the benefit of the surviving
7 spouse or any other person during the spouse's lifetime.

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

10 **SECTION 15. Surviving spouse's estate; property transferred within one year of death.**

11 (1) The surviving spouse's estate includes property of the surviving spouse that passed dur-
12 ing marriage and during the one-year period immediately before the decedent's death to or
13 for the benefit of a person other than the decedent spouse, whether by means of transfer
14 or disclaimer.

15 (2) Except as provided in subsection (3) of this section, the amount included in the sur-
16 viving spouse's estate under the provisions of this section is the value of the transferred
17 property to a donee to the extent that the value of the aggregate transfers to the donee
18 during the year immediately before the decedent's death exceeds the amount that qualifies
19 for exclusion from federal gift tax under 26 U.S.C. 2503(b) or (c), as in effect on the effective
20 date of this 2009 Act.

21 (3) The amount included in the surviving spouse's estate under the provisions of this
22 section does not include any transfer of property for medical or education expenses to the
23 extent the transfer qualifies for exclusion from federal gift tax under 26 U.S.C. 2503(e), as in
24 effect on the effective date of this 2009 Act.

25 (4) A surviving spouse's estate does not include any property transferred or disclaimed
26 by the surviving spouse for which the surviving spouse received fair consideration.

27
28 (Decedent's Probate Transfers to Spouse)

29
30 **SECTION 16. Decedent's probate transfers to surviving spouse.** The decedent's probate
31 transfers to the decedent's surviving spouse include all estate property that is subject to
32 probate, that passes to the surviving spouse by testate or intestate succession, and that is
33 available for distribution to the surviving spouse after payment of claims and expenses of
34 administration.

35
36 (Decedent's Nonprobate Transfers to Spouse)

37
38 **SECTION 17. Decedent's nonprobate transfers to surviving spouse.** (1) Except as provided
39 in subsection (2) of this section, the decedent's nonprobate transfers to the decedent's sur-
40 viving spouse include all property that passed outside probate at the decedent's death from
41 the decedent to the surviving spouse by reason of the decedent's death, including:

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

45 (b) The decedent's ownership interest in property or accounts held in coownership reg-

1 istration with the right of survivorship, to the extent that the decedent's ownership interest
2 passed to the surviving spouse as surviving coowner;

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

5 (d) All other property that would have been included in the decedent's nonprobate estate
6 under sections 11 to 13 of this 2009 Act had it passed to or for the benefit of a person other
7 than the decedent's spouse.

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

10
11 **PAYMENT OF ELECTIVE SHARE**

12
13 **SECTION 18. Priority of sources from which elective share payable.** (1) The following
14 amounts are applied first to satisfy the dollar amount of the elective share and to reduce or
15 eliminate any contributions due from the decedent's probate estate and recipients of the
16 decedent's nonprobate transfers to others:

17 (a) The surviving spouse's estate as described in section 14 of this 2009 Act.

18 (b) The amount of all of the decedent's probate transfers to the surviving spouse de-
19 scribed in section 16 of this 2009 Act.

20 (c) The amount of all of the decedent's nonprobate transfers to the surviving spouse de-
21 scribed in section 17 of this 2009 Act.

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

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

26 (b) Amounts included in the decedent's nonprobate estate under sections 2 to 22 of this
27 2009 Act except those amounts included under section 13 of this 2009 Act.

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

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

41 (5) If after application of the amounts specified in subsections (1) and (2) of this section
42 the elective share amount is not fully satisfied, amounts included in the decedent's
43 nonprobate estate under section 13 of this 2009 Act, other than transfers to charitable in-
44 stitutions, must be applied next to satisfy the elective share amount. Amounts must be ap-
45 plied under this subsection in a manner that ensures that each recipient of a transfer bears

1 liability for a portion of the repayment that is proportionate to the recipient's share of all
2 noncharitable transfers included in the decedent's nonprobate estate under section 13 of this
3 2009 Act.

4 (6) If after application of the amounts specified in subsections (1), (2) and (5) of this
5 section the elective share amount is not fully satisfied, amounts included in the decedent's
6 nonprobate estate under section 13 of this 2009 Act that were transfers to charitable insti-
7 tutions must be applied next to satisfy the elective share amount. Transfers to charitable
8 institutions may not be applied to satisfy the elective share amount under this subsection if
9 making that application would disqualify the transfer from a deduction under federal gift tax
10 laws or regulations. Amounts must be applied under this subsection in a manner that en-
11 sures that each recipient of a transfer bears liability for a portion of the repayment that is
12 proportionate to the recipient's share of all charitable transfers applied under this sub-
13 section.

14 (7) All apportionments required under this section between the probate and nonprobate
15 estates of the decedent and among the recipients of those estates shall be based on the as-
16 sets of each estate that are subject to distribution by the court under the provisions of
17 sections 2 to 22 of this 2009 Act.

18 (8) In any proceeding described in section 4 of this 2009 Act, the court may allocate the
19 cost of storing and maintaining property included in the augmented estate pending distrib-
20 ution of the property.

21 **SECTION 19. Liability of recipients of decedent's nonprobate estate.** (1) The following
22 recipients of the decedent's nonprobate estate are the only persons who may be required to
23 make a proportional contribution toward the satisfaction of the surviving spouse's elective
24 share under the provisions of sections 2 to 22 of this 2009 Act:

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

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

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

33 (3) If any provision of sections 2 to 22 of this 2009 Act is preempted by federal law with
34 respect to a payment, an item of property or any other benefit included in the decedent's
35 nonprobate estate, a person who, without fair consideration, receives the payment, item of
36 property or any other benefit is obligated to return the payment, item of property or benefit,
37 or is personally liable for the amount of the payment or the value of that item of property
38 or benefit to the person who would have been entitled to the payment, item of property or
39 benefit if that provision was not preempted.

40 **SECTION 20. Protective order.** (1) If a surviving spouse has filed a motion or petition
41 described in section 4 of this 2009 Act, the surviving spouse or any person who has received
42 any part of the decedent's probate or nonprobate estate may request, at any time after the
43 filing, that the court issue a protective order. The protective order shall prohibit or impose
44 conditions on the transfer of property included in the augmented estate. The protective order
45 may be served on any person holding property included in the augmented estate.

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

11 (3) If a surviving spouse has filed a motion or petition described in section 4 of this 2009
12 Act, and a notice of pendency of action under ORS 93.740 is recorded, a temporary restrain-
13 ing order is issued under ORCP 79, or provisional process is issued under ORCP 83, an owner
14 of the property that is subject to the notice, order or process may seek relief from the no-
15 tice, order or process by providing a bond or other security to the court in such amount as
16 the court may determine adequate to satisfy the person's proportionate contribution toward
17 the satisfaction of the elective share.

18 PROCEDURE

19
20
21 SECTION 21. Proceedings to claim elective share. (1) A surviving spouse may claim the
22 elective share by filing a petition for the exercise of the election in a circuit court within the
23 time allowed by section 4 (1)(c) of this 2009 Act. Venue for the proceeding is as provided in
24 ORS 113.015. A copy of the petition must be served on all persons who would be entitled to
25 receive information under ORS 113.145 and on all distributees and recipients of portions of
26 the augmented estate known to the surviving spouse who can be located with reasonable
27 efforts. The fee for filing a petition under this subsection shall be the amount prescribed in
28 ORS 21.310, based on the value of the nonprobate estate. The Oregon Rules of Civil Procedure
29 apply to proceedings under this section. Any party to a proceeding under this section may
30 request that the pleadings and records in the proceeding be sealed.

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

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

36 SECTION 22. Effect of separation. If the decedent and the surviving spouse were living
37 apart at the time of the decedent's death, whether or not there was a judgment of legal
38 separation, the court may deny any right to an elective share or may reduce the elective
39 share to such amount as the court determines reasonable and proper. In deciding if all or
40 part of the elective share should be denied, the court shall consider whether the marriage
41 was a first or subsequent marriage for either or both of the spouses, the contribution of the
42 surviving spouse to the property of the decedent in the form of services or transfers of
43 property, the length and cause of the separation and any other relevant circumstances.

44 MISCELLANEOUS

1 **SECTION 23.** ORS 114.545 is amended to read:

2 114.545. (1) The affiant:

3 (a) Shall take control of the property of the estate coming into the possession of the affiant.

4 (b) Within 30 days after filing the affidavit shall mail, deliver or cause to be recorded each in-
5 strument which the affidavit states will be mailed, delivered or recorded.

6 (c) From and to the extent of the property of the estate, shall pay or reimburse any person who
7 has paid:

8 (A) Expenses described in ORS 115.125 (1)(b) and (c) and listed in the affidavit;

9 (B) Claims listed in the affidavit as undisputed;

10 (C) Allowed claims presented to the affiant within the time permitted by ORS 114.540; and

11 (D) Claims which the probate court directs the affiant to pay.

12 (d) Shall pay claims and expenses under paragraph (c) of this subsection in the order of priority
13 prescribed by ORS 115.125.

14 (e) May transfer or sell any vehicle that is part of the estate before the completion of the period
15 established under ORS 114.555 if the affiant complies with the requirements established by the De-
16 partment of Transportation for such purposes under ORS 803.094.

17 (f) May convey any real or personal property that is part of the estate before the completion
18 of the period established under ORS 114.555, provided that each heir or devisee succeeding to the
19 interest conveyed joins in the conveyance and that any proceeds of sale, net of the reasonable ex-
20 penses of sale and any debt secured as of the date of the decedent's death by a duly perfected lien
21 on the property, shall become a part of the estate subject to ORS 114.505 to 114.560. If the property
22 is a manufactured structure as defined in ORS 446.561, the affiant must assign interest in the
23 structure as provided in ORS 446.616. Any conveyance to a purchaser in good faith and for a valu-
24 able consideration made by the affiant and the heir or devisee succeeding to the interest conveyed,
25 or made by the heir or devisee succeeding to the interest conveyed after completion of the period
26 established under ORS 114.555, conveys the interest stated in the conveyance free of any interest
27 of the claiming successors, and the purchaser has no duty with respect to application of the con-
28 sideration paid for the conveyance.

29 **(2) If the decedent was married at the time of death and the decedent's spouse survives**
30 **the decedent, an affiant may not sell, transfer or convey any property of the estate, other**
31 **than payment of claims, until the expiration of nine months after the death of the decedent**
32 **unless the affiant files with the court a written document signed by the surviving spouse**
33 **consenting to the transfer.**

34 [(2)] (3) Any claiming successor to whom payment, delivery or transfer is made under ORS
35 114.505 to 114.560 as a person entitled thereto as disclosed in the affidavit is personally answerable
36 and accountable:

37 (a) To the extent of the value of the property received, to creditors of the estate to the extent
38 such creditors are entitled to payment under subsection (1) of this section; and

39 (b) To any personal representative of the estate of the decedent thereafter appointed.

40 [(3)] (4) The affiant shall cause to be recorded in the deed records of any county in which real
41 property belonging to the decedent is situated an affiant or claiming successor's deed executed in
42 the manner required by ORS chapter 93.

43 [(4)] (5) For a manufactured structure as defined in ORS 446.561 belonging to a decedent and
44 assessed as personal property, the affiant shall file with the Department of Consumer and Business
45 Services the necessary information for recording the successor's interest in the manufactured

1 structure on an ownership document.

2 **SECTION 24.** ORS 114.555 is amended to read:

3 114.555. If a personal representative is not appointed within four months after the filing of the
4 affidavit authorized by ORS 114.515, the interest of the decedent in all of the property described in
5 the affidavit is transferred to the person or persons shown by the affidavit to be entitled thereto,
6 and any other claims against the property are barred, except:

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

8 (2) **For the purposes of a surviving spouse's claim for an elective share in the manner**
9 **provided by sections 2 to 22 of this 2009 Act.**

10 **SECTION 25.** ORS 116.133 is amended to read:

11 116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express
12 or implied purpose of the devise would be defeated by the order of abatement stated in subsection
13 (2) of this section, the shares of the distributees abate as may be found necessary to give effect to
14 the intention of the testator.

15 (2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [*ORS*
16 *114.105 as to the share of the surviving spouse who elects to take against the will*] **sections 2 to 22**
17 **of this 2009 Act relating to the elective share of the surviving spouse**, shares of distributees
18 abate without any preference or priority as between real and personal property in the following
19 order:

20 (a) Property not disposed of by the will.

21 (b) Residuary devises.

22 (c) General devises.

23 (d) Specific devises.

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

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

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

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

38 **SECTION 26.** **Sections 2 to 22 of this 2009 Act and the amendments to ORS 114.545 and**
39 **114.555 by sections 23 and 24 of this 2009 Act apply only to the surviving spouses of decedents**
40 **who die on or after the effective date of this 2009 Act. Notwithstanding the repeal of ORS**
41 **114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 by section 28 of this 2009 Act, the**
42 **rights of a surviving spouse of a decedent who dies before the effective date of this 2009 Act**
43 **shall continue to be governed by the law in effect immediately before the effective date of**
44 **this 2009 Act.**

45 **SECTION 27.** **A written contract, agreement or waiver entered into before the effective**

1 **date of this 2009 Act, whether prenuptial or post-nuptial, that waives in whole or in part the**
2 **elective share of a surviving spouse is effective as a waiver under section 6 of this 2009 Act**
3 **unless a court determines that the contract, agreement or waiver is not enforceable under**
4 **the standards of section 6 of this 2009 Act. Section 6 (5) of this 2009 Act applies to contracts,**
5 **agreements or waivers entered into before, on or after the effective date of this 2009 Act.**

6 **SECTION 28. ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 are re-**
7 **pealed.**

8 **SECTION 29. The unit and section captions used in this 2009 Act are provided only for**
9 **the convenience of the reader and do not become part of the statutory law of this state or**
10 **express any legislative intent in the enactment of this 2009 Act.**

11
12 **EFFECTIVE DATE**

13
14 **SECTION 30. This 2009 Act takes effect on January 1, 2011.**
15 _____