

SENATE AMENDMENTS TO A-ENGROSSED HOUSE BILL 3077

By COMMITTEE ON JUDICIARY

June 2

1 On page 1 of the printed A-engrossed bill, line 2, delete “114.545,”.

2 Delete lines 6 through 26 and delete pages 2 through 13 and insert:

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

“ELECTIVE SHARE

5
6
7
8 **“SECTION 2. Elective share generally. (1) If a decedent is domiciled in this state on the**
9 **decedent’s date of death, and the decedent is survived by a spouse, the surviving spouse of**
10 **the decedent may elect to receive the elective share provided by sections 2 to 20 of this 2009**
11 **Act. An election under sections 2 to 20 of this 2009 Act must be made before the death of the**
12 **surviving spouse by the filing of a motion or petition in the manner described in section 4**
13 **of this 2009 Act. If a motion or petition is filed within the time specified in section 4 of this**
14 **2009 Act, and the surviving spouse dies before payment of the elective share, the personal**
15 **representative for the estate of the surviving spouse may take all steps necessary to secure**
16 **payment of the elective share under sections 2 to 20 of this 2009 Act.**

17 **“(2) Any amounts received under ORS 114.015 are in addition to the elective share pro-**
18 **vided for in sections 2 to 20 of this 2009 Act.**

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

22 **“SECTION 3. Amount of elective share. (1) Except as otherwise provided in sections 2 to**
23 **20 of this 2009 Act, the amount of the elective share is a dollar amount determined by**
24 **multiplying the augmented estate by the percentage provided in this section. All properties**
25 **included in the augmented estate shall be determined as provided in sections 2 to 20 of this**
26 **2009 Act. A court of this state has authority to order distribution under sections 2 to 20 of**
27 **this 2009 Act of all properties included in the augmented estate under sections 2 to 20 of this**
28 **2009 Act.**

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

31 “If the decedent	The elective-share
32 and the spouse	percentage is:
33 were married to	
34 each other:	
35 Less than 2 years	5% of the augmented estate

1	2 years but less	
2	than 3 years	7% of the augmented estate
3	3 years but less	
4	than 4 years	9% of the augmented estate
5	4 years but less	
6	than 5 years	11% of the augmented estate
7	5 years but less	
8	than 6 years	13% of the augmented estate
9	6 years but less	
10	than 7 years	15% of the augmented estate
11	7 years but less	
12	than 8 years	17% of the augmented estate
13	8 years but less	
14	than 9 years	19% of the augmented estate
15	9 years but less	
16	than 10 years	21% of the augmented estate
17	10 years but less	
18	than 11 years	23% of the augmented estate
19	11 years but less	
20	than 12 years	25% of the augmented estate
21	12 years but less	
22	than 13 years	27% of the augmented estate
23	13 years but less	
24	than 14 years	29% of the augmented estate
25	14 years but less	
26	than 15 years	31% of the augmented estate
27	15 years or more	33% of the augmented estate

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

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

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

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

43 “(2) If a court determines that the elective share is payable, the court shall determine
44 the amount of the elective share and shall order its payment pursuant to the priorities es-
45 tablished under section 16 of this 2009 Act. If it appears that property has not come into the

1 possession of the personal representative, or has been distributed by the personal represen-
2 tative, the court nevertheless shall fix the liability of any person who has any interest in the
3 property or who has possession thereof, whether as trustee or otherwise.

4 **“SECTION 5. Payment of elective share.** In determining whether any payment is required
5 to a surviving spouse in satisfaction of the elective share provided for in section 3 of this 2009
6 Act, the court shall consider the values of the decedent’s probate estate, the decedent’s
7 nonprobate estate, the surviving spouse’s estate, the decedent’s probate transfers to the
8 surviving spouse and the decedent’s nonprobate transfers to the surviving spouse. If the
9 court determines that the aggregate value of the surviving spouse’s estate, the decedent’s
10 probate transfers to the surviving spouse and the decedent’s nonprobate transfers to the
11 surviving spouse do not satisfy the amount of the elective share, any additional amount re-
12 quired to satisfy the elective share shall be paid out of the decedent’s probate estate and the
13 decedent’s nonprobate estate in the manner provided by section 16 of this 2009 Act.

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

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

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

28
29 **“AUGMENTED ESTATE**
30 **(Generally)**
31

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

35 **“(a) The decedent’s probate estate as described in section 10 of this 2009 Act.**

36 **“(b) The decedent’s nonprobate estate as described in sections 11 and 12 of this 2009 Act.**

37 **“(c) The surviving spouse’s estate, as described in section 13 of this 2009 Act.**

38 **“(d) The decedent’s probate transfers to the surviving spouse, as described in section 14**
39 **of this 2009 Act.**

40 **“(e) The decedent’s nonprobate transfers to the surviving spouse, as described in section**
41 **15 of this 2009 Act.**

42 **“(2) The value attributable to any property included in the augmented estate under**
43 **sections 2 to 20 of this 2009 Act must be reduced by the amount of all enforceable claims**
44 **against the property and all encumbrances on the property. Any exemption or deduction that**
45 **is allowed for the purpose of determining estate or inheritance taxes on the augmented es-**

1 spouse or any other person during the spouse's lifetime.

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

4
5 "(Decedent's Probate Transfers to Spouse)
6

7 "SECTION 14. Decedent's probate transfers to surviving spouse. The decedent's probate
8 transfers to the decedent's surviving spouse include all estate property that is subject to
9 probate, that passes to the surviving spouse by testate or intestate succession, and that is
10 available for distribution to the surviving spouse after payment of claims and expenses of
11 administration.
12

13 "(Decedent's Nonprobate Transfers to Spouse)
14

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

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

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

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

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

30 "(2) The decedent's nonprobate transfers to the decedent's surviving spouse do not in-
31 clude any property passing to the surviving spouse under the federal Social Security Act.
32

33 "PAYMENT OF ELECTIVE SHARE
34

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

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

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

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

44 "(2) If after application of the amounts specified in subsection (1) of this section the
45 elective share amount is not fully satisfied, the following amounts shall be applied to the

1 extent necessary to satisfy the balance of the elective share amount:

2 “(a) Amounts included in the decedent’s probate estate.

3 “(b) Amounts included in the decedent’s nonprobate estate under sections 2 to 20 of this
4 2009 Act.

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

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

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

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

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

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

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

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

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

43 “(2) Upon the filing of a motion or petition under section 4 of this 2009 Act, any person
44 who has received any part of the decedent’s probate or nonprobate estate and who is re-
45 quired to make a contribution toward the satisfaction of the elective share may file a motion

1 or petition with the court requesting a determination of the amount of the person's propor-
2 tionate contribution toward the satisfaction of the elective share. Upon that determination
3 being made, the person may deposit with the court the amount so determined in the form
4 of money or a bond or other security. The deposit discharges the person from all claims re-
5 lating to the satisfaction of the elective share. In lieu of deposit with the court under this
6 subsection the court may require that the money or security be deposited with a person
7 designated by the court.

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

15 16 “PROCEDURE

17
18 “SECTION 19. Proceedings to claim elective share. (1) A surviving spouse may claim the
19 elective share by filing a petition for the exercise of the election in a circuit court within the
20 time allowed by section 4 (1)(c) of this 2009 Act. Venue for the proceeding is as provided in
21 ORS 113.015. A copy of the petition must be served on all persons who would be entitled to
22 receive information under ORS 113.145 and on all distributees and recipients of portions of
23 the augmented estate known to the surviving spouse who can be located with reasonable
24 efforts. The fee for filing a petition under this subsection shall be the amount prescribed in
25 ORS 21.310, based on the value of the nonprobate estate. The Oregon Rules of Civil Procedure
26 apply to proceedings under this section. Any party to a proceeding under this section may
27 request that the pleadings and records in the proceeding be sealed.

28 “(2) A surviving spouse may withdraw a petition filed under this section at any time be-
29 fore entry of a judgment on the petition.

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

33 “SECTION 20. Effect of separation. If the decedent and the surviving spouse were living
34 apart at the time of the decedent's death, whether or not there was a judgment of legal
35 separation, the court may deny any right to an elective share or may reduce the elective
36 share to such amount as the court determines reasonable and proper. In deciding if all or
37 part of the elective share should be denied, the court shall consider whether the marriage
38 was a first or subsequent marriage for either or both of the spouses, the contribution of the
39 surviving spouse to the property of the decedent in the form of services or transfers of
40 property, the length and cause of the separation and any other relevant circumstances.

41 42 “MISCELLANEOUS

43
44 “SECTION 21. ORS 114.555 is amended to read:

45 “114.555. If a personal representative is not appointed within four months after the filing of the

1 affidavit authorized by ORS 114.515, the interest of the decedent in all of the property described in
2 the affidavit is transferred to the person or persons shown by the affidavit to be entitled thereto,
3 and any other claims against the property are barred, except:

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

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

7 “**SECTION 22.** ORS 116.133 is amended to read:

8 “116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express
9 or implied purpose of the devise would be defeated by the order of abatement stated in subsection
10 (2) of this section, the shares of the distributees abate as may be found necessary to give effect to
11 the intention of the testator.

12 “(2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [*ORS*
13 *114.105 as to the share of the surviving spouse who elects to take against the will*] **sections 2 to 20**
14 **of this 2009 Act relating to the elective share of the surviving spouse**, shares of distributees
15 abate without any preference or priority as between real and personal property in the following
16 order:

17 “(a) Property not disposed of by the will.

18 “(b) Residuary devises.

19 “(c) General devises.

20 “(d) Specific devises.

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

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

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

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

35 “**SECTION 23. Sections 2 to 20 of this 2009 Act and the amendments to ORS 114.555 by**
36 **section 21 of this 2009 Act apply only to the surviving spouses of decedents who die on or**
37 **after the effective date of this 2009 Act. Notwithstanding the repeal of ORS 114.105, 114.115,**
38 **114.125, 114.135, 114.145, 114.155 and 114.165 by section 25 of this 2009 Act, the rights of a**
39 **surviving spouse of a decedent who dies before the effective date of this 2009 Act shall con-**
40 **tinue to be governed by the law in effect immediately before the effective date of this 2009**
41 **Act.**

42 “**SECTION 24. A written contract, agreement or waiver entered into before the effective**
43 **date of this 2009 Act, whether prenuptial or post-nuptial, that waives in whole or in part the**
44 **elective share of a surviving spouse is effective as a waiver under section 6 of this 2009 Act**
45 **unless a court determines that the contract, agreement or waiver is not enforceable under**

1 the standards of section 6 of this 2009 Act. Section 6 (2) of this 2009 Act applies to contracts,
2 agreements or waivers entered into before, on or after the effective date of this 2009 Act.

3 “SECTION 25. ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 are re-
4 pealed.

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

8
9 **“EFFECTIVE DATE**

10
11 “SECTION 27. This 2009 Act takes effect on January 1, 2011.”.
12
