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Amendments to the Oregon Probate Code

Report of the Probate Modernization Work Group on House Bill 4102-A3 (2016)

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The Oregon Law Commission is housed at the Willamette University College of Law, which also provides executive, administrative and research support for the Commission.

I. Introductory summary

Oregon adopted its probate statutes in 1969. Although the legislature has amended the statutes through the years, amendments have been piecemeal and the probate statutes have not undergone a thorough review since 1969. Some sections need updating due to changes in society, some sections need clarification because lawyers working with these sections report uncertainty about their meanings, and the statutes may benefit in general from a careful review of all sections. The goals of the project have been to clarify and modernize statutory sections as appropriate, while leaving intact the parts of the probate statutes that work well.

II. History of the project

In October 2013, the Oregon Law Commission ("OLC" and "Commission") appointed the Probate Modernization Work Group ("Work Group") to review and recommend changes to the Oregon probate statutes. Members of the Work Group came from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice (the Charitable Activities and Civil Recovery Sections of the Civil Enforcement Division), and the Circuit Courts (both probate judges and staff). The Work Group began with Chapter 112 and based on the Work Group's recommendations, the Commission approved Senate Bill 379 for the 2015 Legislative Session. The Legislature enacted that bill, making changes to Chapter 112 effective January 1, 2016. In October 2015, the Work Group resumed its work, turning to Chapter 111. In addition, the Work Group reviewed a few technical problems related to the changes made to Chapter 112 in 2015.

The voting Work Group members are: Lane Shetterly, Chair of the Work Group, OLC Commissioner and Attorney; Laura H. Handzel, Deputy Director of the OLC; Susan N. Gary, Reporter for the Work Group, OLC Commissioner and Professor at University of Oregon School of Law; BeaLisa Sydlik, Deputy Legislative Counsel; Cleve Abbe, Lawyers Title of Oregon LLC; Kathy Belcher, Attorney; Susan Bower, Department of Justice Charitable Activities Section; Jeff Cheyne, Attorney; Retired Judge Rita Cobb, Washington County; Mark Comstock, OLC Commissioner and Attorney; Judge Claudia Burton, Marion County; John Draneas, Attorney; Heather Gilmore, Attorney; Robin Huntting, Clerk in the Civil Case Unit for Clackamas County; Gretchen Merrill, Department of Justice Government Services & Education Section; Marsha Murray-Lusby, Attorney; Ken Sherman, Attorney; Jennifer Todd, Attorney; Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School; and Judge Donald Hull, Samuels Yoelin Kantor LLP.

This bill amends sections in Chapter 111 and includes some technical corrections to Chapter 112.

III. Statement of the problem area and objectives of the proposal

Technological and social changes have affected the way people manage and dispose of their property. The proposal amends Chapter 111 to modernize the statutes and clarify provisions where the language in the current statutes is unclear. The proposal also makes a few technical corrections to Chapter 112 to fix small problems in Senate Bill 379, enacted in 2015.

IV. Review of legal solutions existing or proposed elsewhere

The Work Group approached the project by using the ORS provisions as the baseline. The Work Group was provided with a copy of the sections of the Uniform Probate Code ("UPC") that correspond to the topics being discussed. The UPC had been annotated to indicate where the UPC differs from the ORS, so the Work Group could discuss those differences and decide whether to recommend something similar to the UPC for a particular provision. In addition, the Work Group considered statutes from other states where appropriate.

V. The proposal

Section 1: This section amends ORS 111.005, the definitions section. A number of definitions are changed:

Advancement. In the common law, the doctrine of "advancement" developed to indicate when a gift received during life would reduce the share the donee would otherwise receive in intestacy. The terms "satisfaction" and "ademption by satisfaction" were used for a similar situation when the decedent died testate. The ORS has codified these doctrines, with Chapter 111 using the term advancement for intestate situations and Chapter 112 using the term satisfaction for testate situations.

Increasingly the term advancement has come to be used, by practitioners and others, to cover both situations. The Work Group decided to change the terminology in the statutes to conform to common usage. The amended definition applies the term to testate and intestate situations. Other sections of this proposal make corresponding changes in the sections that provide the substantive rules for advancement and satisfaction.

Decedent. The Work Group deleted the limitation that a "decedent" refers to a person who has died "leaving property that is subject to administration." In most situations covered by the statutes the decedent will have left property subject to administration, but a probate proceeding might be opened in a wrongful death action for a decedent who left no probate property. The term should be clear in context without the limiting language.

Descendant. The Work Group decided to replace the term "issue" with the term "descendant" throughout the statutes. Descendant is the word more commonly used in modern documents. The Work Group left the definition of issue in the statutes, because many older documents will continue to use the term. The definition of descendant tracks the language that had been in the definition of issue to clarify that for purposes of determining intestate shares, a descendant of a living descendant will not be included in the term. The word "lineal" was deleted from the definition because it is unnecessary and confusing. Legal documents use the term descendant to mean someone lineally descended from an ancestor, and that is how it is intended under this definition.

The term "lineal descendant" has been used in the statute to distinguish lineal descendants from collateral descendants. "Collateral descendant" is a term that means descendants of collateral relatives. Using that definition, a niece of a decedent would be the decedent's collateral descendant. The Work Group members agreed that distinguishing between lineal and collateral descendants is confusing. None of the practitioner members of the Work Group used the term "collateral descendant" in their practices; they would refer to the niece of a decedent as a "collateral relative" rather than a collateral descendant. Given that the term collateral descendant is no longer used, the term lineal descendant seems to be a relic of an earlier era. The UPC does not use the word lineal.

The -A3 amendment adds an explicit reference to an adopted child and the adopted child's descendants in the definition of "descendant" to ensure there is no question regarding inclusion. The language had been part of the definition of "issue" and had been dropped as unnecessary, but due to concern that the change might raise an interpretive question the language was added back to the definition.

Devise (as a noun), devise (as a verb), and devisee. These definitions were changed to delete references to "legacy," "bequest," "bequeath," "legatee" and "beneficiary." The Work Group does not intend to change the meaning of the definition. Rather, the extra words were deemed unnecessary.

Funeral. The Work Group discussed the fact that most people and their lawyers think that the word "funeral" includes a memorial service and not just the disposition of remains. The definition now makes that clear.

The Work Group discussed at length the problem of differing views of the appropriate amount to spend on a funeral. Family members may disagree on expenses associated with a memorial service, especially if the costs of the service reduce the shares of the estate they will receive. Further, if the estate has creditors, a lavish memorial service might reduce the amount available to pay creditors.

The Work Group concluded that limitations in other sections were sufficient to address these potential problems and did not add limitations to the definition. ORS 113.005, ORS 113.242, and ORS 114.305 limit the amount that can be spent to a funeral "in a manner suitable to the condition in life of the decedent." ORS 114.305

further provides that if the estate lacks sufficient assets to pay government claims for assistance given to the decedent during life, only expenses "necessary for a plain and decent funeral" can be paid. Similarly, under ORS 115.125 if the estate lacks sufficient assets to pay all creditors and expenses, only the expenses of a plain and decent funeral are entitled to priority in payment, and then only after support of spouse and children and expenses of administration are paid.

The definition says a funeral "includes" the disposition of remains and a memorial service, so the definition is not exclusive and does not try to specify exactly what types of expenses are covered. The Work Group concluded that additional limitations in the definition section were unnecessary.

Generation. In 2015, Senate Bill 379 added a definition of "generation." The Work Group concluded that the definition was not necessary, because the general meaning of generation is commonly understood and a concern that someone would read generation in a statute to mean an era of time (such as the Baby Boomers or Millennial Generations) or a period of years was not sufficient reason to add a definition. The UPC does not include a definition of generation.

Heir. The definition was amended to clarify that an "heir" can be determined whether a person is living or deceased. A living person's heirs do not take property, of course, but may be identified for other purposes. The clause confirming that the term heir can include a surviving spouse was removed as unnecessary. The clause may have been included in the statute to remind a reader that the terms heir and descendant have different meanings. The term heir clearly includes a surviving spouse, and no change is intended by the removal of the unnecessary words.

Issue. The Work Group decided to replace the term "issue" with the term "descendant" throughout the statutes but left the definition of issue in the statutes, because many older documents continue to use the term.

A few other changes were made to improve the language of the definitions.

Sections 2 – 5: ORS 112.025 through ORS 112.058, the intestacy provisions, were amended to change the term "issue" to "descendant" and to make language in the provisions parallel.

The Work Group felt it was necessary to make certain changes effective immediately. Thus, the -A3 amendment creates from former section 4 two new sections: section 4, which becomes effective immediately, and section 4a, which becomes effective on January 1, 2017. The new section 4 fixes an ambiguity that surfaced after the enactment of Senate Bill 379 and needs to be changed immediately. Section 4a, effective January 1, 2017, changes the word "issue" to "descendant" and makes other changes that simply clarify current law and therefore need not become effective until January 1, 2017.

Section 4 made a technical correction to ORS 112.045(4)(a) to clarify the way representation works when the descendants of grandparents are considered. The changes are intended to make clear that if a grandparent predeceases the decedent and leaves no descendants who survive the decedent, the decedent's property will be distributed among the other grandparents who are living and the descendants of any grandparent who predeceased the decedent, leaving descendants who survive the decedent. Property will not escheat unless no grandparent or descendant of a grandparent survives the decedent.

If at least one but not all of the grandparents survive the descendant, the share of any deceased grandparent will go to that grandparent's descendants. If the descendants of that grandparent are all of the same generation, they take equally.

> **Example:** Paternal Grandmother (PGM) and Paternal Grandfather (PGF) both predeceased the decedent leaving one child who survived the decedent. The child will take one-half of the decedent's estate (PGM's one-quarter and PGF's one-quarter). Maternal Grandmother survived the decedent and will take one-quarter of the estate. Maternal Grandfather did not survive the decedent. His two children also predeceased the decedent. Six of Maternal Grandfather's grandchildren survived the decedent. Two of the grandchildren are descended from one child and four grandchildren are descended from the other child. The six grandchildren will share equally.

The -A3 amendment clarifies the chain of the net estate division in section 4 with respect to grandparents who left surviving descendants at the time of the decedent's death. Again, these changes are preserved in section 4a, with the addition of replacement of the term "issue" with "descendant".

The Work Group has been asked to consider a possible ambiguity caused by the changes to ORS 112.045(3). The Work Group intended no change to the pre-2016 distributive pattern, and to the extent that the drafting suggests something different, the Work Group will revisit this section and recommend changes in the next legislative session.

Section 6: ORS 112.065 defines "representation" as a method of determining how intestate shares are distributed among different generations. The language was rewritten to provide a better explanation of the concept, and the definition was changed so that the term representation can be used for any person. The statute being changed defined representation in the context of the decedent, which limited its usefulness in the intestacy provisions where representation may be used to distribute shares to descendants of collateral relatives of the decedent. (*See infra* the discussion under Sections 2-5.)

Section 7: This section repeals ORS 112.390, a provision added by section 28 of Senate Bill 379 (2015) to apply the advancement rules to testate situations. section 8 of the proposal moves the substance of ORS 112.390 to ORS 112.135.

Section 8: This section amends ORS 112.135, the section that provides for advancements. As explained in connection with the definition of advancement, the Work Group decided to apply the term advancement to testate as well as intestate situations. Subsection (1) of section 8 provides the rules for intestate situations, subsection (2) for testate situations, and subsection (3) extends the rules on advancements to property transferred through nonprobate means.

The current statute applies the advancement rules only if the decedent died intestate as to the entire estate. The Work Group eliminated the "wholly intestate" requirement for an advancement in an intestate situation. The UPC advancement provision changed in 1990 to apply to a decedent who died intestate as to "all or part" of his or her estate. This bill adopts the approach of the UPC in applying advancement in a partially intestate situation. Further, the intent of the new provision is that the reduction to a donee's share will apply to both intestate and testate property. In ORS 112.145, the section describing how the reduction is made, "estate" means both intestate and testate property.

The Work Group noted that a person might make a gift intended as an advancement through a nonprobate means (a pay-on-death designation, a beneficiary designation on an insurance policy, etc.). If the donor indicated, in writing, that the transfer was intended to be taken as part of the donee's share of the estate, then the statute should give effect to that intent through the provisions governing advancement. The treatment of nonprobate transfers within the advancement rules extends those rules beyond current statutes and beyond the common law, but is in keeping with the policy of trying to give effect to the intent of decedents. The rules require a written indication of the intent, either a writing by the decedent or an acknowledgment by the donee, and that requirement should limit difficulties in proving advancements. In some cases a decedent may have intended a gift as an advancement without saying so in writing. The statutes will not treat that situation as an advancement, because the challenges of proof are too great. The requirement of a written statement or acknowledgment has been in Oregon law since 1969 and is standard around the country.

Another change to the advancement provisions is that a decedent can provide, in writing, for an alternative time or method of valuing the advancement. If the decedent does not direct valuation, the statute provides, as it has since 1969, that the property will be valued as of the time the donee came into possession or enjoyment of the property or as of the time of the decedent's death, whichever occurs first. For nonprobate transfers, property will be valued as of the decedent's death, unless the decedent provides otherwise in writing. The Work Group acknowledged that parties might argue about the time of possession or enjoyment, but decided not to change the existing statute because circumstances will vary too much for statutory specificity to improve results.

In discussing the valuation provisions, the Work Group noted that an advancement made by a gift of real estate in joint tenancy would be valued at two different times. When a donor adds a donee to title of real property as a joint tenant, the donor makes

a current gift of one-half of the property. That half of the property would be valued at the time of the gift. When the donee receives the other half of the property on the donor's death, that half would be valued at that time. If the donor wanted to reach a different result, the donor could provide in writing for a different valuation time or process.

Section 9: This section amends ORS 112.145, which provides the calculation for reducing an heir or devisee's share if the person received an advancement. The changes extend the provisions to cover testate situations. The word "share" is used to mean the portion of the estate to which the heir or devisee is entitled. The shares of heirs and devisees may not be equal.

Sections 10-11: ORS 112.155 and ORS 112.175 are amended to replace the term "issue" with the term "descendant."

Section 12: ORS 111.015 provided transitional rules when the probate statutes were enacted in 1969. Many of these rules are now obsolete and can be removed.

Sections 13-14: In Oregon, jurisdiction over probate matters lies in the circuit court in most counties and in the county court in six counties. In those six counties, a county court can transfer an estate proceeding to a circuit court. These sections amend ORS 111.095 and ORS 111.115 to clarify and modernize the language. These sections do not make substantive changes.

Sections 15-16: These sections amend ORS 111.175 and ORS 111.185 governing delegation by a judge to a probate commissioner or deputy probate commissioner. The Work Group heard from probate judges and probate staff who described how probate courts operate in different counties in Oregon. The Work Group also heard from practitioners who wanted to be able to ask the judge to review decisions made by a probate commissioner or deputy.

The Work Group concluded that authority to appoint a probate commissioner and deputy commissioners should lie with the probate judge. Section 15 amends ORS 111.175 to require that any deputy commissioners be appointed by the judge, and not by the probate commissioner as under current law. The Work Group wanted the statute to require that the judge prescribe the duties and responsibilities of the probate commissioner and any deputies, by rule or order, to avoid uncertainty about the authority of the probate commissioner.

ORS 111.185 provides for several things a probate commissioner or deputy may do, if authorized by the judge, and section 16 adds the authority to appoint court visitors to the list.

Further revisions to ORS 111.185 clarify the rule that a judge can set aside or modify any order or judgment made by a probate commissioner or deputy within 30 days. The judge can act on his or her own or in response to an objection. The bill adds a

subsection clarifying that any interested person may object to an order or judgment within 30 days, without going through a full-scale appeals process.

Section 17: This section amends ORS 112.238, a statute added by Senate Bill 379 (2015). ORS 112.238 provides that a court can admit a writing to probate as a decedent's will if the proponent of the writing establishes, by clear and convincing evidence, that the decedent intended the writing to be a will or a revocation of a will. Technical corrections have been made to the provisions that indicate who should receive notice of a petition and now provide better coordination with the notice provisions of Chapter 113. Also, a subsection that was included in this section in error (*former* subsection (4)) is deleted. In addition, a new subsection clarifies that after a will is admitted to probate under ORS 112.238, an interested person can still challenge the will under any ground for a will contest provided under ORS 113.075, other than ineffective execution, within the time provided by ORS 113.075.

Section 18: This section amends ORS 111.275 by adding to the list of decisions for which a court may enter a limited judgment, a decision based on admitting or acknowledging the validity of a writing under ORS 112.238.

Section 19: This section makes a conforming amendment needed because the subsection of a definition changed.

Section 20-23: These sections make conforming amendments to ORS 113.005, ORS 113.242, ORS 114.305, and ORS 115.125. Words included in the definition of funeral are deleted in each of these sections as unnecessary and potentially confusing, given that funeral is now defined with additional language.

Section 24: This section makes the amendments to Sections 1 to 3, 4a, 5, 6, 8 to 16, 18 to 23, and the repeal of ORS 112.390 by section 7 operative on January 1, 2017. The amendments to ORS 112.045 and ORS 112.238 by sections 4 and 17 will become effective immediately upon signature pursuant to the emergency clause in section 26.

Section 25: Subsection (1) of this section states that the amendments to sections 1 to 3, 4a, 5, 6, 8 to 16, 18 to 23, and the repeal of ORS 112.390 apply to estates of decedents dying after the delayed operative date of January 1, 2017.

Subsection (2) of this section provides that the amendments to sections 4 and 17 apply to estates of decedents dying after the effective date of the bill, which will be the date that the bill is signed by the Governor pursuant to the emergency clause in section 26.

Section 26: This section declares the bill an emergency and makes it effective on its passage. However, all sections of the bill except for sections 4 and 17 have a delayed operative date of January 1, 2017. This is because sections 4 and 17 contain necessary corrections and cleanups from Senate Bill 379 (2015). The Work Group did not feel the same urgency was necessary with respect to other sections.

VI. Conclusion

The Commission thanks Representative Brent Barton for graciously sponsoring this measure on behalf of the Oregon Law Commission and its Probate Modernization Work Group.

These amendments to Chapters 111 and 112 will improve the statutory law that provides rules for intestacy and wills.