

**Testimony before the House Judiciary Committee
In support of House Bill 2571
On behalf of the OSB Family Law Section
February 12, 2013**

Dear Chair Barker and Members of the Committee:

My name is Ryan Carty. I am an attorney in private practice limited to family law. I am the legislative liaison for the Family Law Section of the Oregon State Bar for the current legislative session and am currently serving as Chair of the Family Law Section's Legislative Subcommittee. I appear today in that capacity. The Family Law Section was originally formed in 1978, and today is made of up of over 1,000 attorneys who practice family law in Oregon. We have members from 30 different Oregon counties, representing a wide variety of clients each with their own unique problems and concerns. Our executive committee is comprised of 12 members from 8 different counties, from the coast, to the Willamette Valley, to Central Oregon. The Executive Committee of the Family Law Section supports House Bill 2571. The bill presents no fiscal or policy issues, and we are not aware of any opposition.

This bill addresses two distinct issues:

1. Termination of a spousal support obligation upon the death of either party; and
2. The applicability of financial restraining orders to ORS Chapter 109 (non-married parent) cases.

Termination of a Spousal Support Obligation Upon the Death of Either Party

Prior to 1987, IRC § 71(b)(1)(D) required the divorce or separation instrument to expressly declare the payor's nonliability for continuation of the payment obligation after the payee's death. Omission of such an express declaration from the divorce or separation instrument effectively disqualified the payment obligation from being deemed as alimony, thus eliminating the payments from being tax deductible to the payor. However, section 1843(b) of the Tax Reform Act of 1986, Pub L 99-514, amended 26 USC § 71(b)(1)(D) so as to delete from the statute the words "and the divorce or separation instrument states that there is no such liability."

Under present IRC § 71(b)(1)(D), all that is required is that there be no liability to make any such payment for any period after the death of the payee spouse and no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. This requirement will be deemed as satisfied if (1) the dissolution judgment expressly so declares or (2) the payor's payment liability ceases upon the death of the payee spouse by operation of state law.

There are at least two Oregon appellate cases that address the issue of spousal support liability after the death of the payee spouse. In *Kemp v. Dept. of Rev.*, OTC-RD No 4241, WL 477958 (July 27, 1998) (unpublished opinion), the Oregon Tax Court said that spousal support under Oregon law is deemed to terminate upon the death of payee spouse absent a provision in the judgment providing otherwise). And in *Miller and Miller*, 207 Or App 198, 203, 140 P3d 1172 (2006), the Court of Appeals observed that "a

hallmark of spousal support is that the beneficiary's death terminates the obligation." (This appears to be quite reasonable, given that a deceased spouse or former spouse generally has no further need for spousal support.)

Nonetheless, confusion and uncertainty appears to abound, particularly in light of *Fithian v. US*, 45 Fed Appx 700, 90 AFTR2d 6210 (9th Cir. 2002), an officially unpublished (but nonetheless widely circulated) opinion in which the 9th Circuit Court of Appeals viewed the spousal support provisions of an Oregon dissolution judgment as being ambiguous on the question of whether the husband's spousal support obligation terminated upon wife's death. Although the federal court opinion did not make a definitive determination of Oregon law nor does it serve as any binding precedent on the legal issue involved, the existence of the opinion certainly suggests the need for a definitive statutory declaration providing, in essence, for automatic termination of spousal support upon the payee spouse's death.

The proposed amendment to ORS 107.105(1) echoes the wording of IRC § 71(b)(1)(D). It codifies but does not change presently-existing Oregon case law. It will eliminate any lingering confusion that may otherwise exist, eliminate potential malpractice trips for lawyers, and avoid potential conflicts between Oregon taxpayers and the IRS.

Financial Restraining Orders and ORS Chapter 109

ORS 109.103 provides that only those provisions of ORS 107.093 that relate to custody, support and parenting time apply to the custody proceeding. The insurance terms of ORS 107.093 presumably apply because health insurance directly relates to support via the ORS 25.275 computation. Life insurance also relates to support because of the provisions of ORS 107.810:

"It is the policy of the State of Oregon to encourage persons obligated to support other persons as the result of a dissolution or annulment of marriage or as the result of a legal separation to obtain or to cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death."

ORS 107.820 provides that, "A court order for the payment of [...] child support [...] constitutes an insurable interest in the party awarded the right to receive the support."

The provisions of ORS 107.093(c) presumably do not apply because they deal with transferring, encumbering, concealing or disposing of property in which the other party has an interest. An unmarried parent who has an interest in the other parent's property would file a Dissolution of Domestic Partnership proceeding under ORS Chapter 106, rather than a Petition for Custody, Parenting Time, and/or Child Support under ORS Chapter 109.

The provisions of ORS 107.093(d) might apply. This part of the statute restrains each party from making extraordinary expenditures without providing written notice and an accounting of such expenditures of the other party. Extraordinary expenditures would theoretically impact the obligor's ability to pay support and the obligee's need for support. These two factors would be most applicable in determining whether a rebuttal is appropriate. Both factors, therefore, arguably do relate to support, although most practitioners

would say unmarried couples need not be restrained from making extraordinary expenditures because the question is one of income, not of resources.

The issue then, is that ORS 107.093 is unclear as to what provisions apply to ORS 109 proceedings. More specificity is necessary, and is provided by the provisions of HB 2571.

What the Bill Does

Section 1 of the bill specifically terminates, as a matter of law, spousal support upon the death of either party *unless otherwise expressly provided in the judgment*. The change is consistent with Oregon case law and federal tax law. Practitioners and parties can still include provisions in a judgment that will make payments continue after death, if they desire to do so, and courts would still retain the authority to do so if appropriate.

Section 2 of the bill excludes ORS 107.093 from the ORS Chapter 107 provisions that apply to ORS Chapter 109 cases. The bill concurrently creates new material that imposes specific restrictions on parties in a custody and parenting time case that are more appropriate for the dynamics of a case involving unmarried parents who have no legal interest in the other party's property and there is no legal basis for a division of either party's property.

On behalf of the Family Law Section of the Oregon State Bar, I thank the committee for its consideration and urge the passage of HB 2571.

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