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Testimony before the Senate Committee on the Judiciary and Ballot Measure 110 Implementation in support of Senate Bill 728

February 25, 2021

Chair Prozanski and Members of the Committee:

My name is Mark Peterson and I taught at the Lewis & Clark Law School for 28 years, including teaching the Oregon Pleading and Practice course for many years. On behalf of the Oregon Council on Court Procedures' Legislative Advisory Committee, I am writing to you today in my capacity as the Executive Director of the Council in support of Senate Bill 728.

The Council on Court Procedures is a statutory entity (ORS 1.725-1.760) made up of lawyers, judges, and a public member, that drafted the Oregon Rules of Civil Procedure (ORCP) and is tasked with continually updating the ORCP. The Council meets on a two-year cycle, and drafts amendments to the ORCP that are promulgated to the Legislature prior to every odd-year session. If the Legislature declines to act on the proposed changes, the promulgated amendments take effect on January 1 of the following year.

Section 24 of S.B. 728 addresses an issue that has been before the Council during the last two biennia.¹ An overwhelming majority of Council members were in favor of addressing this problem, but felt that the issue was arguably outside of the Council's purview, and would be more appropriately addressed through legislation. We are very grateful to the Oregon Law Commission for allowing this concept to be included in this bill.

¹ For a somewhat expanded explanation of the Council's deliberations and conclusions on this issue, please see the relevant portions of the Council's biennial transmittal letter to the Legislature ([https://counciloncourtprocedures.org/Content/Promulgations/2020-2021 Council on Court Procedures Promulgation Letter to Legislature.pdf](https://counciloncourtprocedures.org/Content/Promulgations/2020-2021%20Council%20on%20Court%20Procedures%20Promulgation%20Letter%20to%20Legislature.pdf)) and the Council's final Rule 23/34 report ([https://counciloncourtprocedures.org/Content/2019-2021 Biennium/2020-04-11 Council on Court Procedures Report on Survivorship of Actions and Rules 23 and 34.pdf](https://counciloncourtprocedures.org/Content/2019-2021%20Biennium/2020-04-11%20Council%20on%20Court%20Procedures%20Report%20on%20Survivorship%20of%20Actions%20and%20Rules%2023%20and%2034.pdf)).


In Oregon, civil actions are allowed to continue against persons who are deceased. If a defendant dies after a case begins, a plaintiff can seek to substitute the personal representative of the defendant's estate for the defendant and allow the case to continue. If a defendant dies before a case is filed, existing law permits the case to be filed against the defendant's estate within a year of the defendant's death.

Occasionally, a plaintiff may file a case, e.g., as a consequence of a motor vehicle collision, against a defendant not knowing that the defendant has died during the interim. Usually, the plaintiff will quickly discover the problem and will simply refile the case correctly against the defendant's estate so that the case may proceed. However, if the case against the deceased defendant was filed very close to the expiration of the statute of limitations, the plaintiff may not learn of the defendant's death until after the statute of limitations has run. Oregon appellate courts have ruled that, in such a circumstance, the case may not be refiled, nor may the estate be substituted for the deceased defendant in the original suit. Essentially, the plaintiff is out of luck; the case cannot proceed and the plaintiff is left without redress for the harm inflicted as a result of the deceased defendant's negligent acts or omissions.

Section 24 addresses this problem by creating a limited 90-day window during which the plaintiff may amend the original complaint and substitute the personal representative of the defendant's estate as the defendant. This section does not create a new cause of action or extend any statutes of limitations. It simply ensures that an injured party is not left unable to seek redress because the victim was unaware of a defendant's death.

Thank you again for allowing me to submit this testimony on this bill. Additional information regarding the Council's discussions of this and other issues is available in the minutes section of this biennium's page of the Council's website at <https://counciloncourtprocedures.org/current-biennium/>. If you have any additional questions, please do not hesitate to contact me at ccp@lclark.edu.

Sincerely,



Mark A. Peterson
Executive Director

cc: Council Legislative Advisory Committee

Kenneth C. Crowley
Hon. David Euan Leith
Meredith Holley
Margurite Teresa Weeks
Hon. John A. Wolf