

A-Engrossed
Senate Bill 182

Ordered by the Senate March 8
Including Senate Amendments dated March 8

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Terminates authority of spouse as agent under certain estate planning documents upon annulment, separation or dissolution of marriage.

Extends liability protections for property held as tenants by the entirety when property is conveyed to certain trust.

[Changes references to "small estate affidavit" to "simple estate affidavit." Permits use of simple estate affidavit if decedent died testate and sole devisee is decedent's trust.]

Modifies procedure for disposition of wills by attorney.

A BILL FOR AN ACT

Relating to estate planning; creating new provisions; and amending ORS 107.093, 107.115, 112.805, 112.815, 112.820, 127.002, 127.005, 127.015, 127.722 and 130.315.

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

**TERMINATION OF AUTHORITY OF SPOUSE AS AGENT
UPON DISSOLUTION OF MARRIAGE**

SECTION 1. ORS 107.093 is amended to read:

107.093. (1) After a petition for marital annulment, separation or dissolution is filed and upon service of summons and petition upon the respondent as provided in ORCP 7, a restraining order is in effect against the petitioner and the respondent until a final judgment is issued, until the petition for marital annulment, separation or dissolution is dismissed, or until further order of the court.

(2) The restraining order issued under this section shall restrain the petitioner and respondent from:

(a) Canceling, modifying, terminating or allowing to lapse for nonpayment of premiums any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy that names either of the parties or a minor child of the parties as a beneficiary.

(b) Changing beneficiaries or covered parties under any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy.

(c) Transferring, encumbering, concealing or disposing of property in which the other party has an interest, in any manner, without written consent of the other party or an order of the court,

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 except in the usual course of business or for necessities of life. This paragraph does not apply to
2 payment by either party of:

3 (A) Attorney fees in the existing action;

4 (B) Real estate and income taxes;

5 (C) Mental health therapy expenses for either party or a minor child of the parties; or

6 (D) Expenses necessary to provide for the safety and welfare of a party or a minor child of the
7 parties.

8 (d) Making extraordinary expenditures without providing written notice and an accounting of
9 the extraordinary expenditures to the other party. This paragraph does not apply to payment by
10 either party of expenses necessary to provide for the safety and welfare of a party or a minor child
11 of the parties.

12 (e) **Exercising authority as an agent for the other party under a power of attorney de-**
13 **scribed in ORS 127.005 to 127.045, a health care representative for the other party under a**
14 **form appointing a health care representative described in ORS 127.505 to 127.660 or an**
15 **attorney-in-fact for the other party under a declaration for mental health treatment de-**
16 **scribed in ORS 127.700 to 127.737, unless the power of attorney, form appointing a health care**
17 **representative or declaration for mental health treatment otherwise provides.**

18 (3) Either party restrained under this section may apply to the court for further temporary or-
19 ders, including modification or revocation of the restraining order issued under this section.

20 (4) The restraining order issued under this section shall also include a notice that either party
21 may request a hearing on the restraining order by filing a request for hearing with the court.

22 (5) A copy of the restraining order issued under this section shall be attached to the summons.

23 (6) A party who violates a term of a restraining order issued under this section is subject to
24 imposition of remedial sanctions under ORS 33.055 based on the violation, but is not subject to:

25 (a) Criminal prosecution based on the violation; or

26 (b) Imposition of punitive sanctions under ORS 33.065 based on the violation.

27 **SECTION 2.** ORS 107.115 is amended to read:

28 107.115. (1) A judgment of annulment or dissolution of a marriage restores the parties to the
29 status of unmarried persons, unless a party is married to another person. The judgment gives the
30 court jurisdiction to award, to be effective immediately, the relief provided by ORS 107.105. The
31 judgment shall *revoke*:

32 (a) **Revoke** a will pursuant to ORS 112.315.

33 (b) **Revoke** a transfer on death deed pursuant to ORS 93.981.

34 (c) **Terminate the authority of an agent under a power of attorney pursuant to ORS**
35 **127.015, a health care representative pursuant to ORS 127.545 (5)(c)(B) or an attorney-in-fact**
36 **pursuant to ORS 127.722.**

37 (2) The marriage relationship is terminated when the court signs the judgment of dissolution of
38 marriage.

39 (3)(a) The Court of Appeals or Supreme Court shall continue to have jurisdiction of an appeal
40 pending at the time of the death of either party. The appeal may be continued by the personal rep-
41 resentative of the deceased party. The attorney of record on the appeal, for the deceased party, may
42 be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on ap-
43 peal may not be awarded to either party.

44 (b) The Court of Appeals or Supreme Court shall have the power to determine finally all matters
45 presented on such appeal. Before making final disposition, the Court of Appeals or Supreme Court

1 may refer the proceeding back to the trial court for such additional findings of fact as are required.

2 **SECTION 3.** ORS 127.005 is amended to read:

3 127.005. (1) When a principal designates another person as an agent by a power of attorney in
4 writing, and the power of attorney does not contain words that otherwise delay or limit the period
5 of time of its effectiveness:

6 (a) The power of attorney becomes effective when executed and remains in effect until the power
7 is revoked by the principal **or by the terms of the power of attorney, or until the authority**
8 **of all agents under the power of attorney is terminated as provided in ORS 127.015;**

9 (b) The powers of the agent are unaffected by the passage of time; and

10 (c) The powers of the agent are exercisable by the agent on behalf of the principal even though
11 the principal becomes financially incapable.

12 (2) The terms of a power of attorney may provide that the power of attorney will become ef-
13 fective at a specified future time, or will become effective upon the occurrence of a specified future
14 event or contingency such as the principal becoming financially incapable. If a power of attorney
15 becomes effective upon the occurrence of a specified future event or contingency, the power of at-
16 torney may designate a person or persons to determine whether the specified event or contingency
17 has occurred, and the manner in which the determination must be made. A person designated by a
18 power of attorney to determine whether the principal is financially incapable is the principal's per-
19 sonal representative for the purposes of ORS 192.553 to 192.581 and the federal Health Insurance
20 Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164.

21 (3) If a power of attorney becomes effective upon the principal becoming financially incapable
22 and either the power of attorney does not designate a person or persons to make the determination
23 as to whether the principal is financially incapable or none of the designated persons is willing or
24 able to make the determination, a determination that the principal is financially incapable may be
25 made by any physician. The physician's determination must be made in writing.

26 (4) All acts done by an agent under a power of attorney during a period in which the principal
27 is financially incapable have the same effect, and inure to the benefit of and bind the principal, as
28 though the principal were not financially incapable.

29 (5) If a conservator is appointed for a principal, the agent shall account to the conservator,
30 rather than to the principal, for so long as the conservatorship lasts. The conservator has the same
31 power that the principal would have to revoke, suspend or terminate all or any part of the power
32 of attorney.

33 (6) This section does not apply to ORS 127.505 to 127.660.

34 **SECTION 4.** ORS 127.015 is amended to read:

35 127.015. (1) **The authority of an agent under a power of attorney terminates upon the**
36 **occurrence of any of the following:**

37 (a) **The principal dies.**

38 (b) **The principal or the court revokes the power of attorney.**

39 (c) **The agent dies, becomes financially incapable or incapacitated or resigns.**

40 (d) **The power of attorney by its terms provides that the power of attorney terminates.**

41 (e) **An action is filed for the dissolution or annulment of the principal's marriage or**
42 **registered domestic partnership to the agent, or for the separation of the principal and**
43 **agent, unless otherwise provided by terms of the power of attorney, agreement of the parties**
44 **or order of the court.**

45 (2) **A court may order that a power of attorney is revoked upon appointment by the court**

1 **of a conservator for the principal.**

2 [(1)] (3) The death of a principal who has executed a power of attorney in writing, or the oc-
3 currence of any other event that would otherwise terminate the authority of the agent, does not
4 revoke or terminate the authority of an agent who, without actual knowledge of the death of the
5 principal or other event, acts in good faith under the power of attorney. Any action so taken, unless
6 otherwise invalid or unenforceable, binds the principal and heirs, devisees and personal represen-
7 tatives of the principal.

8 [(2)] (4) An affidavit executed by an agent that states that the agent did not have, at the time
9 of doing an act under the power of attorney, actual knowledge of the revocation or termination of
10 the power of attorney by death or other event, is, in the absence of fraud, conclusive proof of the
11 nonrevocation or nontermination of the power at that time. If the exercise of the power requires
12 execution and delivery of any instrument that is recordable, the affidavit may also be recorded.

13 [(3)] (5) This section does not alter or affect any provision for revocation or termination con-
14 tained in the power of attorney.

15 **SECTION 5.** ORS 127.722 is amended to read:

16 127.722. (1) A declaration may be revoked in whole or in part at any time by the principal if the
17 principal is not incapable. A revocation is effective when a capable principal communicates the re-
18 vocation to the attending physician or other provider. The attending physician or other provider
19 shall note the revocation as part of the principal's medical record.

20 **(2) The authority of the principal's spouse as attorney-in-fact is revoked if a petition for**
21 **dissolution or annulment of marriage is filed, the principal is not incapable and the principal**
22 **or the court does not reaffirm the appointment after the filing of the petition.**

23 **SECTION 6.** ORS 127.002 is amended to read:

24 127.002. For the purposes of ORS 127.005 to 127.045:

25 (1) "Agent" includes an attorney-in-fact; and

26 (2) "Financially incapable" has the meaning given that term in ORS 125.005.

27 (3) "Incapacitated" has the meaning given that term in ORS 125.005.

28
29 **CONVEYANCE OF PROPERTY HELD AS TENANTS**
30 **BY THE ENTIRETY**

31
32 **SECTION 7. (1) Real property of spouses married to each other that was held as tenants**
33 **by the entirety and subsequently conveyed to the trustee or trustees of the joint revocable**
34 **trust of the spouses or of the separate revocable trust of each spouse shall have the same**
35 **immunity from the claims of a spouse's creditors as would exist if the spouses had continued**
36 **to hold the property as tenants by the entirety, if:**

37 **(a) The spouses remain married to each other;**

38 **(b) The real property continues to be held in trust by the trustee or trustees or the**
39 **successor trustee or trustees; and**

40 **(c) Both spouses are beneficiaries of the trust or trusts, including where both spouses**
41 **are current beneficiaries of one trust that holds the entire property or each spouse is a**
42 **current beneficiary of a separate trust and the two separate trusts together hold the entire**
43 **property, whether or not other persons are also current or future beneficiaries of the trust**
44 **or trusts.**

45 **(2) The protection from the claims of separate creditors under this section may be waived**

1 **as to any specific creditor, including any separate creditor of either spouse, or any specif-**
2 **ically described property, including any former tenancy by the entirety property conveyed**
3 **into trust, by the trustee acting under the express provision of a trust instrument or with**
4 **the written consent of both spouses.**

5 **SECTION 8.** ORS 130.315 is amended to read:

6 130.315. (1) Whether or not the terms of a trust contain a spendthrift provision, **except as**
7 **provided in section 7 of this 2021 Act:**

8 (a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of
9 the settlor's creditors.

10 (b) A creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount
11 that can be distributed to or for the settlor's benefit. If an irrevocable trust has more than one
12 settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the
13 settlor's interest in the portion of the trust attributable to that settlor's contribution.

14 (c) If a trust was revocable at the settlor's death, the property of the trust becomes subject to
15 creditors' claims as provided in ORS 130.350 to 130.450 when the settlor dies. The payment of claims
16 is subject to the settlor's right to direct the priority of the sources from which liabilities of the
17 settlor are to be paid.

18 (d) Notwithstanding the provisions of paragraph (b) of this subsection, the assets of an irrev-
19 ocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of
20 the settlor, in whole or in part, solely because of the existence of a discretionary power granted to
21 the trustee by the terms of the trust or any other provision of law to pay the amount of tax owed
22 directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal
23 that is payable or has been paid by the settlor under the law imposing the tax.

24 (2) For the purpose of creditors' claims, the holder of a power of withdrawal is treated in the
25 same manner as the settlor of a revocable trust to the extent property of the trust is subject to the
26 power. The provisions of this subsection apply to the holder of a power of withdrawal only during
27 the period that the power may be exercised.

28 (3) Upon the lapse, release or waiver of a power of withdrawal, the property of the trust that
29 is the subject of the lapse, release or waiver becomes subject to claims of creditors of the holder
30 of the power only to the extent the value of the property exceeds the greatest of:

31 (a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code, as in ef-
32 fect on December 31, 2012;

33 (b) The amount specified in section 2503(b) of the Internal Revenue Code, as in effect on De-
34 cember 31, 2012; or

35 (c) Twice the amount specified in section 2503(b) of the Internal Revenue Code, as in effect on
36 December 31, 2012, if the donor was married at the time of the transfer to which the power of
37 withdrawal applies.

38 (4) The assets of an irrevocable trust that are attributable to a contribution to an inter vivos
39 marital deduction trust described in section 2523(e) or (f) of the Internal Revenue Code, as in effect
40 on December 31, 2012, after the death of the spouse of the settlor of the inter vivos marital de-
41 duction trust shall be deemed to have been contributed by the settlor's spouse and not by the settlor.

42 (5) The assets of an irrevocable trust for the benefit of a person, including the settlor, are not
43 subject to claims of creditors of the settlor to the extent that the property of the trust is subject
44 to a presently exercisable general power of appointment held by a person other than the settlor.

45 (6) Subsections (2) and (3) of this section do not apply to a person other than a settlor who is

1 a beneficiary of a revocable or irrevocable trust and who is also a trustee of the trust, if the power
2 to withdraw for the person's own benefit is limited by an ascertainable standard.

3
4 **DISPOSITION OF WILLS**

5
6 **SECTION 9.** ORS 112.805 is amended to read:

7 112.805. (1) Any person having custody of a will has a duty to maintain custody of the will and
8 may not destroy or discard the will, disclose its contents to any person or deliver the will to any
9 person except as authorized by the testator or as permitted by ORS 112.800 to 112.830.

10 (2) Nothing in ORS 112.800 to 112.830 bars a testator from destroying, revoking, delivering to
11 any person or otherwise dealing with the will of the testator.

12 (3) A will destroyed in accordance with ORS 112.800 to 112.830 *[shall]* **is** not *[be]* revoked by
13 virtue of such destruction and its contents may be proved by secondary evidence.

14 **SECTION 10.** ORS 112.815 is amended to read:

15 112.815. An attorney who has custody of a will may dispose of the will in accordance with ORS
16 112.820 if:

17 (1) The attorney is licensed to practice law in the State of Oregon;

18 *[(2) At least 40 years has elapsed since execution of the will;]*

19 *[(3) The attorney does not know and after diligent inquiry cannot ascertain the address of the*
20 *testator; and]*

21 *[(4)]* **(2)** The will is not subject to a contract to make a will or devise or not to revoke a will
22 or devise*[,]*; **and**

23 **(3)(a) If the attorney knows the testator is deceased, at least five years have elapsed**
24 **since the testator's death and the attorney does not know and after diligent inquiry has been**
25 **unable to ascertain the addresses for the personal representative and each successor per-**
26 **sonal representative named in the will or, if the attorney was able to locate the personal**
27 **representative or one or more of the successor personal representatives named in the will,**
28 **none will accept delivery of the will; or**

29 **(b) If the attorney does not know the testator is deceased, at least 20 years have elapsed**
30 **since execution of the will and the attorney does not know and after diligent inquiry has been**
31 **unable to ascertain the address of the testator.**

32 **SECTION 11.** ORS 112.820 is amended to read:

33 112.820. (1) An attorney **who intends to destroy a will as** authorized *[to destroy a will]* under
34 ORS 112.815 *[may proceed as follows]* **must:**

35 (a) *[The attorney shall first publish a notice in a newspaper of general circulation in the county*
36 *of the last-known address of the testator, if any, otherwise in the county of the principal place of busi-*
37 *ness of the attorney.]* **Provide notice of the attorney's intent to destroy the will to the testator**
38 **or, if the attorney knows the testator is deceased, to the personal representative and to each**
39 **successor personal representative named in the will; and**

40 **(b) Deliver the notice by mail, electronic mail, telephone and any other method reason-**
41 **ably calculated to convey the notice to the mailing addresses, electronic mail addresses and**
42 **telephone numbers known to the attorney or reasonably ascertainable through public records**
43 **or other searches.**

44 **(2) The notice [shall] under subsection (1) of this section must** state the name of the testator,
45 the date of the will and the intent of the attorney to destroy the will if, **within 90 days after the**

1 **date of the notice**, the testator does not contact the attorney **or, if the testator is deceased, the**
2 **personal representative and each successor personal representative fail to accept delivery**
3 **of the will** [*within 90 days after the date of the notice*].

4 [(b)] (3) If the testator fails to contact the attorney within 90 days after the date of the notice
5 **or, if the testator is deceased, the personal representative and any successor personal rep-**
6 **resentative fail to accept delivery of the will within 90 days of the date of the notice**, the at-
7 torney may destroy the will.

8 [(c) *Within 30 days after destruction of the will, the attorney shall file with the probate court in the*
9 *county where the notice was published an affidavit stating the name of the testator, the name and re-*
10 *lationship of each person named in the will whom the testator identified as related to the testator by*
11 *blood, adoption or marriage, the date of the will, proof of the publication and the date of destruction.*]

12 [(d) *The clerk of the probate court shall charge and collect the fee established under ORS 21.145*
13 *for filing of the affidavit.*]

14 [(2) *If a will has not been admitted to probate within 40 years following the death of the testator,*
15 *an attorney having custody of the will may destroy the will without notice to any person or court.*]

16 (4)(a) **At the time the attorney destroys a will under this section, the attorney shall sign**
17 **an affidavit affirming:**

18 (A) **That despite diligent inquiry, the attorney was unable to locate the testator or, if the**
19 **testator is deceased, that the attorney has knowledge of the testator's death and, despite**
20 **diligent inquiry, the attorney was unable to locate the personal representative and successor**
21 **personal representatives named in the testator's will or, if the attorney was able to locate**
22 **the personal representative or any successor personal representative, that none would accept**
23 **delivery of the will;**

24 (B) **That the attorney has created a complete digital copy of the testator's will, including**
25 **any affidavit of attesting witnesses and codicils to the will; and**

26 (C) **That the attorney will retain a digital copy of the affidavit, the testator's will and any**
27 **affidavit of attesting witnesses and codicils to the will for a period of no fewer than 20 years**
28 **from the date of the affidavit.**

29 (b) **The affidavit must include documentation of the attorney's diligent efforts to provide**
30 **notice to the testator or, if the attorney knows the testator is deceased, the personal rep-**
31 **resentative and successor personal representatives, including but not limited to public re-**
32 **records search results, the addresses, electronic mail addresses, telephone numbers or any**
33 **other methods of contact the attorney used to provide notice of the attorney's intent to de-**
34 **stroy the will, a copy of the notice and any other documentation of the attorney's attempts**
35 **to provide notice to the testator or, if the testator is deceased, to the personal representative**
36 **and successor personal representatives.**

37 (c) **No earlier than 20 years following the date of the affidavit, the attorney may destroy**
38 **the electronic copies of the affidavit and the will and any affidavit of attesting witnesses or**
39 **codicils to the will without notice of the destruction to any person or court.**

40
41 **APPLICABILITY**

42
43 **SECTION 12.** Section 7 of this 2021 Act and the amendments to ORS 130.315 by section
44 **8 of this 2021 Act apply to tenancy by the entirety property conveyed to a trustee or trustees**
45 **of a trust or trusts on or after the effective date of this 2021 Act.**

CAPTIONS

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SECTION 13. The unit captions used in this 2021 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 2021 Act.
