

B-Engrossed
House Bill 3077

Ordered by the Senate June 2
Including House Amendments dated April 14 and Senate Amendments
dated June 2

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 114.555 and
3 116.133; repealing ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165; and pre-
4 scribing an effective date.

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

6 **SECTION 1. Sections 2 to 20 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 20 of this 2009**
14 **Act. An election under sections 2 to 20 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 20 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 20 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**

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 20 of this 2009 Act, the amount of the elective share is a dollar amount determined by
 2 multiplying the augmented estate by the percentage provided in this section. All properties
 3 included in the augmented estate shall be determined as provided in sections 2 to 20 of this
 4 2009 Act. A court of this state has authority to order distribution under sections 2 to 20 of
 5 this 2009 Act of all properties included in the augmented estate under sections 2 to 20 of this
 6 2009 Act.

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

9 If the decedent	The elective-share
10 and the spouse	percentage is:
11 were married to	
12 each other:	
13 Less than 2 years	5% of the augmented estate
14 2 years but less	
15 than 3 years	7% of the augmented estate
16 3 years but less	
17 than 4 years	9% of the augmented estate
18 4 years but less	
19 than 5 years	11% of the augmented estate
20 5 years but less	
21 than 6 years	13% of the augmented estate
22 6 years but less	
23 than 7 years	15% of the augmented estate
24 7 years but less	
25 than 8 years	17% of the augmented estate
26 8 years but less	
27 than 9 years	19% of the augmented estate
28 9 years but less	
29 than 10 years	21% of the augmented estate
30 10 years but less	
31 than 11 years	23% of the augmented estate
32 11 years but less	
33 than 12 years	25% of the augmented estate
34 12 years but less	
35 than 13 years	27% of the augmented estate
36 13 years but less	
37 than 14 years	29% of the augmented estate
38 14 years but less	
39 than 15 years	31% of the augmented estate
40 15 years or more	33% of the augmented estate

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

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

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

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

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

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

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

30 (2) Unless specifically provided otherwise, a written agreement that waives all rights in
31 the property or estate of a present or prospective spouse, using the phrase "all rights" or
32 other equivalent language, or a complete property settlement entered into after or in antic-
33 ipation of separation or divorce is a waiver of all rights to an elective share under sections
34 2 to 20 of this 2009 Act by each spouse in the property of the other and a renunciation by
35 each of all benefits that would otherwise pass to each spouse from the other by intestate
36 succession or by virtue of any will executed before the written agreement or property
37 settlement.

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

41
42 **AUGMENTED ESTATE**

43 (Generally)

44
45 SECTION 8. Augmented estate. (1) Except as otherwise provided in sections 2 to 20 of

1 this 2009 Act, the augmented estate consists of all of the following property, whether real
2 or personal, movable or immovable, or tangible or intangible, wherever situated:

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

4 (b) The decedent's nonprobate estate as described in sections 11 and 12 of this 2009 Act.

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

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

8 (e) The decedent's nonprobate transfers to the surviving spouse, as described in section
9 15 of this 2009 Act.

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

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

21 (4) The value attributable to property included in the augmented estate is equal to the
22 value that would be used for purposes of federal estate and gift tax laws if the property had
23 passed without consideration to an unrelated person on the date that the value of the prop-
24 erty is determined for the purposes of sections 2 to 20 of this 2009 Act.

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

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

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

32 (3) The augmented estate does not include any property that is community property un-
33 der ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located.
34

35 (Decedent's Probate Estate)

36
37 **SECTION 10. Decedent's probate estate.** For purposes of sections 2 to 20 of this 2009 Act,
38 a decedent's probate estate is the value of all estate property that is subject to probate and
39 that is available for distribution after payment of claims and expenses of administration. A
40 decedent's probate estate includes all property that could be administered under a small es-
41 tate affidavit pursuant to ORS 114.505 to 114.560. A decedent's probate estate does not in-
42 clude any property that constitutes a probate transfer to the decedent's surviving spouse
43 under section 14 of this 2009 Act.
44

45 (Decedent's Nonprobate Estate)

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

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

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

15
16 (Decedent's Probate Transfers to Spouse)

17
18 **SECTION 14. Decedent's probate transfers to surviving spouse.** The decedent's probate
19 transfers to the decedent's surviving spouse include all estate property that is subject to
20 probate, that passes to the surviving spouse by testate or intestate succession, and that is
21 available for distribution to the surviving spouse after payment of claims and expenses of
22 administration.

23
24 (Decedent's Nonprobate Transfers to Spouse)

25
26 **SECTION 15. Decedent's nonprobate transfers to surviving spouse.** (1) Except as provided
27 in subsection (2) of this section, the decedent's nonprobate transfers to the decedent's sur-
28 viving spouse include all property that passed outside probate at the decedent's death from
29 the decedent to the surviving spouse by reason of the decedent's death, including:

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

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

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

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

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

43
44 **PAYMENT OF ELECTIVE SHARE**

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

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

6 (b) The amount of all of the decedent's probate transfers to the surviving spouse de-
7 scribed in section 14 of this 2009 Act.

8 (c) The amount of all of the decedent's nonprobate transfers to the surviving spouse de-
9 scribed in section 15 of this 2009 Act.

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

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

14 (b) Amounts included in the decedent's nonprobate estate under sections 2 to 20 of this
15 2009 Act.

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

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

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

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

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

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

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

44 (2) A recipient of all or part of the decedent's nonprobate estate who is required to make
45 a proportional contribution toward the satisfaction of the surviving spouse's elective share

1 may elect to make the contribution by returning property determined to be adequate to
2 satisfy the recipient's obligation or by paying money equal to the value of that property.

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

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

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

26
27 **PROCEDURE**
28

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

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

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

44 **SECTION 20. Effect of separation.** If the decedent and the surviving spouse were living
45 apart at the time of the decedent's death, whether or not there was a judgment of legal

1 separation, the court may deny any right to an elective share or may reduce the elective
2 share to such amount as the court determines reasonable and proper. In deciding if all or
3 part of the elective share should be denied, the court shall consider whether the marriage
4 was a first or subsequent marriage for either or both of the spouses, the contribution of the
5 surviving spouse to the property of the decedent in the form of services or transfers of
6 property, the length and cause of the separation and any other relevant circumstances.

7
8 **MISCELLANEOUS**
9

10 **SECTION 21.** ORS 114.555 is amended to read:

11 114.555. If a personal representative is not appointed within four months after the filing of the
12 affidavit authorized by ORS 114.515, the interest of the decedent in all of the property described in
13 the affidavit is transferred to the person or persons shown by the affidavit to be entitled thereto,
14 and any other claims against the property are barred, except:

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

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

18 **SECTION 22.** ORS 116.133 is amended to read:

19 116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express
20 or implied purpose of the devise would be defeated by the order of abatement stated in subsection
21 (2) of this section, the shares of the distributees abate as may be found necessary to give effect to
22 the intention of the testator.

23 (2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [*ORS*
24 *114.105 as to the share of the surviving spouse who elects to take against the will*] **sections 2 to 20**
25 **of this 2009 Act relating to the elective share of the surviving spouse**, shares of distributees
26 abate without any preference or priority as between real and personal property in the following
27 order:

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

29 (b) Residuary devises.

30 (c) General devises.

31 (d) Specific devises.

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

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

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

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

