



OREGON LAW COMMISSION

Oregon Probate Code

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Report of the Probate Modernization Work Group

on

HB 2986A (2017)

Prepared by:

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From the Offices of:
Executive Director Jeffrey C. Dobbins
&
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I. Introductory summary

Oregon adopted its probate statutes in 1969. The probate statutes had not undergone a thorough review until the Oregon Law Commission's Probate Modernization Work Group began its efforts in 2013. In two recent sessions, the Oregon Legislature has recognized the importance of the Oregon Law Commission's work recommending changes to the Probate Code by enacting them. The current bill contains additional amendments to improve the probate statutes. The Work Group's goal continues to be to clarify and modernize the probate statutes, while leaving intact the parts of the 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.

Beginning in October 2015, the Work Group reviewed and modernized Chapter 111, while also adjusting some technical issues in Chapter 112. The Commission approved House Bill 4102 for the 2016 Legislative Session. The Legislature enacted that bill, making changes effective in January 1, 2017, with an emergency clause for technical corrections to Chapter 112 effective immediately.

In April 2016, the Work Group resumed its efforts by reviewing Chapters 111, 113, 114, 115, and 116, and related Chapters 18 and 125. HB 2986A amends sections in those chapters and makes conforming amendments to other affected chapters.

The voting Work Group members are:

Lane Shetterly, Chair of the Work Group and OLC Commissioner
Prof. Susan Gary, OLC Commissioner, Work Group Reporter & Professor at
University of Oregon School of Law
Cleve Abbe, Lawyers Title of Oregon LLC
Kathy Belcher, McGinty & Belcher Attorneys PC
Victoria Blachly, Samuels Yoelin Kantor LLP
Susan Bower, Department of Justice, Charitable Activities Section
Judge Claudia Burton, Marion County Circuit Court
Judge Rita Cobb, Washington County Circuit Court
Mark Comstock, OLC Commissioner and Attorney
John Draneas, Draneas & Huglin PC

Heather Gilmore, Heather O. Gilmore PC
Judge Donald Hull, Samuel's Law
Robin Huntting, Clerk in the Civil Case Unit for Clackamas County Courthouse
Gretchen Merrill, Department of Justice, Civil Recovery Section
Marsha Murray-Lusby, Dunn Carney Allen Higgins & Tongue LLP
Professor Scott Shepard, Willamette University College of Law
Ken Sherman, Sherman Sherman Johnnie & Hoyt LLP
Jennifer Todd, Private Attorney
Prof. Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School

The Staff Members are:

Laura Handzel, Deputy Director, Oregon Law Commission
Nita Kumar, Law Clerk, Oregon Law Commission
Marisa James, Deputy Legislative Counsel

Attorney Jeff Cheyne was a valued member of the Work Group until he passed away in July of 2016. This Work Group also benefited from the contributions of many Interested Persons who regularly attended meetings.

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

Technological and social changes have affected the way people manage and dispose of their property. The bill amends Chapters 111, 113, 114, 115, and 116 to modernize the statutes and clarify provisions where language is currently unclear. A few related chapters are amended for consistency.

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 reviewed the legislative history of the current ORS provisions, considered sections of the Uniform Probate Code ("UPC") that corresponded to the topics being discussed, and discussed statutes from other states where appropriate.

V. The measure

Section 1: This section amends ORS 111.005(15), the definition of "estate." A new subsection is added to the definition of "estate" to clarify that personal property of a decedent is included in the estate, even if the property is located outside Oregon. This provision simply confirms the common law rule. The Work Group recognizes that it will not be binding on a court of another state but hopes it will serve as a general reminder of the common law rules.

Section 2: This section adds two new subsections to ORS 111.085, providing that when someone takes a distribution from an Oregon estate, the person submits to

personal jurisdiction in Oregon for any matter involving the estate. The new provision does not preclude other methods of obtaining jurisdiction over a distributee.

Section 3: ORS 111.215 addresses notice of a hearing when an order or judgment is sought. The amendments provide that the court may authorize notice by electronic means and that the Department of Human Services or the Oregon Health Authority may adopt rules permitting the acceptance of electronic notice.

Sections 4-6: ORS 113.005 provides for the appointment of a special administrator to protect property of a decedent before a personal representative is appointed. The Work Group wanted to balance the need for a bond to protect the persons interested in an estate with the concern that in some situations a bond could create an unnecessary expense. The Work Group considered providing a minimum in the statute but concluded that a minimum was not necessary. The amendments to ORS 113.005 emphasize the importance of a bond and provide additional guidance to the court in setting the bond. The amendments clarify how a special administrator is appointed and how the bond is set. A new section (Section 6 of the bill) provides that a court can waive the bond under circumstances in which the property will be protected. Section 41 of the bill amends ORS 22.020 to remove a restriction on the use of letters of credit in lieu of a bond in probate matters. This is because in some cases a letter of credit will provide both sufficient protection and greater flexibility.

Section 7: The requirement in ORS 113.035 that the decedent's social security number or taxpayer identification number be included on a petition for appointment of a personal representative was removed. The term "executor" was changed to "personal representative." (This updating change in language was made throughout the statutory sections affected by this bill.)

Sections 8: Section 8 adds a new section to Chapter 113, set forth in Section 9. The new section creates an alternative compensation scheme for the personal representative.

The Work Group heard concerns from the probate judges that finding someone willing to serve as a personal representative for an estate with modest assets and complicated property issues can be difficult. If no family member is available to serve, a professional fiduciary may be unwilling to serve if compensation is based on a percentage of the value of the estate under ORS 116.173(3). The new provision allows a personal representative to request that compensation be determined in a different manner, presumably on an hourly basis. The personal representative must request the alternative means of determining compensation in the petition to be appointed, and cannot make the request after the appointment. The petition must include "specific facts" demonstrating that compensation determined in the usual way will likely be inadequate. The court then has discretion to grant the request, but only if the court finds that the usual method for determining compensation would be inadequate.

The Work Group discussed whether to permit a request for an alternative form of compensation later in the administration of the estate. A personal representative

may agree to appointment and then later learn about problems with the property of the estate that will severely reduce the fees the personal representative will receive. The Work Group concluded that it needed to balance a variety of interests and that requiring the request in the petition was the best solution. Although a variety of concerns were raised, the goal is to make it possible to find a personal representative willing to serve.

The Work Group noted that a reason for fees based on a percentage of the assets of an estate is that hourly fees do not compensate a personal representative for the liability that comes with administering a large estate.

The Work Group discussed the possibility that someone might petition for the alternative compensation as a way to drain money from an insolvent estate. Of particular concern was the worry that if the estate was required to pay estate recovery of government benefits provided by the Department of Human Services, a family member might try to inflate the fees of the personal representative in order to obtain more money from the estate. The Work Group concluded that the judges will properly exercise discretion to prevent abusive use of this new provision. The new provision requires notice to the Department of Human Services and the Oregon Health Authority so that they have both notice and time to object.

A personal representative who has been appointed subject to this alternative compensation provision can later elect to be compensated as provided in ORS 116.173(3).

Section 9: The amendments appearing on page six at lines 14, 19 and 27 delete “differently” or “different compensation” and instead insert “a different method of compensation.” The intent is to make it clear that the request for different compensation that is included in the petition for appointment is only a request for a different method of determining the personal representative's compensation; it is not a request for approval of a specific amount of compensation up front.

The amendments appearing on page six at line 30 adds language to clarify that if the Department of Human Services, the Oregon Health Authority, or anyone with a right to object to a request for different compensation, does not object to the request for the different *method* of compensation up front, they still can object to the *amount* of compensation that the personal representative actually requests in the final account.

Section 10: This section modernizes the language in ORS 113.045.

Section 11: ORS 113.055(1) now states that a court will consider an affidavit of an attesting witness at the “*ex parte* review,” and not the “*ex parte* hearing” of a petition for probate. The bill amends the notice period in ORS 113.055(2) to provide that a motion contesting an attesting witness must be filed 30 days after the personal representative delivers or mails notice, rather than 30 days after the will is admitted to probate. This change makes it more likely that an interested party will get notice in time to respond.

Section 12: ORS 113.075 provides rules related to the filing of a will contest but in its current form does not require someone contesting a will to provide notice to the people who may be affected. A new subsection requires someone filing a will contest to give notice to the heirs and devisees identified in the petition for probate. Although some other persons might be interested in the estate, the Work Group concluded that requiring notice to the people named in the petition for probate of the will was sufficient. The Work Group did not want to create undue hurdles to the filing of a contest, given the benefits of getting the will contest filed quickly.

If the personal representative has provided notice to the Department of State Lands, the contestant must also provide notice to that department. Further, if any devisee under the contested will is a charity, the contestant must give notice to the Attorney General.

Section 13: This section adjusts the order of priority set forth in ORS 113.085 for naming a personal representative. One adjustment is that the surviving spouse of the decedent takes priority over everyone other than someone named in the will only if the surviving spouse is a distributee of the estate. Other relatives of the decedent had fallen in the category of “nearest of kin” and that provision is changed to give priority (after a surviving spouse who is a distributee) first to a person who is both a distributee and an intestate heir, followed by a person who is a distributee but not an intestate heir. The amended statute does not create priority based on degree of kinship of persons who are distributees, but the Work Group concluded that the court would consider the suitability of any person as a personal representative in making the appointment. A new subsection states that the court may require a person asking to be appointed as personal representative to attempt to notify other people with higher priority.

Section 14: ORS 113.095 is amended to replace the term “incompetent,” with “incapacitated or financially incapable,” which corresponds with the terminology under ORS Chapter 125.

Section 15: The Work Group discussed the problems faced by Oregonians of limited means in obtaining bonds. Sometimes the family member who would be the best choice as personal representative cannot be considered because the person cannot meet the bonding requirement. The countervailing concern, however, is the importance of a bond in some circumstances. The Work Group concluded that the statute could provide more flexibility to the court for limiting the bond but also should clarify that a court can require a bond even a will waives a bond.

Much of ORS 113.105 is rewritten, to modernize and clarify the language. One substantive change is that the amendment removes the authority of the court to waive a bond if all devisees and heirs agree to the waiver. The Work Group concluded that the general discretion in the court regarding waiver was preferable. The amended language says that the court may waive or reduce the bond if the personal representative states the reasons for the waiver and describes known creditors of the

estate. Further, the court may waive or reduce the bond if the personal representative provides written confirmation from a financial institution that the institution holds property of the estate that can be withdrawn only with an order of the court. Also, the court may waive or reduce the bond if the sale or other disposition of property is restricted.

Section 16: ORS 113.125 is amended to replace the words “executor” and “administrator” with “personal representative.”

Section 17: An amendment to ORS 113.165 extends the time period for filing the inventory from 60 days to 90 days. The Work Group noted that extensions for time are frequently requested. In listing property the personal representative provides estimates of value, and the statute is clarified by changing the term “true cash value” to “fair market value.”

Section 18: ORS 113.185 is amended to modernize the language (changing “appraisement” to “appraisal”).

Section 19: This section amends ORS 113.195 to create a new section (4), which allows a court to remove a personal representative “for other good cause shown.” The Work Group discussed the need that sometimes arises when a personal representative is not unqualified for the position but if left in the position could harm the estate. The goal of the amendment is to give the court discretion to remove a personal representative before the problems become too great. The Work Group does not intend this provision to suggest that the court compare family members with each other to determine the “best” or “most suitable” person for the position. The testator’s nomination of a personal representative should be honored in most cases, and after a personal representative is appointed, the appointment creates a presumption of suitability. Only if serious problems arise should a court use the new subsection to remove the personal representative. The fact that another family member might be more suitable should not be considered “good cause” for purposes of this subsection.

Section 20: Language in ORS 113.205 is modernized.

Section 22: Language in ORS 113.215 is modernized.

Section 23: A cross-reference in ORS 113.238 is updated.

Section 24: ORS 114.005 provides that a surviving spouse and dependent children of a decedent can continue to live in the house for a year after the death of the decedent. If the spouse is not paying the mortgage, this situation can create a liquidity problem for the estate. The Work Group decided to leave the provision in the statutes but to add a new subsection that permits the court, for good cause shown, to waive or alter the right to stay in the house.

This section makes three clarifying changes that are not substantive changes. The limit that applies if the decedent has less than a fee interest is intended to encompass

month-to-month rentals as well as an estate for the lifetime of another (the language that was removed). New language clarifies that the occupants of the dwelling must not only insure the dwelling but also pay the cost for the insurance. A new subsection clarifies that the dwelling is subject to the rights of anyone with a security interest in the dwelling.

Section 24 also modernizes language in ORS 114.005, changing “mechanic’s” and “materialman’s” liens to “construction” liens and “abode” to “dwelling.”

Section 25: This section adds a cross-reference in ORS 114.325(1). The ability of the personal representative to sell property may have been restricted as a way to limit the size of the bond under ORS 113.105.

Section 26: ORS 114.630 is updated by removing a reference to inheritance taxes.

Section 27: The revisions to ORS 115.005 provide guidance on what constitutes presentment of a claim.

The amended language recognizes that a creditor may file a claim with the court, but makes clear that doing so does not constitute presentment to the personal representative. Filing with the court does not provide special status over any other claim. Some creditors, particularly the Department of Human Services, like to file their claims with the court to provide information the court can consider when reviewing the final accounts. However, filing with the court creates no obligation on the court.

To present a claim a creditor must mail or personally deliver the claim to the personal representative at the address in the petition, the address provided for presentation of claims, or the address for presentation of claims provided in the published notice, as specified in the statute. The personal representative may also authorize presentment by electronic mail or facsimile transmittal.

The time for barring claims is expanded to 45 days from 30 days for creditors to whom the personal representative was required to deliver or mail a notice.

Section 28: ORS 115.065 is revised to address the ambiguity regarding a creditor with a claim secured by a security interest in property. ORS 115.056(1) is amended to clarify the creditor’s continued right to foreclose on the security interest. Presentment to the personal representative does not waive the security interest in the property.

Section 29: The Work Group wanted to clarify the effect of a money judgment that creates a judgment lien against real property owned by a decedent. The bill amends the provisions in ORS 115.070 to clarify the treatment of a creditor with a judgment. Additional changes are made to ORS 18.312 in Section 42 of the bill.

In ORS 115.070, if the judgment was not a lien against property at the date of the decedent’s death, the creditor will present the claim in the usual manner but with a

copy of the judgment attached. If the judgment was a lien against property on the date of the decedent's death, then the lien shall be treated as a claim for which the creditor holds security, under ORS 115.065.

Section 30: ORS 115.125 provides for the priority of claims when an estate is insolvent. The bill adds, as a priority item, expenses of administration of a protective proceeding for the decedent before the decedent's death, placing those expenses at the level of priority of expenses of administration of the probate estate. The Work Group concluded that expenses related to a protective proceeding should be given a high level of priority when the protected person dies.

Medical expenses of the last illness of the decedent receive priority and include compensation of persons attending the decedent. These expenses receive priority above claims by other creditors of the estate, including the Department of Human Services for reimbursement of assistance paid to the decedent. In an insolvent estate family members may try to avoid payments to creditors by requesting compensation for "attending the decedent" in the last illness. Family members may inflate the time spent and include compensation for visiting the decedent during the last illness. The amendment limits compensation to that "which the persons are otherwise entitled by law." The intent of ORS 115.125 is to compensate a caregiver who is entitled to wages but not a family member who visits a grandparent in the hospital. The amendment is not intended to change presumptions created under case law, for example a presumption that a family member visiting a decedent did not expect compensation.

Section 31: ORS 115.135 provides for the disallowance of claims. The Work Group heard from probate judges that the courts see across-the-board denials of claims. The Work Group considered imposing a good faith requirement for denial of a claim, but concluded that determining what constitutes good faith for denial was problematic. The considerations included worries that adding a good faith would heighten conflict and increase litigation. Under existing law the court can surcharge a personal representative if the court finds that the personal representative denied a claim in bad faith. Those provisions, ORS 114.265, 114.395, are sufficient to cover potential misbehavior related to claims.

In order to limit the across-the-board denials, Section 31 amends ORS 115.135 to require that a notice of disallowance of a claim include a statement of the reason for a disallowance. To protect against matters that the statement of a reason will unfairly limit the personal representative, additional language clarifies that the statement of a reason does not constitute an admission by the personal representative and does not preclude the assertion of other defenses to the claim.

Work Group members thought that in some cases disallowance results from a lack of understanding of the meaning of disallowance. A personal representative may conclude that in an insolvent estate claims should be disallowed because they cannot be paid. Section 31 adds a new subsection to ORS 115.135 clarifying that a claim will be paid only if there are assets in the estate to pay the claim. Allowance of a claim is an admission of liability but does not ensure payment.

Section 32: This section amends ORS 115.145 to clarify that if a claimant wants to challenge the disallowance of a claim in the estate proceeding, the claimant must file the request with the court.

Section 33: ORS 116.083 is amended to change references to “voucher” to “evidence of disbursement.” The statute was also updated to include irrevocable letter of credit.

The Work Group noted that the final account must include a statement that taxes have been paid, but often taxes are not yet due. Section 33 amends ORS 116.083(3)(a) to provide that the statement concerning taxes must say that taxes due have been paid, that tax returns due have been filed, and that any estate tax return that is required to be filed has been filed.

The Work Group discussed the need to request a reserve for remaining fees and expenses. Section 33 adds to ORS 116.083 a requirement that the final account include any request to retain a reserve for the payment of taxes and related expenses as a way to signal the authority to request such a reserve. The Work Group discussed whether the statute should explicitly mention the court’s authority to require a supplemental accounting when a reserve has been created. The Work Group concluded that the need for a supplemental accounting rarely arises, given the limited nature of reserves, so the court can use its existing authority to require a supplemental accounting in cases where that would be appropriate.

Section 33 also adds a requirement that the final account include a statement describing the determination of compensation of the personal representative.

The provisions related to a statement in lieu of final account are amended to require a statement describing a request for a reserve. In addition, the requirement that all distributees of an estate consent to the filing of a statement in lieu of final account is changed to limit the necessary consents to distributees other than distributees who receive a specific bequest or a cash bequest and have been paid in full.

Section 34: ORS 116.093 provides for notice when the personal representative files the final account and petition for a judgment of distribution. Section 34 adds a requirement that notice be given to the Attorney General if a charity is a residual beneficiary or if the will provides a specific devise for a charity and the charity will not receive the full amount of that specific devise. A charity named as a devisee may not be able to protect its interests, and the Attorney General needs information about the estate to determine whether excessive fees or other problems have unfairly reduced the charity’s interest in the estate. Note that this requirement of notice to the Attorney General applies to final accounts under ORS 116.093, and not to statements in lieu of final account, which are governed by ORS 116.083.

Section 34 deletes subsection (1)(d) of ORS 116.093 because the other categories capture everyone who would have an interest in the estate. Additional changes in Section 34 modernize the language of ORS 116.093.

Section 35: Under ORS 116.113, when a final account or statement in lieu of final account is filed, the court will issue a judgment of final distribution. Only one document—one judgment—is needed to approve the final account and authorize distributions. Section 35 adds to the list of the findings that appear in the judgment findings concerning any reserve requested and attorney fees. Section 35 also clarifies that under ORS 116.113 the court can approve a statement in lieu of final account as well as a final account.

Section 36: ORS 116.173 provides the rules for determining compensation for the personal representative. In general, fees are based on a percentage of the value of the estate “subject to the jurisdiction of the court,” with the percentage decreasing as the value of the estate increases. Section 36 amends ORS 116.173 to provide better guidance in determining how the value of the estate should be determined.

The amendments address the changes in the value of the estate that may occur during administration. The goal is to capture the initial value of the estate plus increases during administration from income and capital gains. The amendments also provide that each asset should be valued at its highest value, determined by considering the inventory, any amended or supplemental inventory, any interim or final account, and any statement in lieu of final account.

A new subsection provides that despite a provision in the will authorizing fees at a particular level, if the estate is insolvent, the compensation of the personal representative cannot exceed the amounts specified in the statute.

This section adds a cross-reference to the alternative determination of compensation under the new provision added in Section 9 of this bill.

Section 37: This section amends ORS 116.183 to allow an attorney an opportunity to create a record, if the court reduces the attorney fees requested. A new subsection provides that an attorney can submit additional information in support of the reasonableness of the fee and then let the judge make the decision. A new subsection (2)(c) is also added, which states that ORCP 68 (requiring that requests be in a particular form) does not apply to requests for attorney fees under this section.

Section 38: Language in ORS 116.223 is modernized.

Section 39: This section amends ORS 116.263 to change “chose in action” to “right to sue” and to require that if a foreign personal representative submits an affidavit the affidavit be accompanied by proof of the foreign personal representative’s authority.

Section 40: Language in ORS 116.343 is modernized.

Section 41: ORS 22.020 states that an irrevocable letter of credit cannot be used lieu of a bond in connection with various court proceedings. Section 41 amends ORS 22.020 so that the prohibition on letters of credit no longer applies to probate

proceedings. In some estates providing a letter of credit will be an appropriate alternative to a bond, and the Work Group wanted to make a letter of credit an option.

Section 42: ORS 18.312 provides that a lienholder cannot collect a judgment against a decedent except by making a claim against the estate or by meeting the requirements of ORS 18.312(2). A new subsection to ORS 18.312 provides that when the property subject to the lien ceases to be property of the estate, the stay imposed by ORS 18.312(1) no longer applies. The new subsection makes clear that when property subject to a lien is distributed, the lien continues with the property and the lienholder may execute the lien after the property is no longer property of the estate. If the claim is not satisfied during the administration of the estate, when the property subject to a lien is transferred out of the estate, the lienholder can enforce the lien against the property.

Sections 43 – 61. These sections modernize language or conform language to other changes made in this bill in the following statutes: ORS 86.809, 111.025, 111.205, 111.245, 111.255, 112.315, 113.065, 113.145, 113.242, 114.385, 114.525, 115.003, 115.025, 115.105, 116.043, 116.243, 125.525, 316.387, and 406.100.

Sections 62-77: These sections relate to effective dates and applicability of the amendments.

Section 78: This section explains that unit captions are provided only for the convenience of the reader.

VI. Conclusion

This measure should be adopted because it furthers the work of the Oregon Law Commission's Probate Modernization Work Group, which has put forth successful measures in the last several sessions in an effort to update Oregon's Probate Code. The Work Group is informed by some of the best legal minds in the state on the topic. It includes a wide range of private practitioners, judges, court clerks, agency representatives, as well as academics who have come together to provide well-tailored solutions to practical questions.