

House Bill 3077

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 **as introduced**.

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.

A BILL FOR AN ACT

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

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

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

"PROPERTY" DESCRIBED

SECTION 2. "Property" described. For purposes of sections 2 to 22 of this 2009 Act, "property" includes rights subject to a beneficiary designation.

ELECTIVE SHARE

SECTION 3. 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 22 of this 2009 Act. An election under sections 2 to 22 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 21 of this 2009 Act. If a motion or petition is filed within the time specified in section 21 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 section 21 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 22 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 4. Amount of elective share. (1) Except as otherwise provided in sections 2 to 22 of this 2009 Act, the amount of the elective share is equal to a percentage of the aug-

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 mented estate of the deceased spouse as provided in this section. Properties and assets in-
 2 cluded in the augmented estate shall be determined as provided in sections 2 to 22 of this
 3 2009 Act.

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

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

38 **SECTION 5. Payment of elective share.** In determining whether any payment is required
 39 to a surviving spouse in satisfaction of the elective share provided for in sections 2 to 22 of
 40 this 2009 Act, the court shall consider the values of the decedent's probate estate, the
 41 decedent's nonprobate estate, the surviving spouse's estate, the decedent's probate transfers
 42 to the surviving spouse and the decedent's nonprobate transfers to the surviving spouse. If
 43 the court determines that the surviving spouse's estate, the decedent's probate transfers to
 44 the surviving spouse and the decedent's nonprobate transfers to the surviving spouse do not
 45 satisfy the amount of the elective share, any additional amount required to satisfy the elec-

1 tive share shall be paid out of the decedent's probate estate and the decedent's nonprobate
 2 estate in the manner provided by section 18 of this 2009 Act.

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

6 (2) A surviving spouse's waiver under this section is not enforceable if the surviving
 7 spouse proves that the surviving spouse did not execute the waiver voluntarily.

8 (3) A surviving spouse's waiver under this section is not enforceable if the surviving
 9 spouse proves that the waiver was unconscionable when the waiver was executed and that
 10 before execution of the waiver the surviving spouse:

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

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

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

17 (4) The court shall decide whether a waiver is unconscionable under subsection (3) of this
 18 section.

19 (5) Unless specifically provided otherwise, a written agreement that waives all rights in
 20 the property or estate of a present or prospective spouse, using the phrase "all rights" or
 21 other equivalent language, or a complete property settlement entered into after or in antic-
 22 ipation of separation or divorce is a waiver of all rights to an elective share under sections
 23 2 to 22 of this 2009 Act by each spouse in the property of the other and a renunciation by
 24 each of all benefits that would otherwise pass to each spouse from the other by intestate
 25 succession or by virtue of any will executed before the written agreement or property
 26 settlement.

27 **SECTION 7. Exercising right of election.** (1) The right of election may be personally ex-
 28 ercised by a surviving spouse, or may be exercised on the surviving spouse's behalf by a
 29 conservator, guardian or agent under the authority of a power of attorney.

30 (2) An election under sections 2 to 22 of this 2009 Act must be made by filing a motion
 31 or petition within the time specified in section 21 of this 2009 Act, whether the election is
 32 made by the surviving spouse or by another person under the provisions of this section.

34 **AUGMENTED ESTATE**

35 (Generally)

36
 37 **SECTION 8. Augmented estate.** (1) Except as otherwise provided in sections 2 to 22 of
 38 this 2009 Act, the augmented estate consists of all of the following property, whether real
 39 or personal, movable or immovable, or tangible or intangible, wherever situated:

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

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

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

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

45 (e) The decedent's nonprobate transfers to the surviving spouse, as described in section

1 17 of this 2009 Act.

2 (2) The value attributable to any property included in the augmented estate under
 3 sections 2 to 22 of this 2009 Act must be reduced by the amount of all enforceable claims
 4 against the property. Any exemption or deduction that is allowed for the purpose of deter-
 5 mining estate or inheritance taxes on the augmented estate and that is attributable to the
 6 marriage of the decedent and the surviving spouse inures to the benefit of the surviving
 7 spouse as provided in ORS 116.343 (2).

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

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

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

20
 21 (Decedent's Probate Estate)

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

30
 31 (Decedent's Nonprobate Estate)

32
 33 **SECTION 11. Decedent's nonprobate estate.** For purposes of sections 2 to 22 of this 2009
 34 Act, a decedent's nonprobate estate is property described in sections 11 to 13 of this 2009
 35 Act that is not included in the decedent's probate estate and that does not constitute a
 36 probate transfer to the decedent's surviving spouse.

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

38 (1) A decedent's nonprobate estate includes the decedent's fractional interest in property
 39 held by the decedent in any form of survivorship tenancy immediately before the death of
 40 the decedent. The amount included in the decedent's nonprobate estate under the provisions
 41 of this subsection is the value of the decedent's fractional interest, to the extent the frac-
 42 tional interest passes by right of survivorship at the decedent's death to a surviving tenant
 43 other than the decedent's surviving spouse. For the purposes of this subsection, the
 44 decedent's fractional interest in property held by the decedent in a survivorship tenancy is
 45 determined by multiplying the value of the property by a fraction, the numerator of which

1 is one and the denominator of which is one plus the number of tenants who survive the
2 decedent.

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

11 (3) A decedent's nonprobate estate includes any property that the decedent could have
12 acquired by revocation of a revocable trust or other revocable transfer of property, without
13 regard to whether the revocation was required to be made by the decedent alone or in con-
14 junction with other persons.

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

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

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

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

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

35
36 (Surviving Spouse's Estate)

37
38 **SECTION 14. Surviving spouse's estate.** (1) For purposes of sections 2 to 22 of this 2009
39 Act, a surviving spouse's estate is:

40 (a) All property of the spouse other than decedent's probate transfers to the surviving
41 spouse under section 16 of this 2009 Act, reduced by all claims against the property and all
42 debts of the surviving spouse, as determined on the date of the decedent's death.

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

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

1 Act.

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

4 (2) For the purpose of establishing the value of the surviving spouse’s estate under this
 5 section, the estate includes 35 percent of the corpus of a trust that distributes income to the
 6 surviving spouse for life, if the trustee does not have the power to distribute principal or
 7 income to anyone other than the spouse during the spouse’s lifetime.

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

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

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

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

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

25
 26 (Decedent’s Probate Transfers to Spouse)
 27

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

33
 34 (Decedent’s Nonprobate Transfers to Spouse)
 35

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

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

43 (b) The decedent’s ownership interest in property or accounts held in coownership reg-
 44 istration with the right of survivorship, to the extent that the decedent’s ownership interest
 45 passed to the surviving spouse as surviving coowner;

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

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

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

8
9 **PAYMENT OF ELECTIVE SHARE**

10
11 **SECTION 18. Priority of sources from which elective share payable.** (1) The following
12 amounts are applied first to satisfy an elective share amount and to reduce or eliminate any
13 contributions due from the decedent's probate estate and recipients of the decedent's
14 nonprobate transfers to others:

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

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

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

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

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

24 (b) Amounts included in the decedent's nonprobate estate under sections 2 to 22 of this
25 2009 Act except those amounts included under section 13 of this 2009 Act.

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

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

39 (5) If after application of the amounts specified in subsections (1) and (2) of this section
40 the elective share amount is not fully satisfied, the remaining portion of the decedent's
41 nonprobate estate must be applied to satisfy the balance of the elective share amount in a
42 manner that ensures that each recipient of the remaining portion of the decedent's
43 nonprobate estate bears liability for a portion of the payment out of the nonprobate estate
44 that is proportionate to the recipient's interest in the nonprobate estate.

45 (6) All apportionments required under this section between the probate and nonprobate

1 estates of the decedent and among the recipients of those estates shall be based on the as-
 2 sets of each estate that are subject to distribution by the court under the provisions of
 3 sections 2 to 22 of this 2009 Act.

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

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

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

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

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

23 **SECTION 20. Protection of payers and other third parties.** (1) Except as provided in
 24 subsection (2) of this section, a person does not incur any liability for making a payment or
 25 transferring an item of property or other benefit pursuant to an instrument after having
 26 requested and received satisfactory proof of death, or for taking any other action in good
 27 faith reliance on the validity of an instrument, even though the payment, item of property
 28 or other benefit is part of a decedent's nonprobate estate under the provisions of sections 2
 29 to 22 of this 2009 Act.

30 (2) A person is liable for making a payment or transferring an item of property or other
 31 benefit included in the decedent's nonprobate estate under the provisions of sections 2 to 22
 32 of this 2009 Act if the payment or delivery is made after the person receives written notice
 33 from the spouse or the spouse's representative that indicates that the surviving spouse or
 34 representative has filed a motion or petition for the elective share under section 21 of this
 35 2009 Act or that the surviving spouse or representative intends to file a motion or petition
 36 within the time allowed in section 21 of this 2009 Act.

37 (3) Notice under subsection (2) of this section must be mailed by registered or certified
 38 mail, return receipt requested, or be served in the same manner as a summons in a civil
 39 action. The person receiving the notice may deposit any money or property held by the
 40 person with the court having jurisdiction of the probate proceedings relating to the
 41 decedent's estate or, if no proceedings have been commenced, with the circuit court for the
 42 county of the decedent's residence. If a motion or petition is not filed in the court within the
 43 time allowed under section 21 of this 2009 Act, the court shall order disbursement of the
 44 money or property to the appropriate beneficiary. Deposit of the money or property with the
 45 court discharges the person making the deposit from all claims for the money or property.

PROCEDURE

1
2
3 **SECTION 21. Proceedings for elective share; time limit.** (1) If any property of a decedent
4 is subject to probate, the surviving spouse may claim the elective share only after the ap-
5 pointment of a personal representative. The election must be made by filing a motion in the
6 proceeding and serving a copy of the motion on the personal representative, on all persons
7 who would be entitled to receive information under ORS 113.145 and on all distributees and
8 recipients of portions of the augmented estate whose interests may be adversely affected by
9 the taking of the elective share. The motion must be filed within six months after the ap-
10 pointment of the personal representative, or 30 days after the date of the filing of the in-
11 ventory, whichever is later.

12 (2) If no property of a decedent is subject to probate, the surviving spouse may claim the
13 elective share by filing a petition in a circuit court. Venue for the proceeding is as provided
14 in ORS 113.015. A copy of the petition must be served on all persons who would be entitled
15 to receive information under ORS 113.145 and on all distributees and recipients of portions
16 of the augmented estate whose interests may be adversely affected by the taking of the
17 elective share. A petition under this subsection must be filed within six months after the
18 date of the decedent's death. The petition must contain an inventory and valuation of the
19 decedent's nonprobate estate. The fee for filing a petition under this subsection shall be the
20 amount prescribed in ORS 21.310, based on the value of the nonprobate estate.

21 (3) A surviving spouse may withdraw a motion for an election filed under subsection (1)
22 of this section at any time before the court enters an order granting the motion. A surviving
23 spouse may withdraw a petition for an elective share filed under subsection (2) of this section
24 at any time before entry of a judgment on the petition.

25 (4) After notice and hearing the court shall determine whether the elective share is
26 payable. If the court determines that the elective share is payable, the court shall determine
27 the amount of the elective share and shall order its payment pursuant to the priorities es-
28 tablished under section 18 of this 2009 Act. If it appears that property has not come into the
29 possession of the personal representative, or has been distributed by the personal represen-
30 tative, the court nevertheless shall fix the liability of any person who has any interest in the
31 money or property or who has possession thereof, whether as trustee or otherwise.

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

MISCELLANEOUS

40
41
42
43 **SECTION 23.** ORS 116.133 is amended to read:

44 116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express
45 or implied purpose of the devise would be defeated by the order of abatement stated in subsection

1 (2) of this section, the shares of the distributees abate as may be found necessary to give effect to
 2 the intention of the testator.

3 (2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [ORS
 4 *114.105 as to the share of the surviving spouse who elects to take against the will*] **sections 2 to 22**
 5 **of this 2009 Act relating to the elective share of the surviving spouse**, shares of distributees
 6 abate without any preference or priority as between real and personal property in the following
 7 order:

- 8 (a) Property not disposed of by the will.
- 9 (b) Residuary devisees.
- 10 (c) General devisees.
- 11 (d) Specific devisees.

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

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

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

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

26 **SECTION 24. Sections 2 to 22 of this 2009 Act apply only to the surviving spouses of**
 27 **decedents who die on or after the effective date of this 2009 Act. Notwithstanding the repeal**
 28 **of ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 by section 26 of this 2009**
 29 **Act, the rights of a surviving spouse of a decedent who dies before the effective date of this**
 30 **2009 Act shall continue to be governed by the law in effect immediately before the effective**
 31 **date of this 2009 Act.**

32 **SECTION 25. A written contract, agreement or waiver entered into before the effective**
 33 **date of this 2009 Act, whether prenuptial or post-nuptial, that waives in whole or in part the**
 34 **elective share of a surviving spouse is effective as a waiver under section 6 of this 2009 Act**
 35 **unless a court determines that the contract, agreement or waiver was not executed volun-**
 36 **tarily or was unconscionable under the provisions of section 6 of this 2009 Act. Section 6 (5)**
 37 **of this 2009 Act applies to contracts, agreements or waivers entered into before, on or after**
 38 **the effective date of this 2009 Act.**

39 **SECTION 26. ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 are re-**
 40 **pealed.**

41 **SECTION 27. The unit and section captions used in this 2009 Act are provided only for**
 42 **the convenience of the reader and do not become part of the statutory law of this state or**
 43 **express any legislative intent in the enactment of this 2009 Act.**