

Enrolled
Senate Bill 385

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CHAPTER

AN ACT

Relating to the elective share of a surviving spouse; creating new provisions; amending ORS 114.630, 114.635, 114.660, 114.665, 114.675 and 114.700; and declaring an emergency.

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

AUGMENTED ESTATE GENERALLY

SECTION 1. ORS 114.635 is amended to read:

114.635. *[(1) The augmented estate does not include any value attributable to future enhanced earning capacity of either spouse.]*

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

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

The augmented estate does not include:

- (1) Any value attributable to future enhanced earning capacity of either spouse;**
- (2) Any property that is irrevocably transferred before the death of the decedent spouse;**
- (3) Any property that is transferred on or after the date of the death of the decedent spouse with the written joinder or written consent of the surviving spouse;**
- (4) Any property that is community property under ORS 112.705 to 112.775 or under the laws of the jurisdiction where the property is located; or**
- (5) Any property that is held by either spouse solely in a fiduciary capacity.**

DECEDENT'S NONPROBATE ESTATE

SECTION 2. ORS 114.660 is amended to read:

114.660. For purposes of ORS 114.600 to 114.725, a decedent's nonprobate estate consists of the property described in ORS 114.665 that is not included in the decedent's probate estate and that does not constitute a *[probate]* transfer to the decedent's surviving spouse. **The value of the decedent's nonprobate estate is reduced by all debts and liabilities of the decedent that are not paid in probate, and by all costs of administering the decedent's nonprobate estate that**

are incurred for the purpose of settling claims against the nonprobate estate and distributing the nonprobate estate property to the persons entitled to that property.

SECTION 3. ORS 114.665 is amended to read:

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

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

(3) A decedent's nonprobate estate includes any property owned by the decedent immediately before death for which the decedent had the power to designate a beneficiary, **but only to the extent that the decedent could have designated the decedent, or the spouse of the decedent, as the beneficiary.**

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

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

SECTION 4. ORS 114.630 is amended to read:

114.630. (1) Except as otherwise provided in ORS 114.600 to 114.725, the augmented estate consists of all of the following property, whether real or personal, movable or immovable, or tangible or intangible, wherever situated:

(a) The decedent's probate estate as described in ORS 114.650.

(b) The decedent's nonprobate estate as described in ORS 114.660 and 114.665.

(c) The surviving spouse's estate, as described in ORS 114.675.

[(d) The decedent's probate transfers to the surviving spouse, as described in ORS 114.685.]

[(e) The decedent's nonprobate transfers to the surviving spouse, as described in ORS 114.690.]

(2) The value attributable to any property included in the augmented estate under ORS 114.600 to 114.725 must be reduced by the amount of all enforceable claims against the property and all encumbrances on the property. Any exemption or deduction that is allowed for the purpose of determining estate or inheritance taxes on the augmented estate and that is attributable to the marriage of the decedent and the surviving spouse inures to the benefit of the surviving spouse as provided in ORS 116.343 (2).

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

(4) The value attributable to property included in the augmented estate is equal to the value that would be used for purposes of federal estate and gift tax laws if the property had passed without consideration to an unrelated person on the date that the value of the property is determined for the purposes of ORS 114.600 to 114.725.

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

SURVIVING SPOUSE'S ESTATE

SECTION 5. ORS 114.675 is amended to read:

114.675. (1) For purposes of ORS 114.600 to 114.725, a surviving spouse's estate is:

[(a) All property of the spouse other than decedent's probate transfers to the surviving spouse under ORS 114.685, as determined on the date of the decedent's death.]

[(b)] (a) The decedent's probate transfers to the spouse, as described in ORS 114.685.

(b) The decedent's nonprobate transfers to the spouse, as described in ORS 114.690.

(c) All other property of the spouse, as determined on the date of the decedent's death.

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

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

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

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

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

(e) The value of the surviving spouse's beneficial interest in a trust other than a trust described in paragraphs (a) to (d) of this subsection shall be determined under the provisions of ORS 114.630 (3) and (4).

PAYMENT OF ELECTIVE SHARE

SECTION 6. ORS 114.700 is amended to read:

114.700. (1) *[The following amounts are]* **The surviving spouse's estate, as described in ORS 114.675, shall be** applied first to satisfy the dollar amount of the elective share and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others.*[:]*

[(a) The surviving spouse's estate as described in ORS 114.675.]

[(b) The amount of all of the decedent's probate transfers to the surviving spouse described in ORS 114.685.]

[(c) The amount of all of the decedent's nonprobate transfers to the surviving spouse described in ORS 114.690.]

(2) If after application of the *[amounts specified in]* **surviving spouse's estate under** subsection (1) of this section the elective share amount is not fully satisfied, the following amounts shall be applied to the extent necessary to satisfy the balance of the elective share amount:

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

(b) Amounts included in the decedent's nonprobate estate under ORS 114.600 to 114.725.

(3) Unless otherwise provided by a will, trust or other instrument executed by the decedent spouse:

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

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

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

[(5)] (4) All apportionments [required] under this section between the probate and nonprobate estates of the decedent and among the recipients of those estates shall be based on the assets of each estate that are subject to distribution by the court under the provisions of ORS 114.600 to 114.725.

[(6)] (5) In any proceeding described in ORS 114.610, the court may allocate the cost of storing and maintaining property included in the augmented estate pending distribution of the property.

APPLICABILITY

SECTION 7. The amendments to ORS 114.630, 114.635, 114.660, 114.665, 114.675 and 114.700 by sections 1 to 6 of this 2011 Act apply to the surviving spouses of all decedents who die on or after the effective date of this 2011 Act.

CAPTIONS

SECTION 8. The unit captions used in this 2011 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2011 Act.

EMERGENCY CLAUSE

SECTION 9. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

Passed by Senate April 4, 2011

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House May 24, 2011

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Bruce Hanna, Speaker of House

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Arnie Roblan, Speaker of House

Received by Governor:

.....M,....., 2011

Approved:

.....M,....., 2011

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M,....., 2011

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Kate Brown, Secretary of State