Advanced Estate Planning 2017

Cosponsored by the Estate Planning and Administration Section

Friday, June 9, 2017
8:30 a.m.–4:15 p.m.

5.25 General CLE credits and 1 Ethics credit
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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935
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7. 25 Drafting Tips from a Recovering Lawyer ....................... 7–i
   — Christopher Cline, Riverview Trust Company, Vancouver, Washington
SCHEDULE

7:30  Registration

8:30  Advance Directives
    ✦ Current state of advance directives
    ✦ How advance directives are used by medical professionals
    ✦ Tips on generating useful statements of “quality of life”
Hilary Newcomb, HAN Legal, Portland
Ella Vining, MD, Portland

9:15  Estate Planning in Transition
    ✦ How to plan in an ever-changing world: politically speaking
John Draneas, Draneas & Huglin PC, Lake Oswego

10:00 Break

10:15 Planning for the Oregon (Only) Taxable Estate
    ✦ “Disconnected” federal and Oregon estate taxes
    ✦ Federal QTIP and portability elections
    ✦ Oregon-only elections
    ✦ Planning and drafting considerations
    ✦ Benefits of lifetime gifts
Kay Abramowitz, Miller Nash Graham & Dunn LLP, Portland
Stephen Kantor, Samuels Yoelin Kantor LLP, Portland
Jeffrey Thede, Thede Culpepper Moore Munro & Silliman LLP, Portland

11:15 Probate Modernization Update
    ✦ Changes in the probate code
Lane Shetterly, Shetterly Irick & Ozias, Dallas

Noon Lunch

1:00  Conflicting Conundrums: Current Ethical Issues Facing Trusts and Estate Lawyers
    ✦ Who is the client?
    ✦ Can I represent more than one party?
    ✦ When are there conflicts between clients?
    ✦ Should I worry about conflicts with the lawyer?
David Elkanich, Holland & Knight LLP, Portland

2:00  Intellectual Property: Types, Tips, and Traps
    ✦ Trademark, copyright, patent, and trade secret basics
    ✦ Issues that may affect estates
Ian Gates, Dascenzo Intellectual Property Law PC, Portland

3:00 Break

3:15  25 Drafting Tips from a Recovering Lawyer
    ✦ Critical trust provisions
    ✦ Mistakes estate planning attorneys make
    ✦ 25 ideas for making documents easier to administer
Christopher Cline, Riverview Trust Company, Vancouver

4:15 Adjourn
**FACULTY**

**Kay Abramowitz**, *Miller Nash Graham & Dunn LLP, Portland*. Ms. Abramowitz provides counsel to individuals and business owners on wealth preservation through sophisticated estate planning techniques, estate and trust administration, entity formation, and business succession. She is a member of the Estate Planning Council of Portland and the Oregon State Bar Estate Planning and Administration Section and Taxation Section. Ms. Abramowitz is a frequent lecturer. She is admitted to practice in Washington, Utah, and Oregon.

**Christopher Cline**, *Riverview Trust Company, Vancouver*. Mr. Cline is the President and CEO of Riverview Trust Company, a boutique asset management and trust company headquartered in Vancouver. He has spent eight years in the trust and asset management field and the previous 17 years as an estate planning attorney, helping ultra-high-net worth families and private businesses meet their estate planning and succession needs. He is a Fellow of the American College of Trust and Estate Counsel. Mr. Cline is a nationally recognized speaker. He is the author of *The Law of Trustee Investments*, published by the American Bar Association, along with six other volumes on various estate planning topics.

**John Draneas**, *Draneas & Huglin PC, Lake Oswego*. Mr. Draneas has been an Oregon attorney since 1977 and a CPA since 1978. His practice focuses on business and tax planning for individuals, many of whom are owners of family and other closely held businesses, particularly in the areas of estate planning and administration, income tax planning, tax controversies, business entities, business acquisitions, general business matters, and collector cars. Mr. Draneas is a Fellow in the American College of Trust and Estate Counsel and a member of its Estate and Gift Tax and Business Planning committees and Valuation and Tax Controversy subcommittees. He also is a member of the American Bar Association, the Oregon Society of CPAs, and the Estate Planning Council of Oregon.

**David Elkanich**, *Holland & Knight LLP, Portland*. Mr. Elkanich focuses his practice on litigation, with an emphasis on legal ethics and risk management. He advises both lawyers and law firms in a wide range of professional responsibility matters. Mr. Elkanich frequently counsels lawyers and other professionals on how to navigate an “electronic” practice, including the rules of engaging in online activity, mining metadata, and utilizing social media. In addition, Mr. Elkanich has a commercial litigation practice. Mr. Elkanich also is an adjunct professor at Lewis & Clark Law School, where he has taught the required ethics course (Regulation and Legal Ethics) since 2012. He is a member of the Oregon State Bar Discipline System Review Committee, member and past chair of the OSB Legal Ethics Committee, and a member of the Multnomah Bar Association, the Association of Professional Responsibility Lawyers, and the ABA Center for Professional Responsibility. Mr. Elkanich is admitted to practice in Idaho, Oregon, and Washington.

**Ian Gates**, *Dascenzo Intellectual Property Law PC, Portland*. Mr. Gates has a broad intellectual property practice, focusing on patent and trademark procurement and client counseling. He has wide experience across multiple disciplines, including the mechanical and business method arts. In particular, he actively works with client technology related to outdoor sports and recreation products, aerospace and automotive technologies, toys, and consumer products. Mr. Gates is admitted to practice in Oregon and California and before the U.S. Patent and Trademark Office.

**Stephen Kantor**, *Samuels Yoelin Kantor LLP, Portland*. Mr. Kantor is a business, estate, and trust attorney and educator with years of experience in the planning and administration of complex issues. He also assists Fortune 500 executive groups in estate planning matters. He is a Fellow of the American College of Trust and Estate Counsel and a member of the American Bar Association, the American Society of Certified Public Accountants, the Estate Planning Council of Portland, the Financial Planning Association, the Multnomah Bar Association, and the Oregon Society of Certified Public Accountants CPE Strategic Interest Team. He has been interviewed on matters regarding tax laws, charitable planning, trusts, business succession, and estate administration by Money, The Oregonian, The Daily Journal of Commerce, The Business Journal, and local radio and television stations. Mr. Kantor is a regular presenter and has written treatises on estates and taxation, family succession planning, and estate and trust administration. He is licensed to practice law in Oregon and Washington.
Hilary Newcomb, HAN Legal, Portland. Ms. Newcomb practices fiduciary litigation, probate and trust administration, estate planning, and guardianships and conservatorships. She is a Fellow of the American College of Trust and Estate Counsel, a member of the Oregon State Bar Estate Planning and Administration Section Executive Committee, a member of the editorial review board for the 2017 revision of the Oregon State Bar’s Administering Trusts in Oregon, and a member of the Estate Planning Council of Portland. Ms. Newcomb is admitted to practice in Oregon and California (inactive).

Lane Shetterly, Shetterly Irick & Ozias, Dallas. In addition to his private practice, Mr. Shetterly has chaired the Oregon Law Commission since 1998. He was appointed by the Governor in 2005 to serve as an Oregon representative on the National Conference of Commissioners on Uniform State Laws. From 2004 through 2007, Mr. Shetterly served as director of the Oregon Department of Land Conservation and Development. Prior to his appointment to the DLCD, Mr. Shetterly served seven years in the Oregon Legislature, including three years as Speaker Pro Tem.

Jeffrey Thede, Thede Culpepper Moore Munro & Silliman LLP, Portland. Mr. Thede’s practice emphasizes estate and trust planning and administration, charitable planning, and tax-exempt organizations. He is a member and past president of the Estate Planning Council of Portland, a Fellow of the American College of Trust and Estate Counsel, and a member of the Northwest Planned Giving Roundtable. Mr. Thede is admitted to practice in Oregon and Washington.

Ella Vining, MD, Portland. Dr. Vining has been practicing general internal medicine in the Portland area since completing her residency at OHSU in 2004. Her practice currently is limited to in-home visits for those unable to leave their home or long-term care facility.
Chapter 1

Advance Directives

HILARY NEWCOMB
HAN Legal
Portland, Oregon

ELLA VINING, MD
Portland, Oregon

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## Different Documents for Different Purposes

<table>
<thead>
<tr>
<th>Advance Directive</th>
<th>POLST</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A Legal Document</strong></td>
<td><strong>A Medical Order</strong></td>
</tr>
<tr>
<td>For all adults regardless of health status at any age, starting at age 18</td>
<td>For those with serious illness, or frailty, or a limited prognosis at any age, depending on health status</td>
</tr>
</tbody>
</table>
| 1) Appoints a Health Care Representative  
2) Memorializes values and preferences  
3) Is signed by the principal | 1) Is a specific medical order  
2) Is signed by a Health Care Professional |
| Provides for theoretical situations in which a person may not have capacity for decision making.  
Guidelines for imagined future situations which may arise and for which a person may have preferences for a particular kind of care plan. | Provides for likely events that can be foreseen.  
Specific medical orders addressing defined medical interventions for situations that are likely to arise given the patient’s health status and prognosis. |
Advance Directive

YOU DO NOT HAVE TO FILL OUT AND SIGN THIS FORM

Part A: Important Information About This Advance Directive

This is an important legal document. It can control critical decisions about your health care. Before signing, consider these important facts:

Facts About Part B (Appointing a Health Care Representative)

You have the right to name a person to direct your health care when you cannot do so. This person is called your "health care representative." You can do this by using Part B of this form. Your representative must accept on Part E of this form.

You can write in this document any restrictions you want on how your representative will make decisions for you. Your representative must follow your desires as stated in this document or otherwise made known. If your desires are unknown, your representative must try to act in your best interest. Your representative can resign at any time.

Facts About Part C (Giving Health Care Instructions)

You also have the right to give instructions for health care providers to follow if you become unable to direct your care. You can do this by using Part C of this form.

Facts About Completing This Form

This form is valid only if you sign it voluntarily and when you are of sound mind. If you do not want an advance directive, you do not have to sign this form.

Unless you have limited the duration of this advance directive, it will not expire. If you have set an expiration date, and you become unable to direct your health care before that date, this advance directive will not expire until you are able to make those decisions again.

You may revoke this document at any time. To do so, notify your representative and your health care provider of the revocation.

Despite this document, you have the right to decide your own health care as long as you are able to do so.

If there is anything in this document that you do not understand, ask a lawyer to explain it to you.

You may sign Part B, Part C, or both parts. You may cross out words that don't express your wishes or add words that better express your wishes. Witnesses must sign Part D.
Print your NAME, BIRTHDATE AND ADDRESS here:

<Client>
<birthdate>
<address>

Unless revoked or suspended, this advance directive will continue for:

INITIAL ONE:

___ My entire life

___ Other period ( ____ Years)

**Part B: Appointment of Health Care Representative**

I appoint the following person(s), to act in the order that they appear:

1. <Name>
   <address>
   <address>
   <phone number>

2. <Name>
   <address>
   <address>
   <phone number>

I authorize my representative (or alternate) to direct my health care when I cannot do so.

**NOTE:** You may not appoint your doctor, an employee of your doctor, or an owner, operator or employee of your health care facility, unless that person is related to you by blood, marriage or adoption or that person was appointed before your admission into the health care facility.
1. **Limits.**

Special Conditions or Instructions: ________________________________________________

INITIAL IF THIS APPLIES:

_____ I have executed a Health Care Instruction or Directive to Physicians. My representative is to honor it.

2. **Life Support.**

"Life support" refers to any medical means for maintaining life, including procedures, devices and medications. If you refuse life support, you will still get routine measures to keep you clean and comfortable.

INITIAL IF THIS APPLIES:

_____ My representative MAY decide about life support for me. (If you don't initial this space, then your representative MAY NOT decide about life support.)

3. **Tube Feeding.**

One sort of life support is food and water supplied artificially by medical device, known as tube feeding.

INITIAL IF THIS APPLIES:

_____ My representative MAY decide about tube feeding for me. (If you do not initial this space, then your representative MAY NOT decide about tube feeding.)

DATED: <Month> ________, 2017.

SIGN HERE TO APPOINT A HEALTH CARE REPRESENTATIVE

________________________________________

<CLIENT>
Part C: Health Care Instructions

NOTE: In filling out these instructions, keep the following in mind:

- The term "as my physician recommends" means that you want your physician to try life support if your physician believes it could be helpful and then discontinue it if it is not helping your health condition or symptoms.

- "Life support" and "tube feeding" are defined in Part B above.

- If you refuse tube feeding, you should understand that malnutrition, dehydration and death will probably result.

- You will get care for your comfort and cleanliness, no matter what choices you make.

- You may either give specific instructions by filling out Items 1 to 4 below, or you may use the general instruction provided by Item 5.

Here are my desires about my health care if my doctor and another knowledgeable doctor confirm that I am in a medical condition described below:

1. Close to Death.

   If I am close to death and life support would only postpone the moment of my death:

   A. INITIAL ONE:

      ____ I want to receive tube feeding.

      ____ I want tube feeding only as my physician recommends.

      ____ I DO NOT WANT tube feeding.

   B. INITIAL ONE:

      ____ I want any other life support that may apply.

      ____ I want life support only as my physician recommends.

      ____ I want NO life support.
2. **Permanently Unconscious.**

   If I am unconscious and it is very unlikely that I will ever become conscious again:

   A. INITIAL ONE:
      
      ____ I want to receive tube feeding.
      
      ____ I want tube feeding only as my physician recommends.
      
      ____ I DO NOT WANT tube feeding.
   
   B. INITIAL ONE:
      
      ____ I want any other life support that may apply.
      
      ____ I want life support only as my physician recommends.
      
      ____ I want NO life support.

3. **Advanced Progressive Illness.**

   If I have a progressive illness that will be fatal and is in an advance stage, and I am consistently and permanently unable to communicate by any means, swallow food and water safely, care for myself and recognize my family and other people, and it is very unlikely that my condition will substantially improve:

   A. INITIAL ONE:
      
      ____ I want to receive tube feeding.
      
      ____ I want tube feeding only as my physician recommends.
      
      ____ I DO NOT WANT tube feeding.
   
   B. INITIAL ONE:
      
      ____ I want any other life support that may apply.
      
      ____ I want life support only as my physician recommends.
      
      ____ I want NO life support.
4. **Extraordinary Suffering.**

If life support would not help my medical condition and would make me suffer permanent and severe pain:

A. **INITIAL ONE:**

   ____ I want to receive tube feeding.
   ____ I want tube feeding only as my physician recommends.
   ____ I DO NOT WANT tube feeding.

B. **INITIAL ONE:**

   ____ I want any other life support that may apply.
   ____ I want life support only as my physician recommends.
   ____ I want NO life support.

5. **General Instruction.**

**INITIAL IF THIS APPLIES:**

   ____ I do not want my life to be prolonged by life support. I also do not want tube feeding as life support. I want my doctors to allow me to die naturally if my doctor and another knowledgeable doctor confirm I am in any of the medical conditions listed in Items 1 to 4 above.

6. **Additional Conditions or Instructions.**

(Insert description of what you want done.)
7. **Other documents.**

   A "health care power of attorney" is any document you may have signed to appoint a representative to make health care decisions for you.

   INITIAL ONE:

   ____ I have previously signed a health care power of attorney. I want it to remain in effect unless I appointed a health care representative after signing the health care power of attorney.

   ____ I have a health care power of attorney, and I REVOKE IT.

   ____ I DO NOT have a health care power of attorney.

   DATED: <Month> _______, 2017.

   SIGN HERE TO GIVE INSTRUCTIONS

   <CLIENT>
Chapter 1—Advance Directives

Part D: Declaration of Witnesses

We declare that the person signing this advance directive:

(a) Is personally known to us or has provided proof of identity;

(b) Signed or acknowledged that person's signature on this advance directive in our presence;

(c) Appears to be of sound mind and not under duress, fraud or undue influence;

(d) Has not appointed either of us as health care representative or alternate representative; and

(e) Is not a patient for whom either of us is attending physician.

Witnessed By:

__________________________________________  ______________________________
SIGNATURE OF WITNESS / DATE       PRINTED NAME OF WITNESS

__________________________________________  ______________________________
SIGNATURE OF WITNESS / DATE       PRINTED NAME OF WITNESS

NOTE: One witness must not be a relative (by blood, marriage or adoption) of the person signing this advance directive. That witness must also not be entitled to any portion of the person's estate upon death. That witness must also not own, operate or be employed at a health care facility where the person is a patient or resident.
Part E: Acceptance by Health Care Representative

I accept this appointment and agree to serve as health care representative. I understand I must act consistently with the desires of the person I represent, as expressed in this advance directive or otherwise made known to me. If I do not know the desires of the person I represent, I have a duty to act in what I believe in good faith to be that person's best interest. I understand that this document allows me to decide about that person's health care only while that person cannot do so. I understand that the person who appointed me may revoke this appointment. If I learn that this document has been suspended or revoked, I will inform the person's current health care provider if known to me.

SIGNATURE OF HEALTH CARE REPRESENTATIVE / DATE

SIGNATURE OF ALTERNATE HEALTH CARE REPRESENTATIVE / DATE

PRINTED NAME

PRINTED NAME
Health care providers are authorized to print Oregon POLST Forms for use with their patients. The Oregon POLST Form remains a copyright protected document and in order to print the form certain guidelines must be followed.

**Requirements and information for printing Oregon POLST Forms**

- The form must not be altered in any way including the overall layout, text, or images.
- Copy or print forms on 65# Cover Ultra Pink card stock*
- Both side of the form must be printed back to back and not on separate pages
- A POLST Form requires a signature from an MD, DO, PA, or NP to be valid and should only be filled out and signed after an in-depth conversation between the patient and health care provider about the patient’s goals of care
- The Oregon POLST Form is updated every two to three years. Please check back periodically to make sure that you are using the most current version of the form
- Forms differ from state to state depending on local laws and requirements. If you are a patient or provider outside of Oregon visit www.polst.org to find out about POLST Programs and Forms in your state
- Written authorization is still required to reproduce the Oregon POLST Form for purposes other than patient care. To request authorization email polst@ohsu.edu.

If you have questions about the Oregon POLST Program or Oregon POLST Form visit www.oregonpolst.org

## Physician Orders for Life-Sustaining Treatment (POLST)

Follow these medical orders until orders change. Any section not completed implies full treatment for that section.

### A. Cardiopulmonary Resuscitation (CPR):
- **Unresponsive, pulseless, & not breathing.**
  - **Attempt Resuscitation/CPR**
  - **Do Not Attempt Resuscitation/DNR**

### B. Medical Interventions:
- If patient has pulse and is breathing.
  - **Comfort Measures Only.** Provide treatments to relieve pain and suffering through the use of any medication by any route, positioning, wound care and other measures. Use oxygen, suction, and manual treatment of airway obstruction as needed for comfort. **Patient prefers no transfer to hospital for life-sustaining treatments. Transfer if comfort needs cannot be met in current location.**
    - **Treatment Plan:** Provide treatments for comfort through symptom management.
  - **Limited Treatment.** In addition to care described in Comfort Measures Only, use medical treatment, antibiotics, IV fluids and cardiac monitor as indicated. No intubation, advanced airway interventions, or mechanical ventilation. May consider less invasive airway support (e.g. CPAP, BiPAP). **Transfer to hospital if indicated. Generally avoid the intensive care unit.**
    - **Treatment Plan:** Provide basic medical treatments.
  - **Full Treatment.** In addition to care described in Comfort Measures Only and Limited Treatment, use intubation, advanced airway interventions, and mechanical ventilation as indicated. **Transfer to hospital and/or intensive care unit if indicated.**
    - **Treatment Plan:** All treatments including breathing machine.

### C. Artificially Administered Nutrition:
- **Offer food by mouth if feasible.**
  - **Long-term artificial nutrition by tube.**
  - **Defined trial period of artificial nutrition by tube.**
  - **No artificial nutrition by tube.**

### D. Documentation of Discussion:
- **See reverse side for add’l info.**
  - **Patient** (If patient lacks capacity, must check a box below)
  - **Health Care Representative** (legally appointed by advance directive or court)
  - **Surrogate** defined by facility policy or Surrogate for patient with developmental disabilities or significant mental health condition (Note: Special requirements for completion- see reverse side)

### E. Patient or Surrogate Signature and Oregon POLST Registry Opt Out
- **Signature:** recommended
- **This form will be sent to the POLST Registry unless the patient wishes to opt out, if so check opt out box:**

### F. Attestation of MD/DO/NP/PA
- **By signing below, I attest that these medical orders are, to the best of my knowledge, consistent with the patient’s current medical condition and preferences.**

**Print Signing MD/DO/NP/PA Name:** required
**Signer Phone Number:**
**Signer License Number:** (optional)
**MD/DO/NP/PA Signature:** required
**Date:** required
**Office Use Only**

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Chapter 1—Advance Directives

**HIPAA PERMITS DISCLOSURE TO HEALTH CARE PROFESSIONALS & ELECTRONIC REGISTRY AS NECESSARY FOR TREATMENT**

**Information for patient named on this form**

**PATIENT’S NAME:**

The POLST form is always voluntary and is usually for persons with serious illness or frailty. POLST records your wishes for medical treatment in your current state of health (states your treatment wishes if something happened tonight). Once initial medical treatment is begun and the risks and benefits of further therapy are clear, your treatment wishes may change. Your medical care and this form can be changed to reflect your new wishes at any time. No form, however, can address all the medical treatment decisions that may need to be made. An Advance Directive is recommended for all capable adults and allows you to document in detail your future health care instructions and/or name a Health Care Representative to speak for you if you are unable to speak for yourself. Consider reviewing your Advance Directive and giving a copy of it to your health care professional.

**Contact Information (Optional)**

<table>
<thead>
<tr>
<th>Health Care Representative or Surrogate:</th>
<th>Relationship:</th>
<th>Phone Number:</th>
<th>Address:</th>
</tr>
</thead>
</table>

**Health Care Professional Information**

<table>
<thead>
<tr>
<th>Preparer Name:</th>
<th>Preparer Title:</th>
<th>Phone Number:</th>
<th>Date Prepared:</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>PA’s Supervising Physician:</th>
<th>Phone Number:</th>
</tr>
</thead>
</table>

**Primary Care Professional:**

**Directions for Health Care Professionals**

**Completing POLST**

- Completing a POLST is always voluntary and cannot be mandated for a patient.
- An order of CPR in Section A is incompatible with an order for Comfort Measures Only in Section B (will not be accepted in Registry).
- For information on legally appointed health care representatives and their authority, refer to ORS 127.505 - 127.660.
- Should reflect current preferences of persons with serious illness or frailty. Also, encourage completion of an Advance Directive.
- Verbal / phone orders are acceptable with follow-up signature by MD/DO/NP/PA in accordance with facility/community policy.
- Use of original form is encouraged. Photocopies, faxes, and electronic registry forms are also legal and valid.
- A person with developmental disabilities or significant mental health condition requires additional consideration before completing the POLST form; refer to Guidance for Health Care Professionals at www.oregonpolst.org.

**Oregon POLST Registry Information**

<table>
<thead>
<tr>
<th>Health Care Professionals:</th>
<th>Registry Contact Information:</th>
<th>Patients:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) You are <strong>required</strong> to send a copy of both sides of this POLST form to the Oregon POLST Registry unless the patient opts out.</td>
<td>Phone: 503-418-4083</td>
<td>Mailed confirmation packets from Registry may take four weeks for delivery.</td>
</tr>
<tr>
<td>(2) The following sections must be completed:</td>
<td>Fax or eFAX: 503-418-2161</td>
<td>MAY PUT REGISTRY ID STICKER HERE:</td>
</tr>
<tr>
<td>• Patient’s full name</td>
<td><a href="http://www.orpolstregistry.org">www.orpolstregistry.org</a></td>
<td></td>
</tr>
<tr>
<td>• Date of birth</td>
<td><a href="mailto:polstreg@ohsu.edu">polstreg@ohsu.edu</a></td>
<td></td>
</tr>
<tr>
<td>• MD / DO / NP / PA signature</td>
<td>Oregon POLST Registry</td>
<td></td>
</tr>
<tr>
<td>• Date signed</td>
<td>3181 SW Sam Jackson Park Rd.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Mail Code: CDW-EM</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Portland, Or 97239</td>
<td></td>
</tr>
</tbody>
</table>

**Updating POLST:** A POLST Form only needs to be revised if patient treatment preferences have changed.

This POLST should be reviewed periodically, including when:

- The patient is transferred from one care setting or care level to another (including upon admission or at discharge), or
- There is a substantial change in the patient’s health status.

If patient wishes haven’t changed, the POLST Form does not need to be revised, updated, rewritten or resent to the Registry.

**Voiding POLST:** A copy of the voided POLST must be sent to the Registry unless patient has opted-out.

- A person with capacity, or the valid surrogate of a person without capacity, can void the form and request alternative treatment.
- Draw line through sections A through E and write “VOID” in large letters if POLST is replaced or becomes invalid.
- Send a copy of the voided form to the POLST Registry (required unless patient has opted out).
- If included in an electronic medical record, follow voiding procedures of facility/community.

For permission to use the copyrighted form contact the OHSU Center for Ethics in Health Care at polst@ohsu.edu or (503) 494-3965. Information on the Oregon POLST Program is available online at www.oregonpolst.org or at polst@ohsu.edu

SEND FORM WITH PATIENT WHENEVER TRANSFERRED OR DISCHARGED, SUBMIT COPY TO REGISTRY

© CENTER FOR ETHICS IN HEALTH CARE, Oregon Health & Science University. 2014
OPTIONAL LANGUAGE FOR ADVANCE DIRECTIVE

SPoon Feeding Language

The quality of my life is of supreme importance to me, even at the end. When the time comes, I do not want any extraordinary measures taken to extend my life. This includes any spoon feeding by staff if I am at a stage of dementia or failing health in which the offering of food by spoon to the mouth elicits an automatic response to take in the food. Should this be a conflict at the facility, I direct my health care representative to move me back home or to a homelike setting and have either family or a trusted friend be with me. I do not wish to be kept alive because I am having an automatic memory response to a utensil with food placed on my lips.

DEMENTIA AND QUALITY OF LIFE LANGUAGE

If I have been diagnosed with advanced dementia requiring 24 hour care, I want no life-prolonging measures, including antibiotics.
1. Part B (appointing a Health Care Representative) is the most useful part
2. Medical team may not know an Advance Directive exists
3. If one exists, it may not be available at the time decisions need to be made
4. If one is available, don’t know if it was subsequently updated
5. The situations outlined in the Advance Directive are specific, with decisions for tube feeding and “life support”

Dementia is not mentioned in the AD.
The prevalence of dementia is approximately 6% to 10% of individuals aged 65 years or older
  1% to 2% among those aged 65 to 74
  30% or more of those aged 85 or older
(sourced: https://www.cdc.gov/pcd/issues/2006/apr/05_0167.htm)

On average, a person with Alzheimer's lives four to eight years after diagnosis, but can live as long as 20 years. (source: http://www.alz.org/alzheimers_disease_stages_of_alzheimers.asp)

Alzheimer’s dementia is the fifth leading cause of death among those over 65 years old (alz.org)
Death is caused by infections, particularly eating / swallowing problems which result in pneumonia.

Most people say they do not want life prolonging measure if they don’t/won’t have “quality of life”
Defining “quality of life”:
  “If I can’t read and walk my dog, I don’t want my life to be prolonged”
  “If I can eat chocolate ice cream and watch sports on TV, that’s good enough for me”
  “If I can’t recognize my children, don’t treat me for pneumonia”

What does a good day look like?
Are there things that I need to be able to do, to have a life worth living?
What would I consider a good death?

Physician Orders for Life Sustaining Treatment (POLST), “companion document” to the AD

Web resources:
oregonpolst.org
http://theconversationproject.org/
https://www.compassionandchoices.org/

Books:
Being Mortal, by Atul Gawande (nonfiction)
Still Alice, by Lisa Genova (fiction)
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.

Establishes Advance Directive [Rules] Adoption Committee for purpose of adopting form of advance directive to be used in this state. Specifies that form may not take effect unless form is submitted and presented to certain committees of Legislative Assembly. Specifies that first form may not take effect unless form is ratified according to constitutional requirements for passage of legislative measures.

Repeals statute setting forth current form of advance directive used in this state. Sets forth alternative form of advance directive that may be used in this state. Sunsets alternative form on January 1, 2020.

Modifies means by which advance directive is executed.

Modifies law by which individual is selected to make health care decisions for another individual who becomes incapable of making health care decisions.

Makes certain other changes to provisions governing individuals who become incapable of making health care decisions.

Becomes operative January 1, 2018.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT


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

FORM OF AN ADVANCE DIRECTIVE
(Series Placement)

SECTION 1. Sections 2 to 6 of this 2017 Act are added to and made a part of ORS 127.505 to 127.660.

(Advance Directive Adoption Committee)

SECTION 2. (1) The Advance Directive Adoption Committee is established within the division of the Oregon Health Authority that is charged with performing the public health functions of the state.

(2)(a) The committee consists of 13 members.

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.
(b) One member shall be the Long Term Care Ombudsman or the designee of the Long
Term Care Ombudsman.

(c) The other 12 members shall be appointed by the Governor as follows:
(A) One member who represents primary health care providers.
(B) One member who represents hospitals.
(C) One member who is a clinical ethicist affiliated with a health care facility located in
this state, or affiliated with a health care organization offering health care services in this
state.
(D) Two members who are health care providers with expertise in palliative or hospice
care, one of whom is not employed by a hospital or other health care facility, a health care
organization or an insurer.
(E) One member who represents individuals with disabilities.
(F) One member who represents consumers of health care services.
(G) One member who represents the long term care community.
(H) One member with expertise advising or assisting consumers with end-of-life deci-
sions.
(I) One member from among members proposed by the Oregon State Bar who has ex-
tensive experience in elder law and advising individuals on how to execute an advance di-
rective.
(J) One member from among members proposed by the Oregon State Bar who has ex-
tensive experience in estate planning and advising individuals on how to make end-of-life
decisions.
(K) One member from among members proposed by the Oregon State Bar who has ex-
tensive experience in health law.

(3) The term of office of each member of the committee is four years, but a member
serves at the pleasure of the appointing authority. Before the expiration of the term of a
member, the appointing authority shall appoint a successor whose term begins on January
1 next following. A member is eligible for reappointment. If there is a vacancy for any cause,
the appointing authority shall make an appointment to become immediately effective for the
unexpired term.

(4) A majority of the members of the committee constitutes a quorum for the transaction
of business.

(5) Official action by the committee requires the approval of a majority of the members
of the committee.

(6) The committee shall elect one of its members to serve as chairperson.

(7) The committee shall meet at times and places specified by the call of the chairperson
or of a majority of the members of the committee, provided that the committee meets at
least twice a year.

(8) The committee may adopt rules necessary for the operation of the committee.

(9) Members of the committee are not entitled to compensation, but may be reimbursed
for actual and necessary travel and other expenses incurred by them in the performance of
their official duties in the manner and amounts provided for in ORS 292.495. Claims for ex-
spenses shall be paid out of funds appropriated to the Oregon Health Authority for purposes
of the committee.

SECTION 3. (1) In accordance with public notice and stakeholder participation require-
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ments prescribed by the Oregon Health Authority and section 4 of this 2017 Act, the Advance
Directive Adoption Committee established under section 2 of this 2017 Act shall:
(a) Adopt the form of an advance directive to be used in this state; and
(b) Review the form not less than once every four years for the purpose of adopting
changes to the form that the committee determines are necessary.
(2) Except as otherwise provided by ORS 127.505 to 127.660, the form of an advance di-
rective adopted pursuant to this section is the only valid form of an advance directive in this
state.
(3) At a minimum, the form of an advance directive adopted under this section must
contain the following elements:
(a) A statement about the purposes of the advance directive, including:
(A) A statement about the purpose of the principal's appointment of a health care re-
presentative to make health care decisions for the principal if the principal becomes incapable;
(B) A statement about the priority of health care representative appointment in ORS
127.655 in the event the principal becomes incapable and does not have a valid health care
representative appointment;
(C) A statement about the purpose of the principal's expression of the principal's values
and beliefs with respect to health care decisions and the principal's preferences for health
care;
(D) A statement about the purpose of the principal's expression of the principal's pref-
erences with respect to placement in a care home or a mental health facility; and
(E) A statement that advises the principal that the advance directive allows the principal
to document the principal's preferences, but is not a POLST, as defined in ORS 127.663.
(b) A statement explaining that to be effective the advance directive must be:
(A) Accepted by signature or other applicable means; and
(B) Either witnessed and signed by at least two adults or notarized.
(c) A statement explaining that to be effective the appointment of a health care repre-
sentative or an alternate health care representative must be accepted by the health care
representative or the alternate health care representative.
(d) A statement explaining that the advance directive, once executed, supersedes any
previously executed advance directive.
(e) The name, date of birth, address and other contact information of the principal.
(f) The name, address and other contact information of any health care representative
or any alternate health care representative appointed by the principal.
(g) A section providing the principal with an opportunity to state the principal's values
and beliefs with respect to health care decisions, including the opportunity to describe the
principal's preferences, by completing a checklist, by providing instruction through narrative
or other means, or by any combination of methods used to describe the principal's prefer-
ences, regarding:
(A) When the principal wants all reasonably available health care necessary to preserve
life and recover;
(B) When the principal wants all reasonably available health care necessary to treat
chronic conditions;
(C) When the principal wants to specifically limit health care necessary to preserve life
and recover, including artificially administered nutrition and hydration, cardiopulmonary
resuscitation and transport to a hospital; and
(D) When the principal desires comfort care instead of health care necessary to preserve
life.

(h) A section where the principal and the witnesses or notary may accept by signature
or other means, including electronic or verbal means, the advance directive.
(i) A section where any health care representative or any alternate health care repre-
sentative appointed by the principal may accept the advance directive by signature or other
means, including electronic or verbal means.

(4)(a) In adopting the form of an advance directive under this section, the committee
shall use plain language, such as “tube feeding” and “life support.”
(b) As used in this subsection:
(A) “Life support” means life-sustaining procedures.
(B) “Tube feeding” means artificially administered nutrition and hydration.
(5) In adopting the form of an advance directive under this section, the committee shall
use the components of the form for appointing a health care representative or an alternate
health care representative set forth in section 5 of this 2017 Act.
(6) The principal may attach supplementary material to an advance directive. In addition
to the form of an advance directive adopted under this section, supplementary material at-
tached to an advance directive under this subsection is a part of the advance directive.
(7) The Oregon Health Authority shall post the form of an advance directive adopted
under this section on the authority's website.

SECTION 4. (1) In addition to the requirements prescribed by the Oregon Health Au-
thority under section 3 (1) of this 2017 Act, the form of an advance directive adopted or
changed pursuant to section 3 of this 2017 Act:
(a) May not take effect until after adjournment sine die of an odd-numbered year regular
session of the Legislative Assembly; and
(b) May not take effect unless:
(A) On or before December 1 of the even-numbered year preceding the year that the form
is to take effect, the Advance Directive Adoption Committee submits the form to the interim
committees of the Legislative Assembly related to health care and the judiciary; and
(B) During the odd-numbered year regular session of the Legislative Assembly during the
year that the form is to take effect, the Advance Directive Adoption Committee presents
each committee of the Legislative Assembly related to health care and the judiciary infor-
mation on the current form of an advance directive, an assessment of the efficacy of using
that form, the issues presented through use of that form and the proposed changes to that
form.
(2) The chair of a committee of the Legislative Assembly to which the Advance Directive
Adoption Committee must present information under subsection (1)(b)(B) of this section may
waive the requirement established in subsection (1)(b)(B) of this section for that committee.

SECTION 4a. The first form of an advance directive submitted by the Advance Directive
Adoption Committee pursuant to section 4 of this 2017 Act following the effective date of this
2017 Act may not become effective unless the form is ratified according to the constitutional
requirements for passage of a legislative measure.
SECTION 5. A form for appointing a health care representative and an alternate health care representative must be written in substantially the following form:

FORM FOR APPOINTING HEALTH CARE REPRESENTATIVE
AND ALTERNATE HEALTH CARE REPRESENTATIVE

This form may be used in Oregon to choose a person to make health care decisions for you if you become too sick to speak for yourself. The person is called a health care representative.

• If you have completed a form appointing a health care representative in the past, this new form will replace any older form.

• You must sign this form for it to be effective. You must also have it witnessed by two witnesses or a notary. Your appointment of a health care representative is not effective until the health care representative accepts the appointment.

• If you become too sick to speak for yourself and do not have an effective health care representative appointment, a health care representative will be appointed for you in the order of priority set forth in ORS 127.635 (2).

1. ABOUT ME.

Name: __________________________ Date of Birth: ______________
Telephone numbers: (Home) ______ (Work) ______ (Cell) ______
Address: __________________________
E-mail: __________________________

2. MY HEALTH CARE REPRESENTATIVE.

I choose the following person as my health care representative to make health care decisions for me if I can't speak for myself.

Name: __________________________ Relationship: ______________
Telephone numbers: (Home) ______ (Work) ______ (Cell) ______
Address: __________________________
E-mail: __________________________

I choose the following people to be my alternate health care representatives if my first choice is not available to make health care decisions for me or if I cancel the first health care representative's appointment.

First alternate health care representative:
Name: __________________________ Relationship: ______________
Telephone numbers: (Home) ______ (Work) ______ (Cell) ______
Address: __________________________
E-mail: __________________________

Second alternate health care representative:
Name: __________________________ Relationship: ______________
Telephone numbers: (Home) ______ (Work) ______ (Cell) ______
Address: __________________________
E-mail: __________________________
3. MY SIGNATURE.
   My signature: __________________________ Date: ____________

4. WITNESS.
   COMPLETE A OR B WHEN YOU SIGN.

   A. WITNESS DECLARATION:
   The person completing this form is personally known to me or has provided proof of identity, has signed or acknowledged the person's signature on the document in my presence and appears to be not under duress and to understand the purpose and effect of this form. In addition, I am not the person's health care representative or alternate health care representative, and I am not the person's attending health care provider.

   Witness Name (print): __________________________
   Signature: __________________________
   Date: ____________
   Witness Name (print): __________________________
   Signature: __________________________
   Date: ____________

   B. NOTARY:
   State of ________________
   County of ________________
   Signed or attested before me on _____, 20__, by
   ____________________________________________
   Notary Public - State of Oregon

5. ACCEPTANCE BY MY HEALTH CARE REPRESENTATIVE.
   I accept this appointment and agree to serve as health care representative.
   Health care representative:
   Printed name: __________________________
   Signature or other verification of acceptance: __________________________
   Date ____________

First alternate health care representative:
Printed name: __________________________
Signature or other verification of acceptance: __________________________
Date ____________
Second alternate health care representative:
Printed name: __________________________
Signature or other verification of acceptance: __________________________
Date ____________

(Temporary Form for Advance Directive)

SECTION 6. (1) In lieu of the form of an advance directive adopted by the Advance Directive Adoption Committee under section 3 of this 2017 Act, on or before January 1, 2021, a principal may execute an advance directive that is in a form that is substantially the same
as the form of an advance directive set forth in this section.

(2) Notwithstanding section 3 (2) of this 2017 Act, the form of an advance directive set forth in this section is a valid form of an advance directive in this state.

(3) The form of an advance directive executed as described in subsection (1) of this section is as follows:

ADVANCE DIRECTIVE
(STATE OF OREGON)

This form may be used in Oregon to choose a person to make health care decisions for you if you become too sick to speak for yourself. The person is called a health care representative. If you do not have an effective health care representative appointment and become too sick to speak for yourself, a health care representative will be appointed for you in the order of priority set forth in ORS 127.635 (2).

This form also allows you to express your values and beliefs with respect to health care decisions and your preferences for health care.

• If you have completed an advance directive in the past, this new advance directive will replace any older directive.

• You must sign this form for it to be effective. You must also have it witnessed by two witnesses or a notary. Your appointment of a health care representative is not effective until the health care representative accepts the appointment.

• If your advance directive includes directions regarding the withdrawal of life support or tube feeding, you may revoke your advance directive at any time and in any manner that expresses your desire to revoke it.

• In all other cases, you may revoke your advance directive at any time and in any manner as long as you are capable of making medical decisions.

1. ABOUT ME.

Name: __________________________ Date of Birth: ____________
Telephone numbers: (Home)______ (Work)______ (Cell)______
Address: __________________________
E-mail: __________________________

2. MY HEALTH CARE REPRESENTATIVE.

I choose the following person as my health care representative to make health care decisions for me if I can't speak for myself.

Name: __________________________ Relationship: ______________
Telephone numbers: (Home)______ (Work)______ (Cell)______
Address: __________________________
E-mail: __________________________

I choose the following people to be my alternate health care representatives if my first choice is not available to make health care decisions for me or if I cancel the first health care representative's appointment.

First alternate health care representative:

Name: __________________________ Relationship: ______________
Telephone numbers: (Home)______ (Work)______ (Cell)______
Address: ________________________________

E-mail: ________________________________

Second alternate health care representative:

Name: ________________________________ Relationship: ________________

Telephone numbers: (Home)______ (Work)______ (Cell)______

Address: ________________________________

E-mail: ________________________________

3. INSTRUCTIONS TO MY HEALTH CARE REPRESENTATIVE.

If you wish to give instructions to your health care representative about your health care decisions, initial one of the following three statements:

___ To the extent appropriate, my health care representative must follow my instructions.

___ My instructions are guidelines for my health care representative to consider when making decisions about my care.

___ Other instructions: ________________________________

4. DIRECTIONS REGARDING MY END OF LIFE CARE.

In filling out these directions, keep the following in mind:

• The term “as my health care provider recommends” means that you want your health care provider to use life support if your health care provider believes it could be helpful, and that you want your health care provider to discontinue life support if your health care provider believes it is not helping your health condition or symptoms.

• The term “life support” means any medical treatment that maintains life by sustaining, restoring or replacing a vital function.

• The term “tube feeding” means artificially administered food and water.

• If you refuse tube feeding, you should understand that malnutrition, dehydration and death will probably result.

• You will receive care for your comfort and cleanliness no matter what choices you make.

A. Statement Regarding End of Life Care. You may initial the statement below if you agree with it. If you initial the statement you may, but you do not have to, list one or more conditions for which you do not want to receive life support.

___ I do not want my life to be prolonged by life support. I also do not want tube feeding as life support. I want my health care provider to allow me to die naturally if my health care provider and another knowledgeable health care provider confirm that I am in any of the medical conditions listed below.

B. Additional Directions Regarding End of Life Care. Here are my desires about my health care if my health care provider and another knowledgeable health care provider confirm that I am in a medical condition described below:

a. Close to Death. If I am close to death and life support would only postpone the moment of my death:

INITIAL ONE:

___ I want to receive tube feeding.

___ I want tube feeding only as my health care provider recommends.

___ I DO NOT WANT tube feeding.

INITIAL ONE:
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1. I want any other life support that may apply.
2. I want life support only as my health care provider recommends.
3. I DO NOT WANT life support.

b. Permanently Unconscious. If I am unconscious and it is very unlikely that I will ever become conscious again:

INITIAL ONE:
1. I want to receive tube feeding.
2. I want tube feeding only as my health care provider recommends.
3. I DO NOT WANT tube feeding.

INITIAL ONE:
1. I want any other life support that may apply.
2. I want life support only as my health care provider recommends.
3. I DO NOT WANT life support.

C. Additional Instruction. You may attach to this document any writing or recording of your values and beliefs related to health care decisions. These attachments will serve as guidelines for health care providers. Attachments may include a description of what you would like to happen if you are close to death, if you are permanently unconscious, if you have an advanced progressive illness or if you are suffering permanent and severe pain.

5. MY SIGNATURE.
   My signature: __________________________ Date: __________

6. WITNESS.

   COMPLETE A OR B WHEN YOU SIGN.

   A. WITNESS DECLARATION:
The person completing this form is personally known to me or has provided proof of identity, has signed or acknowledged the person’s signature on the document in my presence and appears to be not under duress and to understand the purpose and effect of this form. In addition, I am not the person’s health care representative or alternate health care representative, and I am not the person’s attending health care provider.

Witness Name (print): ____________________________
Signature: ____________________________
Date: ___________
Witness Name (print): ____________________________
Signature: ____________________________
Date: ___________

B. NOTARY:

State of ____________________________
County of ____________________________
Signed or attested before me on ____________, 20__, by

__________________________
Notary Public - State of Oregon

7. ACCEPTANCE BY MY HEALTH CARE REPRESENTATIVE.

I accept this appointment and agree to serve as health care representative.

Health care representative:
Printed name: ____________________________
Signature or other verification of acceptance: ____________________________
Date ____________

First alternate health care representative:
Printed name: ____________________________
Signature or other verification of acceptance: ____________________________
Date ____________

Second alternate health care representative:
Printed name: ____________________________
Signature or other verification of acceptance: ____________________________
Date ____________

APPOINTING HEALTH CARE REPRESENTATIVES AND EXECUTING ADVANCE DIRECTIVES

SECTION 7, ORS 127.510 is amended to read:

127.510. (1) A capable adult may designate in writing a competent adult to serve as attorney-in-fact for health care. A capable adult may also designate a competent adult to serve as alternate attorney-in-fact if the original designee is unavailable, unable or unwilling to serve as attorney-in-fact at any time after the power of attorney for health care is executed. The power of attorney for health care is effective when it is signed, witnessed and accepted as required by ORS 127.505 to 127.660 and 127.995. The attorney-in-fact so appointed shall make health care decisions on behalf of the principal
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(1) A capable adult may execute an advance directive. The advance directive is effective when it is signed by the principal and witnessed or notarized as required by ORS 127.505 to 127.660.

(2)(a) A capable adult may use an advance directive or the form set forth in section 5 of this 2017 Act to appoint a competent adult to serve as the health care representative for the capable adult. A health care representative appointed under this paragraph shall make health care decisions for the principal if the principal becomes incapable.

(b) A capable adult may use an advance directive or the form set forth in section 5 of this 2017 Act to appoint one or more competent adults to serve as alternate health care representatives for the capable adult. For purposes of ORS 127.505 to 127.660, an alternate health care representative has the rights and privileges of a health care representative appointed under paragraph (a) of this subsection, including the rights described in ORS 127.535. An alternate health care representative appointed under this paragraph shall make health care decisions for the principal if:

(A) The principal becomes incapable; and

(B) The health care representative appointed under paragraph (a) of this subsection is unable, unwilling or unavailable to make timely health care decisions for the principal.

(c) For purposes of paragraph (b) of this subsection, the health care representative appointed under paragraph (a) of this subsection is unavailable to make timely health care decisions for the principal if the health care representative is not available to answer questions for the health care provider in person, by telephone or by another means of direct communication.

(d) An appointment made under this section is effective when it is accepted by the health care representative.

(3) Unless the period of time that an advance directive or a form appointing a health care representative is [to be] effective is limited by the terms of the advance directive or the form appointing a health care representative, the advance directive [shall continue] or the form appointing a health care representative continues in effect until:

(a) The principal dies; or

(b) The advance directive or the form appointing a health care representative is revoked, suspended or superseded pursuant to ORS 127.545.

(4) Notwithstanding subsection (3) of this section, if the principal is incapable at the expiration of the term of the advance directive or the form appointing a health care representative, the advance directive or the form appointing a health care representative continues in effect until:

(a) The principal is no longer incapable;

(b) The principal dies; or

(c) The advance directive or the form appointing a health care representative is revoked, suspended or superseded pursuant to the provisions of ORS 127.545.

(5) A health care provider shall make a copy of an advance directive, a copy of a form appointing a health care representative and a copy of any other instrument a part of the principal’s medical record when a copy of [that] the advance directive, form appointing a health care representative or instrument is provided to the principal’s health care provider.
(6) Notwithstanding subsections (3)(a) and (4)(b) of this section, an advance directive remains in effect with respect to an anatomical gift, as defined in ORS 97.953, made on an advance directive is effective after the principal dies.

SECTION 8. ORS 127.515 is amended to read:

127.515. (1) An advance directive or a form appointing a health care representative may be executed by a resident or nonresident adult of this state in the manner provided by ORS 127.505 to 127.660, [and 127.995.]

[(2) A power of attorney for health care must be in the form provided by Part B of the advance directive form set forth in ORS 127.531, or must be in the form provided by ORS 127.530 (1991 Edition).]

[(3) A health care instruction must be in the form provided by Part C of the advance directive form set forth in ORS 127.531, or must be in the form provided by ORS 127.610 (1991 Edition).]

[(4) An advance directive must reflect the date of the principal’s signature. To be valid, an advance directive must be witnessed by at least two adults as follows:]

[(a) Each witness shall witness either the signing of the instrument by the principal or the principal’s acknowledgment of the signature of the principal.]

[(b) Each witness shall make the written declaration as set forth in the form provided in ORS 127.531.]

[(c) One of the witnesses shall be a person who is not:]

[(A) A relative of the principal by blood, marriage or adoption,]

[(B) A person who at the time the advance directive is signed would be entitled to any portion of the estate of the principal upon death under any will or by operation of law; or]

[(C) An owner, operator or employee of a health care facility where the principal is a patient or resident.]

[(d) The attorney-in-fact for health care or alternative attorney-in-fact may not be a witness. The principal’s attending physician at the time the advance directive is signed may not be a witness.]

[(e) If the principal is a patient in a long term care facility at the time the advance directive is executed, one of the witnesses must be an individual designated by the facility and having any qualifications that may be specified by the Department of Human Services by rule.]

(2) An advance directive or a form appointing a health care representative must reflect the date of the principal's signature or other method of accepting the advance directive or the form appointing a health care representative. To be valid, an advance directive or a form appointing a health care representative must be:

(a) Witnessed and signed by at least two adults; or
(b) Notarized by a notary public.

(3) If an advance directive or a form appointing a health care representative is validated under subsection (2)(a) of this section, each witness must witness:

(a) The principal signing the advance directive or the form appointing a health care representative; or

(b) The principal acknowledging the signature of the principal on the advance directive or the form appointing a health care representative, or the principal acknowledging any other method by which the principal accepted the advance directive or the form appointing a health care representative.

(4) For an advance directive or a form appointing a health care representative to be valid under subsection (2)(a) of this section, the witnesses may not, on the date the advance di-
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rective or the form appointing a health care representative is signed or acknowledged:

(a) Be the principal’s attending physician or attending health care provider.

(b) Be the principal’s health care representative or alternate health care representative
appointed under ORS 127.510.

(5) If an advance directive or a form appointing a health care representative is validated
under subsection (2)(a) of this section, and if the principal is a patient in a long term care
facility at the time the advance directive or the form appointing a health care representative
is executed, one of the witnesses must be an individual who is designated by the facility and
qualified as specified by the Department of Human Services by rule.

Notwithstanding subsections (2) to (4) of this section, an advance di-
rective or a form appointing a health care representative that is executed by an adult who [at
the time of execution resided in another state,] resides in another state at the time of execution
and that is executed in compliance with [the formalities of execution required by] the laws of that
state, the laws of the state where the principal [was] is located at the time of the execution or the
laws of this state[,] is validly executed for the purposes of ORS 127.505 to 127.660 [and 127.995 and
may be given effect in accordance with its provisions, subject to the laws of this state].

DEFINITIONS

SECTION 9. ORS 127.505 is amended to read:

127.505. As used in ORS 127.505 to 127.660 and 127.995:

(1) “Adult” means an individual who:

(a) Is 18 years of age or older[, who]; or

(b) Has been adjudicated an emancipated minor, or [who] is a minor who is
married.

(2) “Advance directive” means a document that contains a health care instruction or a power of
attorney for health care.

(A) “Advance directive” means a document executed by a principal that contains:

(1) “Advance directive” means a document executed by a principal that contains:

(A) A form appointing a health care representative; and

(B) Instructions to the health care representative.

(B) “Advanced directive” includes any supplementary document or writing attached by
the principal to the document described in paragraph (a) of this subsection.

(3) “Appointment” means [a power of attorney for health care] the portion of the form adopted
under section 3 of this 2017 Act used to appoint a health care representative or an alternate
health care representative, the form set forth in section 5 of this 2017 Act, letters of
guardianship or a court order appointing a health care representative.

(4)(a) “Artificially administered nutrition and hydration” means a medical intervention to pro-
vide food and water by tube, mechanical device or other medically assisted method.

(b) “Artificially administered nutrition and hydration” does not include the usual and typical
 provision of nutrition and hydration, such as the provision of nutrition and hydration by cup, hand,
bottle, drinking straw or eating utensil.

(5) “Attending health care provider” means the health care provider who has primary
responsibility for the care and treatment of the principal, provided that the powers and du-
ties conferred on the health care provider by ORS 127.505 to 127.660 are within the health
care provider’s scope of practice.

[(5)] (6) “Attending physician” means the physician who has primary responsibility for the care
and treatment of the principal.

[(6) “Attorney-in-fact” means an adult appointed to make health care decisions for a principal under a power of attorney for health care, and includes an alternative attorney-in-fact.]

[(7) “Dementia” means a degenerative condition that causes progressive deterioration of intellectual functioning and other cognitive skills, including but not limited to aphasia, apraxia, memory, agnosia and executive functioning, that leads to a significant impairment in social or occupational function and that represents a significant decline from a previous level of functioning. Diagnosis is by history and physical examination.]

[(7) “Capable” means not incapable.]

[(8) “Form appointing a health care representative” means the portion of the form adopted under section 3 of this 2017 Act used to appoint a health care representative or an alternate health care representative or the form set forth in section 5 of this 2017 Act.]

[(8)] (9) “Health care” means diagnosis, treatment or care of disease, injury and congenital or degenerative conditions, including the use, maintenance, withdrawal or withholding of life-sustaining procedures and the use, maintenance, withdrawal or withholding of artificially administered nutrition and hydration.

[(9)] (10) “Health care decision” means consent, refusal of consent or withholding or withdrawal of consent to health care, and includes decisions relating to admission to or discharge from a health care facility.

[(10)] (11) “Health care facility” means a health care facility as defined in ORS 442.015, a domiciliary care facility as defined in ORS 443.205, a residential facility as defined in ORS 443.400, an adult foster home as defined in ORS 443.705 or a hospice program as defined in ORS 443.850.

[(11) “Health care instruction” or “instruction” means a document executed by a principal to indicate the principal’s instructions regarding health care decisions.]

[(12)] (12)(a) “Health care provider” means a person licensed, certified or otherwise authorized or permitted by the [law] laws of this state to administer health care in the ordinary course of business or practice of a profession[, and includes a health care facility].

(b) “Health care care facility” includes a health care facility.

[(12)] (13) “Health care representative” means:

[(a) An attorney-in-fact;]

[(a) A competent adult appointed to be a health care representative or an alternate health care representative under ORS 127.510.

(b) A person who has authority to make health care decisions for a principal under the provisions of ORS 127.635 (2) or (3); or]

[(c) A guardian or other person, appointed by a court to make health care decisions for a principal.

(14) “Incapable” means that in the opinion of the court in a proceeding to appoint or confirm authority of a health care representative, or in the opinion of the principal’s attending physician or attending health care provider, a principal lacks the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the principal’s manner of communicating if those persons are available. ["Capable" means not incapable.]

(15) “Instrument” means an advance directive, [acceptance,] form appointing a health care representative, disqualification, withdrawal, court order, court appointment or other document governing health care decisions.

[14]
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[(16) “Life support” means life-sustaining procedures.]

[(17)] (16)(a) “Life-sustaining procedure” means any medical procedure, pharmaceutical, medical
device or medical intervention that maintains life by sustaining, restoring or supplanting a vital
function.

(b) “Life-sustaining procedure” does not include routine care necessary to sustain patient
cleanliness and comfort.

[(18)] (17) “Medically confirmed” means the medical opinion of the attending physician or at-
tending health care provider has been confirmed by a second physician or second health care
provider who has examined the patient and who has clinical privileges or expertise with respect to
the condition to be confirmed.

[(19)] (18) “Permanently unconscious” means completely lacking an awareness of self and ex-
ternal environment, with no reasonable possibility of a return to a conscious state, and that condi-
tion has been medically confirmed by a neurological specialist who is an expert in the examination
of unresponsive individuals.

[(20)] (19) “Physician” means an individual licensed to practice medicine by the Oregon Medical
Board.

[(21) “Power of attorney for health care” means a power of attorney document that authorizes an
attorney-in-fact to make health care decisions for the principal when the principal is incapable.]

[(22)] (20) “Principal” means:

(a) An adult who has executed an advance directive;

(b) A person of any age who has a health care representative;

(c) A person for whom a health care representative is sought; or

(d) A person being evaluated for capability [who will have] to whom a health care representa-
tive will be assigned if the person is determined to be incapable.

[(23)] (21) “Terminal condition” means a health condition in which death is imminent irrespec-
tive of treatment, and where the application of life-sustaining procedures or the artificial adminis-
tration of nutrition and hydration serves only to postpone the moment of death of the principal.

[(24) “Tube feeding” means artificially administered nutrition and hydration.]

TECHNICAL AMENDMENTS

SECTION 10. ORS 127.005 is amended to read:

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

(a) The power of attorney becomes effective when executed and remains in effect until the power
is revoked by the principal;

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

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

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

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

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

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

(6) This section does not apply to powers of attorney for health care executed under
ORS 127.505 to 127.660 [and 127.995].

SECTION 11. ORS 127.520 is amended to read:
127.520. (1) Except as provided in ORS 127.635 or as may be allowed by court order, the fol-
lowing persons may not serve as health care representatives:

(a) If unrelated to the principal by blood, marriage or adoption:

(A) The attending physician or attending health care provider of the principal, or an em-
ployee of the attending physician or attending health care provider of the principal; or

(B) An owner, operator or employee of a health care facility in which the principal is a patient
or resident, unless the health care representative was appointed before the principal’s admission to
the facility; or

(b) A person who is the principal’s parent or former guardian [and] if:

(A) At any time while the principal was under the care, custody or control of the person, a court
entered an order:

(i) Taking the principal into protective custody under ORS 419B.150; or

(ii) Committing the principal to the legal custody of the Department of Human Services for care,
placement and supervision under ORS 419B.337; and

(B) The court entered a subsequent order that:

(i) The principal should be permanently removed from the person’s home, or continued in sub-
stitute care, because it was not safe for the principal to be returned to the person’s home, and no
subsequent order of the court was entered that permitted the principal to return to the person’s
home before the principal’s wardship was terminated under ORS 419B.328; or

(ii) Terminated the person’s parental rights under ORS 419B.500 and 419B.502 to 419B.524.

(2) A principal, while not incapable, may petition the court to remove a prohibition [contained]
described in subsection (1)(b) of this section.

(3) A capable adult may disqualify any other person from making health care decisions for the
capable adult. The disqualification must be in writing and signed by the capable adult. The dis-
qualification must specifically designate those persons who are disqualified.

(4) A health care representative whose authority has been revoked by a court is disqualified.
(5) A health care provider who has actual knowledge of a disqualification may not accept a health care decision from [a] the disqualified [individual] person.

(6) A person who has been disqualified from making health care decisions for a principal, and who is aware of that disqualification, may not make health care decisions for the principal.

SECTION 12. ORS 127.525 is amended to read:

127.525. [For an appointment under a power of attorney for health care to be effective, the attorney-in-fact must accept the appointment in writing. Subject to the right of the attorney-in-fact to withdraw, the acceptance imposes a duty on the attorney-in-fact to make health care decisions on behalf of the principal at such time as the principal becomes incapable. Until the principal becomes incapable, the attorney-in-fact may withdraw by giving notice to the principal. After the principal becomes incapable, the attorney-in-fact may withdraw by giving notice to the health care provider.] For an appointment of a health care representative or an alternate health care representative in a form adopted under section 3 of this 2017 Act or in the form set forth in section 5 of this 2017 Act to be effective, the health care representative or the alternate health care representative must accept the appointment as described in ORS 127.510. Subject to the right of the health care representative or an alternate health care representative to withdraw, the acceptance imposes a duty on the health care representative or an alternate health care representative to make health care decisions on behalf of the principal as described in ORS 127.510. Until the principal becomes incapable, the health care representative or an alternate health care representative may withdraw by giving notice to the principal. After the principal becomes incapable, the health care representative or an alternate health care representative may withdraw by giving notice to the health care provider.

SECTION 13. ORS 127.535 is amended to read:

127.535. (1) [The health care representative has all the authority over the principal’s health care that the principal would have if the principal were not incapable, subject to the limitations of the appointment and ORS 127.540 and 127.580. A health care representative who is known to a health care provider to be available to make health care decisions has priority over any person other than the principal to act for the principal in all with respect to health care decisions. A health care representative has authority to make a health care decision for a principal only when the principal is incapable.

(2) A health care representative is not personally responsible for the cost of health care provided to the principal solely because the health care representative makes health care decisions for the principal.

(3) Except to the extent that the right is limited by the appointment or [any by federal law or regulation], a health care representative for an incapable principal has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records and to consent to the disclosure of medical records. The right of the health care representative to receive [this] information as described in this section is not a waiver of any evidentiary privilege or any right to assert confidentiality with respect to others.

(4) In making health care decisions, [the] a health care representative has a duty to act consistently with the desires of the principal as expressed in the principal’s advance directive, or as otherwise made known by the principal to the health care representative at any time. If the principal’s desires preferences are unknown, [the] a health care representative has a duty to act in [what] a manner that the health care representative in good faith believes to be in the best interests of the principal.
(5) ORS 127.505 to 127.660 do not authorize a health care representative or health care provider to withhold or withdraw life-sustaining procedures or artificially administered nutrition and hydration [in any situation] if the principal manifests an objection to the health care decision. If the principal objects to [such a] the health care decision, the health care provider shall proceed as though the principal [were] is capable [for the purposes of] with respect to the health care decision [objected to].

(6) An [instrument that would be a valid] advance directive or form appointing a health care representative that would be valid except that the [instrument is not a form described in ORS 127.515, has] advance directive or form appointing a health care representative is expired, is not properly witnessed or otherwise fails to meet the formal requirements of ORS 127.505 to 127.660 shall constitute evidence of the patient’s desires and interests.

(7) A health care representative is a personal representative for the purposes of ORS 192.553 to 192.581 and the federal Health Insurance Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164.

SECTION 14. ORS 127.545 is amended to read:

127.545. (1) An advance directive or a health care decision by a health care representative may be revoked:

(a) If the advance directive or health care decision involves the decision to withhold or withdraw life-sustaining procedures or artificially administered nutrition and hydration, at any time and in any manner by which the principal is able to communicate the intent to revoke; or

(b) At any time and in any manner by a capable principal.

(2) Revocation is effective upon communication by the principal to the principal’s attending physician [or], attending health care provider[. or to the] or health care representative. If the revocation is communicated by the principal to the principal’s health care representative, and the principal is incapable and is under the care of a health care provider known to the health care representative, the health care representative must promptly inform the principal’s attending physician or attending health care provider of the revocation.

(3) Upon learning of the revocation, the health care provider or attending physician shall about a revocation of a health care decision, an attending physician or attending health care provider must cause the revocation to be made a part of the principal’s medical records.

(4) Execution of a valid power of attorney for health care revokes any prior power of attorney for health care. Unless the health care instruction provides otherwise, execution of a valid health care instruction revokes any prior health care instruction.

(4) Unless the advance directive provides otherwise:

(a) Execution of an advance directive revokes any prior advance directive; and

(b) [Unless the advance directive provides otherwise,] The directions [as] with respect to health care decisions in [a valid] an advance directive supersedes:

(A) Any directions contained in a previous court appointment or advance directive; and

(B) Any prior inconsistent expression of [desires] preferences with respect to health care decisions.

(6) Unless the power of attorney for health care provides otherwise, valid appointment of an attorney-in-fact for health care supersedes:

(a) Execution of a form appointing a health care representative revokes any prior form appointing a health care representative;
(b) Valid appointment of a health care representative or an alternate health care representative under ORS 127.510 supersedes:

[(a)] (A) Any power of a guardian or other person appointed by a court to make health care decisions for the protected person; and

[(b)] (B) Any other prior appointment or designation of a health care representative; and

[(7) Unless the power of attorney for health care expressly provides otherwise, a power of attorney for health care is suspended:]

(c) A form appointing a health care representative is suspended:

[(a)] (A) If [both the attorney-in-fact and the alternative attorney-in-fact] the appointed health care representative and all appointed alternate health care representatives have withdrawn; or

[(b)] (B) If the [power of attorney] form appointing a health care representative names the principal’s spouse as [attorney-in-fact] the health care representative or an alternate health care representative, a petition for dissolution or annulment of marriage is filed and the principal does not reaffirm the appointment [in writing] after the filing of the petition.

[(8)(a)] (6)(a) If the principal has both a valid [health care instruction] advance directive and a valid [power of attorney for health care] form appointing a health care representative, and if the directions reflected in those documents are inconsistent, the document last executed governs to the extent of the inconsistency.

(b) If the principal has both a valid [health care instruction] advance directive, or a valid [power of attorney for health care] form appointing a health care representative, and a declaration for mental health treatment made in accordance with ORS 127.700 to 127.737, and if the directions reflected in those documents are inconsistent, the [directions contained in the] declaration for mental health treatment governs to the extent of the inconsistency.

[(9)] (7) Any reinstatement of an advance directive or a form appointing a health care representative must be in writing.

SECTION 15. ORS 127.550 is amended to read:

ORS 127.550. (1) A health care decision made by [an individual] a person who is authorized to make the decision under ORS 127.505 to 127.660 [and 127.995] is effective immediately and does not require judicial approval.

(2) A petition may be filed under ORS 127.505 to 127.660 [and 127.995] for [any] one or more of the following purposes:

(a) Determining whether a principal is incapable.

(b) Determining whether an appointment of [the] a health care representative or [a health care instruction] the execution of an advance directive is valid or has been suspended, reinstated, revoked or terminated.

(c) Determining whether the acts or proposed acts of [the] a health care representative breach any duty of the health care representative and whether those acts should be enjoined.

(d) Declaring that [an individual] a person is authorized to act as a health care representative.

(e) Disqualifying [the] a health care representative upon a determination of the court that the health care representative has violated, has failed to perform or is unable to perform the duties under ORS 127.535 (4).

(f) Approving any health care decision that by law requires court approval.

(g) Determining whether the acts or proposed acts of [the] a health care representative are clearly inconsistent with the [desires] preferences of the principal as made known to the health
care representative, or where the [desires] preferences of the principal are unknown or unclear,
whether the acts or proposed acts of the health care representative are clearly contrary to the best
interests of the principal.

(h) Declaring that a [power of attorney for health care] form appointing a health care repre-
sentative is suspended or revoked upon a determination by the court that the [attorney-in-fact]
appointed health care representative has made a health care decision for the principal that au-
thorized anything illegal. A suspension or revocation of a [power of attorney] form appointing a
health care representative under this paragraph shall be in the discretion of the court.

(i) Considering any other matter that the court determines needs to be decided for the pro-	ection of the principal.

(3) A petition may be filed by any of the following:

(a) The principal.
(b) [The] A health care representative.
(c) The spouse, parent, sibling or adult child of the principal.
(d) An adult relative or adult friend of the principal who is familiar with the desires of the
principal.
(e) The guardian of the principal.
(f) The conservator of the principal.
(g) The attending physician or attending health care provider of the principal.

(4) A petition under this section shall be filed in the circuit court in the county in which the
principal resides or is located.

(5) [Any of the determinations] A determination described in this section may be made by the
court as a part of a protective proceeding under ORS chapter 125 if a guardian or temporary
guardian has been appointed for the principal, or if the petition seeks the appointment of a guardian
or a temporary guardian for the principal.

SECTION 16. ORS 127.555 is amended to read:

127.555. (1) If there is more than one physician or health care provider caring for a principal,
the principal shall designate one physician or one health care provider as the attending physician
or the attending health care provider. If the principal is incapable, the health care representative
for the principal shall designate the attending physician or the attending health care provider.

(2) Health care representatives, and persons who are acting under a reasonable belief that they
are health care representatives, [shall not be] are not guilty of any criminal offense, or subject to
civil liability, or in violation of any professional oath, affirmation or standard of care for any action
taken in good faith as a health care representative.

(3) A health care provider acting or declining to act in reliance on the health care decision
made in an advance directive or in a document that the health care provider reasonably be-
lieves to be an advance directive, made by an attending physician or attending health care
provider under ORS 127.635 (3), or made by a person who the health care provider believes is the
health care representative for an incapable principal, is not subject to criminal prosecution, civil
liability or professional disciplinary action on [the] grounds that the health care decision is unau-
thorized unless the health care provider:

(a) Fails to satisfy a duty that ORS 127.505 to 127.660 [and 127.995] place on the health care
provider;

(b) Acts without medical confirmation as required under ORS 127.505 to 127.660 [and 127.995];

(c) Knows or has reason to know that the requirements of ORS 127.505 to 127.660 [and
127.995] have not been satisfied; or
(d) Acts after receiving notice that:
   (A) The authority or decision on which the health care provider relied is revoked, suspended, superseded or subject to other legal infirmity;
   (B) A court challenge to the health care decision or the authority relied on in making the health care decision is pending; or
   (C) The health care representative has withdrawn or has been disqualified.
(4) The immunities provided by this section do not apply to:
   (a) The manner of administering health care pursuant to a health care decision made by the health care representative or by [a health care instruction] an advance directive; or
   (b) The manner of determining the health condition or incapacity of the principal.
(5) A health care provider who determines that a principal is incapable is not subject to criminal prosecution, civil liability or professional disciplinary action for failing to follow that principal’s direction except for a failure to follow a principal’s manifestation of an objection to a health care decision under ORS 127.535 (5).

SECTION 17. ORS 127.565 is amended to read:
ORS 127.565. (1) In following [a health care instruction] an advance directive or the decision of a health care representative, a health care provider shall exercise the same independent medical judgment that the health care provider would exercise in following the decisions of the principal if the principal were capable.
(2) [No A person shall] may not be required [either] to execute or to refrain from executing an advance directive or to appoint or to refrain from appointing a health care representative as a [criterion] condition for insurance. [No A health care provider shall] may not condition the provision of health care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive or has appointed a health care representative.
(3) No existing or future policy of insurance is legally impaired or invalidated in any manner by actions taken under ORS 127.505 to 127.660 and 127.995. [No person shall] A person may not be discriminated against in premium or contract rates because of the existence or absence of an advance directive or appointment of a health care representative.
(4) Nothing in ORS 127.505 to 127.660 and 127.995 is intended to impair or supersede any conflicting federal statute.

SECTION 18. ORS 127.625 is amended to read:
ORS 127.625. (1) [No health care provider shall be] A health care provider is not under any duty, whether by contract, [by statute or [by any] other legal requirement, to participate in the withdrawal or withholding of life-sustaining procedures or of artificially administered nutrition or hydration.
(2) If a health care provider is unable or unwilling to carry out [a health care instruction] an advance directive or the decisions of the health care representative, the following provisions apply:
   (a) The health care provider shall promptly notify the health care representative, if [there is] the principal has appointed a health care representative;
   (b) If the authority or decision of the health care representative is in dispute, the health care representative or health care provider may seek the guidance of the court in the manner provided in ORS 127.550;
   (c) If the health care representative’s authority or decision is not in dispute, the health care representative shall make a reasonable effort to transfer the principal to the care of another phy-
sician or health care provider; and

(d) If there is no health care representative for an incapable patient, and the health care deci-
sions are not in dispute, the health care provider shall, without abandoning the patient, either dis-
charge the patient or make a reasonable effort to locate a different physician or health care
provider and authorize the transfer of the patient to that physician or health care provider.

SECTION 19. ORS 127.635 is amended to read:

ORS 127.635. (1) Life-sustaining procedures as defined in ORS 127.505 that would otherwise be ap-
plied to an incapable principal who is incapable and who does not have an appointed health
care representative or applicable valid advance directive may be withheld or withdrawn in accord-
ance with subsections (2) and (3) of this section if the principal has been medically confirmed to be
in one of the following conditions:

(a) A terminal condition;
(b) Permanently unconscious;
(c) A condition in which administration of life-sustaining procedures would not benefit the
principal’s medical condition and would cause permanent and severe pain; or
(d) The person has a progressive illness that will be fatal and is in an advanced stage, the per-
son is consistently and permanently unable to communicate by any means, swallow food and water
safely, care for the person’s self and recognize the person’s family and other people, and it is very
unlikely that the person’s condition will substantially improve.

(2) If a principal’s condition has been determined to meet one of the conditions set forth in
subsection (1) of this section, and the principal does not have an appointed health care represen-
tative or applicable valid advance directive, the principal’s health care representative shall be the
first of the following, in the following order, who can be located upon reasonable effort by the health
care facility and who is willing to serve as the health care representative:

(a) A guardian of the principal who is authorized to make health care decisions, if any;
(b) The principal’s spouse;
(c) An adult designated by the others listed in this subsection who can be so located, if no
person listed in this subsection objects to the designation;
(d) A majority of the adult children of the principal who can be so located;
(e) Either parent of the principal;
(f) A majority of the adult siblings of the principal who can be located with reasonable effort;
or
(g) Any adult relative or adult friend.

(3) If none of the persons described in subsection (2) of this section is available, then life-
sustaining procedures may be withheld or withdrawn upon the direction and under the supervision
of the attending physician or attending health care provider.

(4) Life-sustaining procedures may be withheld or withdrawn upon the direction and under the
supervision of the attending physician or attending health care provider at the request of a person
designated the health care representative under subsections (2) and (3) of this section only after the
person has consulted with concerned family and close friends[,] and, if the principal has a case
manager, as defined by rules adopted by the Department of Human Services, after giving notice to
the principal’s case manager.

(5) Notwithstanding subsection (2) of this section, a person who is the principal’s parent or for-
mer guardian may not withhold or withdraw life-sustaining procedures under this section if:

(a) At any time while the principal was under the care, custody or control of the person, a court
entered an order:

(A) Taking the principal into protective custody under ORS 419B.150; or

(B) Committing the principal to the legal custody of the Department of Human Services for care, placement and supervision under ORS 419B.337; and

(b) The court entered a subsequent order that:

(A) The principal should be permanently removed from the person’s home, or continued in sub-

stitute care, because it was not safe for the principal to be returned to the person’s home, and no

subsequent order of the court was entered that permitted the principal to return to the person’s

home before the principal’s wardship was terminated under ORS 419B.328; or

(B) Terminated the person’s parental rights under ORS 419B.500 and 419B.502 to 419B.524.

(6) A principal, while not incapable, may petition the court to remove a prohibition contained

in subsection (5) of this section.

SECTION 20. ORS 127.640 is amended to read:

127.640. Before withholding or withdrawing life-sustaining procedures or artificially administered

nutrition and hydration under the provisions of ORS 127.540, 127.580 or 127.635, the attending phy-

sician or attending health care provider shall determine that the conditions of ORS 127.540,

127.580 and 127.635 have been met.

SECTION 21. ORS 127.649 is amended to read:

127.649. (1) Subject to the provisions of ORS 127.652 and 127.654, all health care organizations

shall maintain written policies and procedures, applicable to [all capable adults who are receiving]

each capable adult individual who receives health care by or through the health care organiza-

tion, that provide for:

(a) Delivering to [those individuals] the individual the following information and materials, in

written form, without recommendation:

(A) Information on the rights of the individual under [Oregon law] the laws of this state to

make health care decisions, including the right to accept or refuse medical or surgical treatment

and the right to execute [advance directives] an advance directive or a form appointing a health

care representative;

(B) Information on the policies of the health care organization with respect to the implementa-

tion of the rights of the individual under [Oregon law] the laws of this state to make health care

decisions;

[(C) A copy of the advance directive set forth in ORS 127.531, along with a disclaimer on the first

line of the first page of each form in at least 16-point boldfaced type stating “You do not have to fill

out and sign this form.”; and]

(C) Materials necessary to execute an advance directive or a form appointing a health

care representative; and

(D) The name of a person who can provide additional information concerning [the forms for]

advance directives and forms appointing a health care representative.

(b) Documenting in a prominent place in the individual’s medical record whether the individual

has executed an advance directive or a form appointing a health care representative.

(c) Ensuring compliance by the health care organization with [Oregon law relating to advance
directives] the laws of this state governing advance directives and forms appointing a health
care representative.

(d) Educating the staff and the community on issues relating to advance directives and forms

appointing a health care representative.
(2) A health care organization [need not furnish a copy of an advance directive to an individual] does not need to deliver materials described in subsection (1)(a)(C) of this section if the health care organization has reason to believe that the individual [has received a copy of an advance directive in the form set forth in ORS 127.531 within] has received materials described in subsection (1)(a)(C) of this section during the preceding 12-month period or has previously executed an advance directive or a form appointing a health care representative.

SECTION 22.
ORS 127.737 is amended to read:

(2) For purposes of this section only, a declaration shall be considered a power of attorney for health care, without regard to whether the declaration appoints an attorney-in-fact.

SECTION 23.
ORS 127.760 is amended to read:
127.760. (1) As used in this section:
(a) “Health care instruction” means a document executed by a patient to indicate the patient’s instructions regarding health care decisions, including an advance directive or power of attorney for health care executed under ORS 127.505 to 127.660.
(b) “Health care provider” means a person licensed, certified or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.
(c) “Hospital” has the meaning given that term in ORS 442.015.
(d) “Mental health treatment” means convulsive treatment, treatment of mental illness with psychoactive medication, psychosurgery, admission to and retention in a health care facility for care or treatment of mental illness, and related outpatient services.

(2)(a)(A) A hospital may appoint a health care provider who has received training in health care ethics, including identification and management of conflicts of interest and acting in the best interest of the patient, to give informed consent to medically necessary health care services on behalf of a patient admitted to the hospital in accordance with subsection (3) of this section.

(B) If a person appointed under subparagraph (A) of this paragraph is the patient’s attending physician, the hospital must also appoint another health care provider who meets the requirements of subparagraph (A) of this paragraph to participate in making decisions about giving informed consent to health care services on behalf of the patient.

(b) A hospital may appoint a multidisciplinary committee with ethics as a core component of the duties of the committee, or a hospital ethics committee, to participate in making decisions about giving informed consent to medically necessary health care services on behalf of a patient admitted to the hospital in accordance with subsection (3) of this section.

(3) A person appointed by a hospital under subsection (2) of this section may give informed consent to medically necessary health care services on behalf of and in the best interest of a patient admitted to the hospital if:

(a) In the medical opinion of the attending physician, the patient lacks the ability to make and communicate health care decisions to health care providers;

(b) The hospital has performed a reasonable search, in accordance with the hospital’s policy for locating relatives and friends of a patient, for a health care representative appointed under ORS 127.505 to 127.660 or an adult relative or adult friend of the patient who is capable of making health care decisions for the patient, including contacting social service agencies of the Oregon Health Authority or the Department of Human Services if the hospital has reason to believe that the patient has a case manager with the authority or the department, and has been unable to locate any
person who is capable of making health care decisions for the patient; and
(c) The hospital has performed a reasonable search for and is unable to locate any health care
instruction executed by the patient.
(4) Notwithstanding subsection (3) of this section, if a patient’s wishes regarding health care
services were made known during a period when the patient was capable of making and communi-
cating health care decisions, the hospital and the person appointed under subsection (2) of this
section shall comply with those wishes.
(5) A person appointed under subsection (2) of this section may not consent on a patient’s behalf
to:
(a) Mental health treatment;
(b) Sterilization;
(c) Abortion;
(d) Except as provided in ORS 127.635 (3), the withholding or withdrawal of life-sustaining pro-
cedures as defined in ORS 127.505; or
(e) Except as provided in ORS 127.580 (2), the withholding or withdrawal of artificially admin-
istered nutrition and hydration, as defined in ORS 127.505, other than hyperalimentation, necessary
to sustain life.
(6) If the person appointed under subsection (2) of this section knows the patient’s religious
preference, the person shall make reasonable efforts to confer with a member of the clergy of the
patient’s religious tradition before giving informed consent to health care services on behalf of the
patient.
(7) A person appointed under subsection (2) of this section is not a health care representative
as defined in ORS 127.505.
SECTION 24. ORS 97.953 is amended to read:
97.953. As used in ORS 97.951 to 97.982:
(1) “Adult” means an individual who is 18 years of age or older.
(2) “Agent” means an attorney-in-fact as that term is defined in ORS 127.505; or
(a) A health care representative or an alternate health care representative appointed
under ORS 127.510; or
(b) An individual expressly authorized to make an anatomical gift on the principal’s behalf by
any record signed by the principal.
(3) “Anatomical gift” means a donation of all or part of a human body to take effect after the
donor’s death for the purpose of transplantation, therapy, research or education.
(4) “Body part” means an organ, an eye or tissue of a human being. The term does not include
the whole body.
(5) “Decedent” means a deceased individual whose body or body part is or may be the source
of an anatomical gift, and includes a stillborn infant or a fetus.
(6)(a) “Disinterested witness” means a witness other than:
(A) A spouse, child, parent, sibling, grandchild, grandparent or guardian of the individual who
makes, amends, revokes or refuses to make an anatomical gift; or
(B) An adult who exhibited special care and concern for the individual.
(b) “Disinterested witness” does not include a person to whom an anatomical gift could pass
under ORS 97.969.
(7) “Document of gift” means a donor card or other record used to make an anatomical gift. The
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(8) “Donor” means an individual whose body or body part is the subject of an anatomical gift.

(9) “Donor registry” means a centralized database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(10) “Driver license” means a license or permit issued under ORS 807.021, 807.040, 807.200, 807.280 or 807.730, regardless of whether conditions are attached to the license or permit.

(11) “Eye bank” means an organization licensed, accredited or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage or distribution of human eyes or portions of human eyes.

(12) “Guardian” means a person appointed by a court to make decisions regarding the support, care, education, health or welfare of an individual. “Guardian” does not include a guardian ad litem.

(13) “Hospital” means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state or a subdivision of a state.

(14) “Identification card” means the card issued under ORS 807.021, 807.400 or 807.730, or a comparable provision of the motor vehicle laws of another state.

(15) “Know” means to have actual knowledge.

(16) “Minor” means an individual who is under 18 years of age.

(17) “Organ procurement organization” means an organization designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization.

(18) “Parent” means a parent whose parental rights have not been terminated.

(19) “Physician” means an individual authorized to practice medicine or osteopathy under the law of any state.

(20) “Procurement organization” means an eye bank, organ procurement organization or tissue bank.

(21) “Prospective donor” means an individual who is dead or near death and has been determined by a procurement organization to have a body part that could be medically suitable for transplantation, therapy, research or education. The term does not include an individual who has made a refusal.

(22) “Reasonably available” means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

(23) “Recipient” means an individual into whose body a decedent’s body part has been or is intended to be transplanted.

(24) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(25) “Refusal” means a record that expressly states an intent to prohibit other persons from making an anatomical gift of an individual’s body or body part.

(26) “Sign” means, with the present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound or process.

(27) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(28) “Technician” means an individual determined to be qualified to remove or process body
parts by an appropriate organization that is licensed, accredited or regulated under federal or state law. The term includes an enucleator.

(29) “Tissue” means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education.

(30) “Tissue bank” means a person that is licensed, accredited or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage or distribution of tissue.

(31) “Transplant hospital” means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients.

SECTION 25. ORS 97.955 is amended to read:

97.955. (1) Subject to ORS 97.963, a donor may make an anatomical gift of a donor’s body or body part during the life of the donor for the purpose of transplantation, therapy, research or education.

(2) An anatomical gift may be made in the manner provided in ORS 97.957 by:

(a) The donor, if the donor is an adult or if the donor is a minor and is:

(A) Emancipated; or

(b) An agent of the donor, unless the [power of attorney for health care] form appointing a health care representative, as defined in ORS 127.505, or other record prohibits the agent from making an anatomical gift;

(c) A parent of the donor, if the donor is an unemancipated minor; or

(d) The donor’s guardian.

SECTION 26. ORS 97.959 is amended to read:

97.959. (1) Except as provided in subsection (7) or (8) of this section, an anatomical gift made under ORS 97.957 may be amended or revoked only by the donor in accordance with the provisions of this section and may not be amended or revoked by any other person otherwise authorized to make, amend or revoke a gift under ORS 97.963 or 97.967.

(2) A donor or other person authorized to amend or revoke an anatomical gift under subsection (7) or (8) of this section may amend or revoke an anatomical gift by:

(a) A record signed by:

(A) The donor;

(B) The other person; or

(c) Subject to subsection (3) of this section, another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or

(b) A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

(3) A record signed pursuant to subsection (2)(a)(C) of this section must:

(a) Be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(b) State that it has been signed and witnessed as required in this subsection.

(4) A donor or other person authorized to revoke an anatomical gift under subsection (7) or (8) of this section may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

(5) A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one
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of whom is a disinterested witness.

(6) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in subsection (4) of this section.

(7) If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor’s body or body part.

(8) An agent or guardian of a donor may amend or revoke an anatomical gift only if:

(a) The agent or guardian made the gift under ORS 97.955 (2)(b) or (d); or

(b) [The power of attorney for health care] The form appointing a health care representative, as defined in ORS 127.505, or other record appointing the agent expressly authorizes the agent to amend or revoke anatomical gifts.

SECTION 27. ORS 163.193 is amended to read:

163.193. (1) A person commits the crime of assisting another person to commit suicide if the person knowingly sells, or otherwise transfers for consideration, any substance or object, that is capable of causing death, to another person for the purpose of assisting the other person to commit suicide.

(2) This section does not apply to a person:

(a) Acting pursuant to a court order, an advance directive or [power of attorney for health care] form for appointing a health care representative pursuant to ORS 127.505 to 127.660 or a POLST, as defined in ORS 127.663;

(b) Withholding or withdrawing life-sustaining procedures or artificially administered nutrition and hydration pursuant to ORS 127.505 to 127.660; or

(c) Acting in accordance with the provisions of ORS 127.800 to 127.897.

(3) Assisting another person to commit suicide is a Class B felony.

SECTION 28. ORS 163.206 is amended to read:

163.206. ORS 163.200 and 163.205 do not apply:

(1) To a person acting pursuant to a court order, an advance directive or a [power of attorney for health care] form for appointing a health care representative pursuant to ORS 127.505 to 127.660 or a POLST, as defined in ORS 127.663;

(2) To a person withholding or withdrawing life-sustaining procedures or artificially administered nutrition and hydration pursuant to ORS 127.505 to 127.660;

(3) When a competent person refuses food, physical care or medical care;

(4) To a person who provides an elderly person or a dependent person who is at least 18 years of age with spiritual treatment through prayer from a duly accredited practitioner of spiritual treatment as provided in ORS 124.095, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which the elderly or dependent person is a member or an adherent; or

(5) To a duly accredited practitioner of spiritual treatment as provided in ORS 124.095.

TEMPORARY PROVISION RELATED TO MEMBERSHIP
OF ADVANCE DIRECTIVE ADOPTION COMMITTEE

SECTION 29. Notwithstanding the term of office specified by section 2 of this 2017 Act, of the members first appointed by the Governor to the Advance Directive Adoption Committee:

(1) Four shall serve for a term ending January 1, 2020.
(2) Four shall serve for a term ending January 1, 2021.

(3) Four shall serve for a term ending January 1, 2022.

REPEAL

SECTION 30. ORS 127.531 is repealed.

SUNSET OF SECTION 6

SECTION 31. Section 6 of this 2017 Act is repealed on January 1, 2020.

SAVINGS CLAUSES AND APPLICABILITY

SECTION 32. ORS 127.658 is amended to read:

127.658. [(1) ORS 127.505 to 127.660 and 127.995 do not impair or supersede any power of attorney
for health care, directive to physicians or health care instruction in effect before November 4, 1993.]

[(2) Any power of attorney for health care or directive to physicians executed before November 4,
1993, shall be governed by the provisions of ORS 127.505 to 127.660 and 127.995, except that:]

[(a) The directive to physicians or power of attorney for health care shall be valid if it complies
with the provisions of either ORS 127.505 to 127.660 and 127.995 or the statutes in effect as of the date
of execution;]

[(b) The terms in a directive to physicians in the form prescribed by ORS 127.610 (1991 Edition)
or predecessor statute have those meanings given in ORS 127.605 (1991 Edition) or predecessor statute
in effect at the time of execution; and]

[(c) The terms in a power of attorney for health care in the form prescribed by ORS 127.530 (1991
Edition) have those meanings given in ORS 127.505 in effect at the time of execution.]

[(3) A health care organization, as defined in ORS 127.646, that on November 4, 1993, has printed
materials with the information and forms which were required by ORS 127.649, prior to November 4,
1993, may use such printed materials until December 1, 1993.]

(1) ORS 127.505 to 127.660 as enacted, the repeal of any statute that was a part of ORS
127.505 to 127.660 and subsequent amendments to the provisions of ORS 127.505 to 127.660 do
not impair or supersede any advance directive, form appointing a health care representative
or directive to physicians executed in accordance with:

(a) The provisions of ORS 127.505 to 127.660; or

(b) The provisions of ORS 127.505 to 127.660 or any other statute governing an advance
directive, a form appointing a health care representative or a directive to physicians that
was in effect on the date that the advance directive, the form appointing a health care rep-
resentative or the directive to physicians was executed.

(2) An advance directive, a form appointing a health care representative or a directive
to physicians executed before, on or after the operative date specified in section 35 of this
2017 Act shall be governed by the provisions of ORS 127.505 to 127.660 or any other statute
that are in effect on the date on which:

(a) The issue giving rise to adjudication occurs; or

(b) The advance directive, the form appointing a health care representative or the di-
rective to physicians was executed.
SECTION 33. The amendments to ORS 127.510 by section 7 of this 2017 Act apply to appointments made before, on or after the operative date specified in section 35 of this 2017 Act.

SECTION 34. (1) The amendments to ORS 127.515 by section 8 of this 2017 Act apply to advance directives and forms appointing a health care representative that are executed on or after the operative date specified in section 35 of this 2017 Act.

(2) Sections 1 to 6 of this 2017 Act, the amendments to statutes by sections 7 to 28 and 32 of this 2017 Act and the repeal of ORS 127.531 by section 30 of this 2017 Act do not affect the validity of an advance directive executed on or after the operative date specified in section 35 of this 2017 Act if the principal relied in good faith on a provision of ORS 127.505 to 127.660 as in effect immediately before the operative date specified in section 35 of this 2017 Act.

OPERATIVE DATE

SECTION 35. (1) Sections 1 to 6 of this 2017 Act, the amendments to statutes by sections 7 to 28 and 32 of this 2017 Act and the repeal of ORS 127.531 by section 30 of this 2017 Act become operative on January 1, 2018.

(2) The Advance Directive Adoption Committee and the Oregon Health Authority may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the committee and the authority to exercise, on and after the operative date specified in subsection (1) of this section, all the duties, powers and functions conferred on the committee and authority by sections 1 to 6 of this 2017 Act, the amendments to statutes by sections 7 to 28 and 32 of this 2017 Act and the repeal of ORS 127.531 by section 30 of this 2017 Act.

UNIT CAPTIONS

SECTION 36. The unit captions used in this 2017 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 2017 Act.

EFFECTIVE DATE

SECTION 37. This 2017 Act takes effect on the 91st day after the date on which the 2017 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.
Chapter 2

Estate Planning in Transition

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I. What is happening with estate tax reform in Washington, DC?

Simply stated, not much. There are a number of pending bills that would eliminate the federal estate tax, but none are moving at the moment. The federal government is pre-occupied with other matters.

Whatever your political philosophy, you have to recognize that this situation reflects some bizarre political developments. When the Republican Party won the White House and took control of both the Senate and the House, the estate tax looked like a goner. Five months after the Trump inauguration, the Republican majority has been largely unable to enact any significant legislation, and Washington politics are fully engaged in dealing with several scandals.

Will the situation change soon? That's anyone's guess.

One thing to keep in mind is that estate tax repeal is not really the driving force here. Rather, it is just one component of overall tax reform. And, the key part of tax reform is changing the corporate tax system. While there is general consensus among Republicans that our corporate taxes being the highest in the developed world puts us at a competitive disadvantage, there is sharp disagreement about how they should be changed. Meanwhile, many Democrats oppose lowering corporate tax rates on philosophical grounds. Reformation of corporate taxes will not be politically easy to achieve, but will likely have to be dealt with before attention turns to the estate tax.

II. The legislative variables. The various pending bills have much in common, but differ in important aspects. They deal with the various elements in different ways.

A. Estate tax repeal. All of the pending bills would repeal the estate tax. That is not surprising, since that is their goal. Statistically, it is predicted that less than 0.2% of all decedents will owe an estate tax today under current rules. However, many of those decedents are politically influential, and many of them are key Republican Party donors. The estate tax is unpopular among the public at large, even among those who would likely never pay it. Those factors will always produce a groundswell of support for repeal.

B. Basis step-up at death. One beneficial consequence of exposure to estate tax is the basis step-up at death under §1014. Theoretically, the basis step-up prevents double taxation – estate tax plus income tax. Without an estate tax, there would seem to be no logical basis for the basis step-up.

1. Trump campaign. Prior to the election, the Trump campaign mentioned the elimination of the basis step-up for estates over $10 million. No further detail was provided, and nothing further has since come from the White House.

2. Preserve or replace? Aside from the loss of its theoretical underpinning, the major reason why the basis step-up at death would be eliminated is cost.
The lost revenue from estate tax repeal (and other tax changes) has to be made up somehow, and elimination of the basis step-up at death is an easy place to do it.

3. **Carryover basis.** The most obvious result would be carryover basis. This was tried twice, and met with highly unfavorable response both times. The most common argument is that coming up with basis information is too complicated, especially after the taxpayer has died. It also gets resistance from key Republican supporters, who would view the result not as estate tax repeal, but as merely a reduction in the estate tax rate from the current 40% to the current 20% rate on long term capital gains.

4. **Capital gains tax at death.** Another alternative that has been discussed is the imposition of a capital gains tax at death, which is currently the system in Canada. Under this approach, there would be no estate tax, but every estate would recognize income tax as though all assets had been sold at their fair market values as of the date of death. With the gains recognized, basis would then step up.

   While this approach carries theoretical justification and raises substantial tax revenue, it seems unlikely to become law. It does nothing to minimize the burdens of determining asset basis – in fact, it exacerbates the difficulties. And, it brings up the same criticism that there is no repeal, but just a rate reduction.

   Some proposals would impose a capital gains tax not only at death, but also with respect to lifetime gifts.

5. **Middle positions.** Full basis step-up for up to double the estate exclusion ($10.98 million today) would seem to stand a good chance of prevailing. Not only does that minimize the burden for the vast majority of estates, but it really isn't a tax reduction at all. That much of an estate currently escapes estate taxation and gets a full basis step-up, so it is arguably no change at all.

   The battleground would thus seem to be the larger estates.

C. **Gift tax.** Most all of the proposals would retain the gift tax, ostensibly to avoid income shifting to lower tax family members. More cynical observers suggest the gift tax would retained in order to keep the transfer tax base intact in case the estate tax is re-enacted in the future.

D. **Generation Skipping Tax.** Repeal of the estate tax would not necessarily repeal the generation skipping tax.

E. **Permanency.** Whether permanent repeal would really be permanent will likely be determined under the Senate filibuster rules. The Republicans have the Senate majority, but they do not have the 60 votes needed to break a filibuster. To repeal the estate tax with a 51-vote majority requires that the repeal be part of an omnibus reconciliation bill. In that framework, 51 votes carry the vote only where the reduced tax
effect is limited to the 10 years after enactment. In all likelihood, that will result in a repetition of the previous repeal that went into effect for only one year, then sunnitted in 2011.

**F. Retroactivity.** Some wondered if repeal might be retroactive to January 1, 2017. However, no one is really talking about that now.

**G. Repeal the repeal.** Many are considering that the Republican Party might find a way to repeal the estate tax but then lose its majority to the Democrats afterward. If the Democrats take control of the White House and Congress in the future after the estate tax has been repealed, would they reinstate the estate tax? If they do, what would the exclusions and rates be?

**III. Estate planning strategies today.**

**A. Flexibility is key.** Clients are not going to be very happy about revising their estate planning documents every time the law changes. Lawyers aren't going to want to assume the liability of making sure all their clients' estate plans have been promptly modified each time the law changes. There are many reasons why documents should anticipate as many law changes as possible.

**B. Plan A or B?** One approach to drafting is to have two separate estate plans in each document – one dispositive scheme that applies when there is an estate tax, and another that applies when there is no estate tax. While that seems like double work, it may actually be the cleanest approach. Current forms and formulas depend upon estate tax concepts, and their meaning can be unclear when there is no estate tax to give them meaning.

**C. Clarify formula provisions.** It is critical to ensure that all tax-oriented formulas are clear about what happens if there is no estate tax. For example, if you have a standard A-B share division and there is no estate tax, do you fully fund the A share, fully fund the B share, or something else?

**D. Avoid pecuniary formulas.** Whether we have no estate tax or a large exemption, any formula approach that results in the larger part of an estate passing by way of a pecuniary bequest can create severe estate administration and income tax issues. Stick with fractional share formulas all of the time.

**E. To discount or not?** Planning strategies that rely upon valuation discounts have to be carefully considered. While the valuation discount reduces gift and estate taxes, it reduces the basis step-up and increases income taxes. That trade-off makes planning difficult enough today, but consider the various future combinations – no estate tax with full basis step-up, no estate tax with no basis step-up, capital gains tax at death, etc.
F. **State estate tax planning.** Minimizing state estate tax is already not necessarily the smart option. Federal uncertainty makes those considerations even more difficult.

IV. **Déjà vu all over again.**

If this sounds all too familiar, it should. We've been planning estates to respond to changing tax scenarios ever since 2001.

The most recent memory goes back to the 2010 time frame, when the estate tax was repealed for one year, and then temporarily reverted to its 2002 status before retroactively changing again in 2012.

A 2009 CLE outline, which is once again pertinent today, follows.
Estate Planning in Uncertain Times
Circa 2009

Here we are at the end of 2009, and 2010 was never supposed to get here. Under current law, once the Times Square silver ball hits the bottom of its drop, the lights flash and the fireworks explode, there will no longer be a federal estate tax. But the relief will be only temporary; the estate tax will return with a vengeance one short year later, reverting to its previous format with a $1 million exclusion and a 55% top marginal rate.

This odd state of affairs was created by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGGTRA). The Republican majority wanted to eliminate the estate tax, but could not muster the 60 votes needed under Senate rules to affect tax revenues more than ten years out. So EGGTRA increased exemptions over nine years, provided for an outright repeal of the estate tax in the 10th year, and a reinstatement of the estate tax under existing rules in the 11th year, thereby containing its fiscal impact within a ten-year period. No doubt, the majority expected that the unlikely state of affairs would prompt a subsequent Congress to enact a permanent repeal.

The shift to a Democratic majority, coupled with the recent economic dislocations that have made tax revenue scarce, has eliminated all hope of a permanent repeal. Many thought we were quite close to a consensus reform that would have simply frozen the current estate tax format featuring a $3.5 million exemption and a 45% top marginal rate. But that outcome has been held hostage by the continuing health care reform debate, which has virtually monopolized activity in Washington. Now, many are suggesting that estate tax reform will either occur late in the year, or perhaps not until next year, with a retroactive effect to January 1, 2010.

The prevailing view is that retroactive tax provisions are constitutional, based upon the Supreme Court’s 1994 decision in U.S. v. Carlton (512 U.S. 26) and a string of earlier cases. But those cases generally involved retroactive changes in rates, deductions, etc., which are arguably quite different from the retroactive imposition of a tax that had already been repealed under its own provisions. We will likely hear from the Supreme Court if estate tax reform takes that approach.

Some are pessimistic about the situation and stress that the current shortage of tax revenue may prompt Congress to simply leave everything alone, which will cause the estate tax to revert to its $1 million exemption and 55% top rate format. But others have recognized, and are starting to promote, that such a reversion may not produce as much revenue as others might think on account of the state death tax credit. Prior to the EGGTRA changes, the estate tax contained a prescribed maximum credit against the federal estate tax for estate and inheritance taxes levied by the states. Most of the states patterned their taxes to be equal to the federal state death tax credit, thereby costing estates nothing and creating an effective form of federal revenue sharing. However, EGGTRA paid for its estate tax reductions, in part, with the conversion of the state death tax credit to a less costly estate tax deduction. Most states responded to the resulting loss of revenue by reinstituting their own taxes, thereby increasing the effective tax borne by
estates. However, a return to the previous federal estate tax law would include a return to the state death tax credit as it previously existed. Thus, even with the lower federal exemption and increased marginal tax rates, the additional tax revenue to the federal government may not be as much as many would expect. That observation raises optimism that permanent federal estate tax reform is possible.

Also sitting quietly in the Senate is a bill introduced by Senator Pomeroy, which would eliminate the use of minority interest discounts in the valuation of interests in passive business entities. Under this bill, minority interest discounts could be used only if the entity was engaged in an active business or operated real estate to such a level that it was deemed to be an active business for purposes of the passive activity rules. But even if the entity met those requirements, the valuation would still have to be bifurcated with respect to any passive assets held by the entity, with that ratable portion of the entity interest valued without discounts. While many believe that the Pomeroy bill stands little chance of passing today, many also believe that such a bill has a very good chance of passing eventually.

Predictions

Trying to predict which legislation will pass is a nearly impossible endeavor. And doing so in these economic and political times is even harder than ever. At this writing, Washington is almost totally absorbed with health care reform, and it is becoming more likely that some form of health care reform legislation will be passed. According to a senior Senate staffer, that could come as early as Thanksgiving, or as late as some time in early 2010. And, Senate action on estate tax reform probably won’t come until the health care reform effort comes to a conclusion.

There are a number of bills pending in both the House and the Senate that would take different approaches to estate tax reform. According to the same Senate staffer, the most likely approaches to move forward would either lock in the 2009 structure indefinitely, or increase the exemption to $5 million and reduce the top rate to as low as 35%, whether all at once or over a specified time. The eventual outcome would likely be somewhere in between these two positions, but the precise point is unpredictable due to budgetary concerns.

All of these uncertainties make estate planning quite challenging today. But that is nothing new, as we have been dealing with uncertainty and the unpredictability of future law ever since 2001. In doing so, a number of techniques have been developed that appear likely to continue to be useful to the estate planner.

Marital Deduction Formulas

One of the most apparent consequences of the recent state of constant change has been the effect on the drafting of marital deduction formulas. Since 1981, when the allowable marital deduction became unlimited and the exemption from tax began to increase, mainstream estate planning for a married couple has focused upon doubling the
exemption, as the exemption of the first of the couple to die is lost if the entire estate passes to the surviving spouse. The traditional mechanism for doubling the exemption is to structure the estate of the first spouse to die so that an amount precisely equal to the available exemption passes to a bypass (or credit shelter) trust for the benefit of the surviving spouse, with the remainder passing to the spouse (either outright or in a qualified trust) and qualifying for the marital deduction. Since the gift to the trust is equal to the exemption, and the gift to the spouse qualifies for the marital deduction, there is no tax in the first estate. Although the trust is designed to benefit the surviving spouse, it is not treated as part of the survivor’s estate and, therefore, passes to the family at the survivor’s death without estate tax, no matter how large the trust has grown. Thus, the couple utilizes both exemptions, exempting up to $7 million from estate tax between them under today’s exemption.

Since the exemption has changed over the years, and since the available exemption can be reduced by the use of lifetime gifts, it has always been impossible to accurately predict the exemption that will be available at a person’s death. The solution has been to use a word formula in the will or living trust, designed in a way that one is assured the exactly correct share of the estate will pass to the trust. There have been a variety of approaches to the design of the word formula, generally falling into the two broad categories of pecuniary bequests and fractional shares. Each approach has its own advantages and shortcomings, and the selection of the most advantageous approach has always been case specific.

In making this case-specific determination, the most important factor has usually been the relative size of the two shares. However, with the exemption increasing dramatically over the last nine years, it has not been easy to predict which will be the larger share, except in the largest estates where the exemption is always a relatively small percentage of the estate.

Faced with such uncertainty, the fractional share approach is generally preferable, not so much because it always produces the best result, but because it is the least likely to produce a bad result. This was borne out by an informal poll of the members of the Estate & Gift Tax Committee at a recent meeting of the American College of Trust and Estate Counsel. The group’s comments reflected a consistent trend toward the use of fractional share formulas. Clearly, estate planning documents should be carefully reviewed to assure an appropriately chosen marital deduction formula clause is used.

A related point is whether or not to use the maximum deferral normally created by the marital deduction formulas in the smaller taxable estates. Ignoring for the moment the very real state death tax concerns discussed below, the increasing exemptions have meant that larger and larger shares of the estate of the first spouse to die will be held in trust for the lifetime of the survivor. For example, say that the first spouse to die has an estate of $3 million. Every traditional marital deduction formula will result in 100% of that estate passing to a bypass trust for the lifetime of the survivor. But if the survivor’s separate estate is modest in size, the trust is unnecessary because, if all was left to the survivor, the survivor would still have a non-taxable estate. The administrative cost of managing the
trust for the survivor’s lifetime might well be wasted money. But perhaps more important, the family may be better off with the assets included in the survivor’s estate in order to get a full basis step-up to their fair market value at the survivor’s death. Instead, the trust unnecessarily created at the first death leaves the assets with a basis equal to their fair market values at the first death, and an otherwise avoidable capital gains tax when they are sold after the death of the survivor. Thus, focusing solely on estate tax minimization can lead to unnecessary income taxation that can overcome any estate tax savings in some situations.

State Death Taxes

As already mentioned, the elimination of the state death tax credit caused most of the states to quickly enact death taxes of their own. Most, but not all, have tied their taxes to the federal state death tax credit previously in effect. Those states imposing taxes have established their own exemption levels, which vary considerably from state to state.

To add even more confusion, estates of those who own property in more than one state can be subject to state death taxes in each state, and often with inconsistent results. For example, the state inheritance system in the author’s home state of Oregon includes an exemption of only $1 million, with tax rates above that ranging from 5.6-16%. To the north, Washington allows a $2 million exemption, but the tax rates are higher, ranging from 10-19%. To the south, California has no tax.

State death taxation is based upon jurisdiction, and is fundamentally tied to physical location, or situs. As a general statement, the state of a person’s residence can tax the estate on all real and tangible personal property located within the state, and all intangible personal property wherever located. Other states can tax the estate on all real and tangible personal property located within their borders. However, the states have their own methods for determining the method of apportionment of taxes, and this can lead to inconsistent results.

A fairly simple example illustrates the surprising effects of this uncoordinated system of taxation. Say a California resident dies owning $3.5 million of assets with a California situs, and a $1 million vacation home in Oregon encumbered by $1 million of mortgage debt. With a $3.5 million net estate, there is no federal estate tax. There is no California death tax. The Oregon vacation home gives Oregon taxing jurisdiction. The amount of the Oregon tax is determined by computing a tentative tax on the entire taxable estate of $3.5 million applying Oregon tax rules, which include only a $1 million exemption. The resulting tentative tax ($229,200) is then multiplied by a fraction reflecting the percentage of the gross estate located in Oregon, which is 22.22% ($1 million ÷ $4.5 million). The result is an Oregon tax of $50,928, even though there is no real equity in the Oregon vacation home that creates the taxing jurisdiction.

This phenomenon is in no way limited to the Oregon-California combination, and similarly unfair results can occur in any number of state combinations. This has resulted in an added dimension to modern estate planning - detailed planning for state taxation. In
the example posed, the tax can easily be avoided if the situation is recognized before death. If the Oregon vacation home is owned by an LLC or an S Corporation, the ownership interest will be converted to intangible personal property. As such, it will have a California situs (state of residence of the owner), and Oregon will lose its taxing jurisdiction altogether. Thus, controlling the state of jurisdiction, by controlling the nature of the property interest, is now a key component of a well-designed estate plan. Another common technique for married persons is to design the will or living trust to break the bypass trust down into smaller components, by carefully written will or trust provisions, so that different marital deduction elections can be made in the various states in which property might be taxable.

**Family Limited Partnerships and LLCs**

Although the federal estate tax exemption has been rising steadily for the last nine years, the gift tax exemption has remained static at $1 million. That has made it important to leverage lifetime gifts whenever possible, in order to maximize their effectiveness.

Although Family Limited Partnerships and LLCs have always been disliked by the IRS, they have become rather common features of sophisticated estate plans. This is because they are very effective at leveraging the benefits of lifetime gifts by means of taking advantage of the valuation discounts that reflect the lack of control and lack of marketability of the ownership interests in the entity.

For example, say a married couple transfers $6 million of assets to a limited partnership or LLC, and then gifts 50% of the ownership interests to their children. Although the 50% interests carry $3 million of inherent asset value to the children, they lack control and marketability and are customarily valued on a discount basis. The magnitude of the valuation discount depends upon a number of factors, such as the nature of the assets held by the entity, its operating and distribution history, etc., but discounts ranging from 20-50% are common. At a 33% discount level, the gifted 50% interests will be valued at $2 million, which is fully sheltered by the couple’s two gift tax exemptions (their annual gift exclusions might also be available). Further, their retained 50% interest should obtain a similar discount in their estates. Thus, $2 million of value slips through the cracks of the transfer tax system.

The IRS has achieved an impressive string of victories using §2036 of the Internal Revenue Code to attack such techniques. Under §2036, the entity can be disregarded, and the valuation discounts lost entirely, if the parents are considered to have explicitly or implicitly retained the right to control or receive the income from the assets. This has led many to incorrectly believe that Family Limited Partnerships and LLCs are no longer viable tax planning strategies.

On closer inspection, the IRS victories have all come in very similar patterns, cases that are described by estate planners as having “bad facts.” In most of these cases, the planning was done just before death, there were no reasons for the formation of the entity other than tax minimization, the parent received all of the income whenever it was
needed, substantially all of the parent’s assets were transferred to the entity, legal formalities were not followed, and similar factors. Careful attention to these matters, and more appropriate design of the entity, will go a long way to defending such an IRS attack. In fact, the IRS has been largely unsuccessful when it has pushed outside this narrow box, and taxpayer victories are starting to be reported. Consequently, Family Limited Partnerships and LLCs are still very viable planning techniques, but more care must go into their design and operation to withstand such challenges.

Sales to Grantor Trusts

Worry that the Pomeroy bill, or a future similar bill, might become law and eliminate valuation discounts has focused attention on transferring Family Limited Partnerships and LLCs out of one’s estate as quickly as possible to lock in the discount valuation discounts. That has placed greater emphasis on leveraging the $1 million gift tax exemption, and sales to grantor trusts have become a very popular technique.

This technique starts by creating an irrevocable trust for the benefit of the family. Transfers to the trust are gifts, and utilize some or all of the parent’s $1 million gift tax exemption. The trust can be designed in almost any way desired to assure long-term management of the trust assets for the benefit of the family, protection from creditors, etc., so long as the parent does not reserve any powers that would cause the trust to be included in his or her estate. Thus, the transfers are completed gifts, and are no longer subject to estate tax.

The irrevocable trust is designed to carry an additional special provision that will cause it to be considered a “grantor trust” under the income tax rules. There are several options here, but for example, one of the more commonly used characteristics is to include a “swap out” provision that allows the parent to take assets out of the trust if other assets having an equivalent value are substituted for them. The mere existence of such a power, whether it is ever exercised or not, will cause the trust to be a grantor trust. However, since the substitution power is premised upon equivalent value, it does not cause the trust to be included in the parent’s estate.

As a grantor trust, the income tax rules deem the parent to be the owner of the assets inside the trust. Consequently, all income realized by the grantor trust is taxable to the parent, not the trust or the family. That has the added advantage of serving as an indirect gift to the family. However, since the result is mandated by the income tax rules, the seemingly clear economic benefit to the family is not treated as a taxable gift, no matter how large the magnitude.

Once the grantor trust has been created and funded (see below for funding requirements), and a reasonable length of time has passed to separate the transaction, the parent can sell part or all of his or her Family Limited Partnership or LLC to the grantor trust in exchange for a note. The sales price would be the fair market value of the transferred interest, which would be determined using minority interest valuation discounts.
Since the grantor trust rules provide that the parent is treated as the owner of the trust assets, transactions between the grantor and the trust are generally not taxable events. Consequently, the parent is treated, for income tax purposes, as having sold the interest to himself or herself, and no taxable gain is recognized. Similarly, all interest paid by the grantor trust is deemed to constitute payments made to the parent by the parent, and is not recognized as income. Of course, the income generated by the Family Limited Partnership or LLC is taxable income, and is taxed to the parent under the grantor trust rules.

However, the grantor trust rules apply only for income tax purposes, and the grantor trust is still recognized as a separate entity for gift and estate tax purposes. As a result, the parent ceases to be treated as the owner of the Family Limited Partnership or LLC interest immediately upon the sale, and the note given by the grantor trust becomes the grantor’s asset, includible in the estate. As payments are made, the cash received becomes part of the grantor’s estate, while the note declines in value by the amount of the principal paid.

At the parent’s death, the estate includes only the remaining balance due on the note, not the Family Limited Partnership or LLC interest. Also, the trust ceases to be a grantor trust, and continues for the remainder of its term as a separate taxpayer. Thus, the essence of the technique is to freeze the value of the estate at the minority interest value of the Family Limited Partnership or LLC interest, plus the “interest” paid less the income taxes paid on the income pass-throughs.

There are a few technical details that should be addressed:

1. **Note Terms.** The terms of the note are very flexible. The interest rate must be only high enough to avoid a deemed gift on a below-market loan, but it can be as high as the rate that would be charged in the commercial marketplace. The term of the note is entirely flexible, and it is theoretically feasible to design the note so it is self-cancelling at the parent’s death.

2. **Note Payments.** The grantor trust typically uses the cash distributions from the Family Limited Partnership or LLC interest to fund the payments on the note. Thus, the economic essence of the transaction is that the parent essentially reserves the future distributions from the transferred interest for a specific period of time, after which all future distributions stay with the grantor trust and benefit the family beneficiaries.

3. **Seed Gift.** If the grantor trust has no assets at the time that the Family Limited Partnership or LLC interest is sold to it, it is very possible that the IRS could successfully argue that the transaction is not a sale at all, but merely a series of gifts over the term of the note. To avoid this, most careful estate planners follow informal guidance from the IRS that 10% equity in the grantor trust would be sufficient to avoid such an argument. Consequently, the grantor trust should be funded with a seed gift having a value of at least 10% of the value of the Family Limited Partnership or LLC interest to be.
sold to it. The seed gift can be cash, other assets, or even a smaller interest in the same Family Limited Partnership or LLC. If the seed gift is cash or other assets, they should stay in the grantor trust and not be used as a down payment on the purchase of the Family Limited Partnership or LLC interest. Also, note that the seed gift will likely be a taxable gift, requiring the filing of a gift tax return and the use of some of the grantor’s (and spouse’s if gift split) estate tax exemption.

4. **Basis.** There are complex, and largely unanswered theoretical questions about how the grantor trust determines its basis in the Family Limited Partnership or LLC acquired from the parent. Estate planners disagree about the proper answer, and it will likely have to be resolved over time. The apparent alternative outcomes are a carryover of the parent’s basis in the interest, a cost basis determined by the amounts paid on the purchase price by the grantor trust, and a step-up to fair market value at the death of the parent.

5. **Turning Off Grantor Trust Status.** The grantor trust can be designed so that the grantor can irrevocably relinquish the powers that cause it to be a grantor trust. That creates additional options after the note has been paid. The trust can remain a grantor trust, with the parent paying income tax on the income that passes through to the trust, or the powers can be released and the income will thereafter become taxable to the trust and/or its beneficiaries.

A sale of a Family Limited Partnership or LLC interest to a grantor trust is a very sophisticated transaction, and implementation requires thorough analysis and planning. The expected gift and estate tax results are highly dependant upon the valuation of the Family Limited Partnership or LLC interest, and an appraisal performed by a competent firm is essential.

Properly designed, the sale to the grantor trust will permanently remove the Family Limited Partnership or LLC interest from the parent’s estate at its discounted minority interest valuation, often within the allowable gift amounts that can be sheltered by the gift tax exemption. The “sale” does not cause any income tax consequences. And, most importantly, the benefits of the valuation discounts can be realized today, even if the law changes later to eliminate the use of those discounts.

**Conclusions**

The changes made to the gift and estate tax law were intended to simplify estate planning for the vast majority of Americans. Predictions were that, within a few years after passage, the estate tax exemptions would increase to the point where only the very wealthiest of American families, the top 1%, would ever face an estate tax liability.

Things haven’t really turned out that way. We now have a more complex system than ever imagined, and the goal posts keep changing all the time. That has made estate planning very challenging, and has forced us to devise flexible, but more complex,
techniques to respond to the constantly changing environment, and it is now essential that the most skilled estate planners possible be used as advisors. That has undoubtedly made the process more expensive than before, but the rewards of careful planning may be greater than ever before.
Chapter 3
Planning for the Oregon Taxable Estate

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Planning for the Oregon Taxable Estate

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(A special thanks to the Oregon Society of Certified Public Accountants for allowing us to share these materials)

I. The Oregon Inheritance (Estate) Tax Structure.

A. Background. Prior to 2003, the Oregon inheritance tax ("OTax") was connected to the Internal Revenue Code.

1. The State Death Tax Credit. Through a revenue sharing device, under IRC §2011, a state death tax credit was applied against the federal estate tax. Oregon took advantage of this through its "pickup" tax.

2. In 2001, congress passed the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA"), often referred to as the "Bush Tax Cuts." This Act included sweeping changes in the estate and gift tax laws. Two changes resulted in a profound effect upon the amount of tax that would be payable to the state of Oregon for estates of decedents dying after the year 2000.

   a. Under prior federal law, the Taxpayer Relief Act of 1997, the federal estate tax applicable exclusion amount was intended to gradually increase to $1 million in the year 2006. As a result of the passage of EGTRRA, the applicable exclusion amount was changed so that it capped in fixed dollars at $3.5 million in the year 2009, and the estate tax was repealed in the year 2010. In 2011 and 2012, as a result of the 2011 tax act, the exemption went to $5 million, indexed for inflation. Therefore, the exemption was $5.12 million in 2012. Under the American Taxpayer Relief Act of 2012 ("ATRA"), the rules were made permanent, so the inflation adjusted exemption in 2016 is $5.45 million.

   b. The state death tax credit was eliminated and substituted with a deduction for state inheritance taxes. Therefore, the federal government essentially reduced its revenue sharing arrangement with the state.

3. HB 3072. The result was that on August 27, 2003, the Oregon House passed HB 3072. That legislation was an eleventh hour "power play" by the Oregon senate, forcing the house to either approve the bill or live with no inheritance tax at all. Faced with no other alternative and recognizing the HB 3072 did not provide a global answer to the inheritance tax problem created by EGTRRA, the house nevertheless passed the bill which became effective on November 26, 2003.

   a. The effect of HB 3072 was a disconnect from the federal rules.
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b. In disconnecting from Federal Rules, Oregon essentially stayed connected to the Tax Reform Act of 1997. As a result, Oregon retained an exemption which, today, is $1 million, even though the federal applicable exclusion amount is now $5.45 million.

c. There was concern in 2012 that if the Bush Tax Cuts expired as scheduled in 2013, then the maximum federal estate tax exemption would drop from $5 million to $1 million, and the maximum federal estate tax rate would rise from 35% to 55%. This, among other provisions of the expiring bush tax cuts, were referred to as the “Fiscal Cliff.”

d. These issues were resolved with the passage of ATRA effective as of January 1, 2013. As stated above, the federal estate tax exemption is now locked at $5 million based upon a 2010 commencement date for inflationary adjustments, leaving the exemption in 2016 as $5.45 million. In addition, the maximum federal estate tax rate has been established at 40%. Portability, as further discussed below, has also become a permanent fixture of the federal estate tax law.

5. **Current Oregon Law.** Oregon law now provides that an Oregon estate tax return (OR-706) is due for any taxpayer whose gross estate is $1 million or more (equal to the old unified credit amount of $345,800).

   a. HB 2541, which was approved by the Oregon State Senate and sent back to the House, initially proposed to increase that exemption to $1.5 million. However, the Bill met massive opposition through Kevin Mannix and his associates. In addition, Phil Knight indicated that if the Oregon exemption were to go to $1.5 million and the maximum rate were to be increased to 19.8% from 16% (as proposed), he would move from the state of Oregon. Therefore, the Oregon Senate tabled the Bill and retained the exemption of $1 million.

   b. It is interesting to note that returns are filed even when it is guaranteed that there is no Oregon estate tax. In other words, in a “winner take all” estate, where everything is given to the surviving spouse, if the gross estate still exceeds $1 million, an Oregon return is required.

6. The **Federal/Oregon Gap.** Because of the OTax, decedents with a gross estate in excess of $1 million will be required to file an Oregon estate tax return. Even though Oregon returns will be due for a decedent whose gross estate is $1 million or more, there is no tax unless the taxable estate exceeds $1 million. The current federal exemption is $5.45 million. The difference, which is the amount subject to OTax, is called the “Gap.” Therefore, for 2016, all Oregon estate tax on estates in excess of $1 million will be subject to the Gap.
7. **Filing requirements.** Under HB 3072, no tax return was initially due if the taxable estate of the decedent was $1 million or more. That language changed in HB 3072, for years beginning in 2003 and thereafter. In those years, there is a shift from the language “taxable estate” to “gross estate.” Therefore, at the present time, an Otax return is only due if the Oregon “gross” estate is $1 million or more.

8. **Why bother filing?** Under ORS 118.260, if an Oregon decedent has a gross estate in excess of $1 million but the taxable estate is less than that amount, one might consider not bothering to file a return. However, under the law, a return is due.
   a. There may be no penalties or interest for filing a return, because penalties and interest are based upon tax due.
   b. However, if it is later determined that additional assets are found, the failure to file a return precludes the running of the 3-year statute of limitations.

B. **The way the tax worked prior to January 1, 2012.**
   Although the tax itself provided for rates from .8% to 16.0%, calculation of a tax was somewhat complicated. The net Oregon inheritance tax was the smaller of:
   1. The federal estate tax assuming the December 31, 2000 federal equivalent of a $1 million exemption and the federal rates in effect as of that date, and
   2. The Oregon inheritance tax based upon the Oregon rate schedule (the old IRC §2011 state death tax credit).

C. **Calculate the Tax.**
   1. The first step was to calculate the federal tax.
      a. Add back Oregon Inheritance tax deducted on the 706.
      b. The estate and gift tax rates effective under federal tax law as of December 31, 2000 were applied to total life and death transfers, less gift taxes paid.
      c. This calculation established a ceiling for the Oregon inheritance tax. These rates were calculated from Table A in the instruction to the 2009 form IT-1.
   2. The Oregon inheritance tax was then calculated.
      a. The old federal state death tax credit schedule was then used to determine the amount of tax.
      b. The computation, which was reflected as Table B in the instructions to IT-1, was applied to the Oregon taxable estate less $60,000.
      c. Note, however, that the amount against which the Table B tax was computed was the Oregon taxable estate, prior to adding back adjusted taxable gifts. This presented a golden opportunity for Oregon estate planners by gifting enough to reduce the taxable estate to less than $1 million.
3. The Oregon inheritance tax equaled the lesser of the amounts from steps 1 and 2.


1. The Problem. Oregon’s inheritance tax statutes, found in ORS Chapter 118, were tied heavily to the outdated 2000 federal Internal Revenue Code. Using such a structure was awkward and has created both administrative and tax policy problems. In addition to being outdated, Oregon’s state estate tax chapter was perceived as being overly complicated. The chapter was never originally intended to serve as a stand-alone code, but rather it was viewed as a supplement to the federal Internal Revenue Code during the time of the pass-through estate tax credit. Congress’ continual amendments exacerbate the problems with Oregon’s estate tax chapter. In addition to the general complexity and interpretation problems with many of the estate tax provisions, taxpayers are also frustrated that they can’t easily figure out what their estate will owe in state estate taxes at their death. This problem exists because there was no rate table in Oregon law. Instead, Oregon’s state estate tax is tied to a complicated graduated rate that was found in the 2000 Internal Revenue Code. The 2000 rates are based on the state estate tax credit that has been repealed for more than 6 years. In addition, because of this tie to the old allowable federal credit, there is an odd wall effect that taxes decedents just over the Oregon threshold at perceived overly high rates.

2. Federal Connection. This new law decouples Oregon’s estate tax from the old 2000 federal estate tax code and reconnects to a newer federal tax code—the federal code as it existed on December 31, 2010. The new law provides that Oregon’s estate tax law will continue to rely on the federal code for most definitions and the basic federal estate tax structure. Note that Congress passed H.R. 4853 on December 17, 2010, and thus the tie-in date of December 31, 2010 picks up Congress’ latest revisions to the federal estate tax. Rather than track exactly the federal estate tax code, this new law continues several unique state estate tax provisions but is also drafted so that it is a more of a stand-alone state estate tax law chapter. This will help should Congress continue to amend the federal estate tax code. One of the biggest differences between the federal law and the state law is the estate size threshold. The new law maintains a lower state estate tax threshold than the federal estate tax threshold. Only if an estate is larger than the threshold will there be an estate tax. The bill initially included a provision to increase Oregon’s threshold to $1.5 million. However, the Senate (after Phil Knight threatened to leave the state) lowered the threshold back to the $1 million.

3. Tax Rate Computation. The Oregon estate tax is no longer based on the repealed federal state death tax credit from 2000 that references two complicated and outdated tax schedules. Instead, the bill sets and codifies Oregon’s own estate tax rates, using a progressive tax with a range of 10%
to 16%. Estates over $5 million receive a deduction for the state estate taxes paid on their federal return. The federal deduction is the state estate tax paid multiplied by the federal estate tax rate; that is, presently, taxpayers get 35 cents on the dollar back on the federal tax bill as the federal tax rate is 35% (lowered from 45% in December 2010). This new law makes more reasonable the tax computation process by taxing only dollars over the Oregon threshold only (ramp structure), instead of taxing the entire estate if the estate size is over the threshold (wall). The wall effect occurs because of the tie to the old federal credit. Under prior law, an estate under $1 million pays no Oregon tax, while an estate $1 over $1 million begins paying tax at a 41% marginal rate, which is significantly higher than the 6.4% Oregon inheritance tax rate applicable to the same values. As a result, an estate slightly over $1 million paid over $30,000 in tax on the entire taxable estate. This was perceived as an unfair tax result that creates significant incentives to manage estates and spend down in a way that avoids the $1 million threshold altogether. Instead of the wall, the new law taxes estates only on those dollars over the $1 million threshold. The bill provides for a true $1 million exclusion to all estates.

4. New Rate Schedule.

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5. **Terminology.** From now on, the Oregon *inheritance* tax has now been changed to the Oregon *estate* tax. There appears to be no logical reason for this, and it will probably cause some confusion. However, Oregon now has an “estate,” not an “inheritance” tax.

6. **QFOBI Deduction Termination.** Because the tie-in date to the Internal Revenue Code is now December 31, 2010, and since the Qualified Family Owned Business Interest deduction has been repealed under the Federal tax law, then the repeal is effective for Oregon purposes as well, commencing January 1, 2012.

7. **Interest on Underpayments.** For decedents dying after January 1, 2012, whose estates are engaged in ODR-approved installment payment plans, the interest rate will drop from 9% to 5% per annum.

8. **Oregon Portability Election.** The 2010 federal act introduced the concept of portability, that being the right of a surviving spouse to take advantage of the unused federal estate tax exemption of his or her deceased spouse, if the first spouse died after 2010. This is called portability. ORS 118.007 provides “Any term……has the same meaning as used in a comparable context in the laws of the federal Internal Revenue Code relating to federal estate taxes, unless a different meaning is clearly required…..” ORS 118.010(3) provides that the Oregon taxable estate to be used for purposes of computing Oregon estate tax starts with the federal taxable estate, reduced by any other applicable exclusions or deductions. It is arguable that “any other applicable exclusion” includes the unused exemption of the predeceased spouse. Although the ODR has not yet ruled on this issue, the ODR has indicated that it is the belief of the department that the legislature clearly did not intend to tie the federal portability provisions with Oregon law. No challenge has to date been made.

II. **Oregon Estate Tax and Special Marital Property Elections.**

A. **Exemptions and Planning.**

The federal estate tax exemption is currently $5.45 million. In 2010, there was an unlimited federal estate tax exemption. Taxpayers whose deaths occurred before September 17, 2010, had the right to choose either to take advantage of the 2011 and 2012 rules, meaning a $5 million exemption and full step up in basis, or the 2010 rules, meaning an unlimited exemption with limited increase in basis. The OTax exemption is currently $1 million. The difference between the federal estate tax exemption in 2016 and the Oregon estate tax exemption is $4.45 million. This amount will be increased annually by the inflationary adjustments in the federal exemption. Because of this difference, under either scenario, many existing estate plans for married couples employing “reduce to zero” estate plans cause the immediate incidence of Oregon estate tax.

1. This occurs because the bypass or credit shelter amount set aside for the surviving spouse is generally funded to the maximum extent possible without creating tax. If the Oregon exemption is only $1 million and a
Chapter 3—Planning for the Oregon Taxable Estate

marital deduction does not apply to the excess amount, (the “Gap”), Oregon tax would be due.

2. For example, based upon 2016 tax calculation figures, the amount of tax on the Gap for estates of decedents who die in the year 2016 is $476,750. In this case, the gap is $4.45 million. This would be the amount of unnecessary (or premature) tax payable in an estate large enough to fully fund the 2016 federal $5.45 million exemption.

3. ORS 118.010(7) provides “If the federal taxable estate is determined by making an election under Section 2032 or 2056 of the Internal Revenue Code or another provision of the Internal Revenue Code, or if a federal estate tax return is not required under the Internal Revenue Code, the Department of Revenue may adopt rules providing for a separate election for state inheritance tax purposes.”

B. Married Couples.

The real tax dilemma created by Oregon law is manifest most often with married couples, upon the death of the first spouse. Because of the difference in exemption between the federal estate tax and the Oregon $1 million exemption, many existing estate plans for married couples simply will not work to reduce all taxes to zero at the first death. In recognition of this problem, section 6 of HB 3072 amended ORS 118.010 to add a new section (7), as follows:

“If the federal taxable estate is determined by making an election under Section 2032 or 2056 of the Internal Revenue Code or another provision of the Internal Revenue Code, or if a federal estate tax return is not required under the Internal Revenue Code, the Department of Revenue may adopt rules providing for a separate election for state inheritance tax purposes.”

In essence, the legislature authorized the Department of Revenue to promulgate rules regarding taking a special Oregon marital deduction or a special Oregon alternate valuation date election in order to ameliorate the adverse effects of the passage of HB 3072 as it applied to current planning. In response to those provisions, Oregon Administrative Rules were adopted by the Oregon DOR on April 30, 2004. The DOR Rules became effective on May 1, 2004.

1. The April 30, 2004 Administrative Rule, included the following provisions:
   a. Under OAR 150-11.010(7), special elections may be made under certain Code sections, including Section 2056 of the Internal
Revenue Code (marital deduction provisions). The statute provides that an Oregon election to qualify property for the federal marital deduction, once made, is irrevocable. We will refer to this as the "Oregon QTIP."

b. The OAR rule goes on to provide that if a 706 is not required and the Oregon QTIP election is made for Oregon purposes only, the Oregon QTIP election must be made on the Oregon return in the same manner as required under the Internal Revenue Code as though made on a 706. Following the issuance of this administrative rule, there was some question as to how the election should be made on an Oregon return.

c. The original administrative rule further provided that an Oregon QTIP election could not be made unless the share subject to the election otherwise qualified for QTIP treatment under IRC §2056(b)(7).

d. If the Oregon QTIP election is allowed at the death of the first spouse, then the property subject to the Oregon QTIP election will be includable in the gross estate of the surviving spouse for Oregon estate tax purposes similar to the inclusion rules under IRC §2044. This inclusion is at the value on the surviving spouse’s date of death.

e. The Oregon QTIP election is often confused with the Oregon Special Marital Property election. However, they are quite different.

i. In order to make the Oregon QTIP election, the property qualifying must conform to the standards under IRC §2056(b)(7). In other words:

(A) All income must be payable to the surviving spouse during the surviving spouse’s lifetime;

(B) No one other than the surviving spouse can have any rights to income or principal during the lifetime of the surviving spouse.

ii. Many taxpayers, however, have documents creating credit shelter trusts designed to take advantage of the federal estate tax exemption. These credit shelter trusts need not conform as a QTIP.

(A) Because of this, some credit shelter trusts provide for discretionary income distributions to the surviving spouse, meaning the trustee has the right to accumulate income in the event the spouse expresses no need.

(B) Other credit shelter trusts might provide for distributions to the children during the surviving spouse’s lifetime.
(C) Either of these provisions taints the trust so that it does not qualify as a QTIP and, therefore, does not qualify for the Oregon QTIP election.

iii. However, recognizing that many taxpayers relied on the Oregon law as it stood prior to the enactment of the changes in the Oregon estate tax, and based upon significant prodding from the Oregon State Bar Association and from the OSCPA, the legislature provided for the enactment of a special election to treat a trust for the spouse, which generally would not qualify as an Oregon QTIP, nonetheless to be deductible for Oregon estate purposes, on the condition that the trust property is includable in surviving spouse’s Oregon estate when the spouse dies. This election, called the Oregon Special Marital Property election (“the OSMP election”), allows trusts which, on their face, provide either for discretionary income distributions to the spouse and/or distributions to beneficiaries other than the spouse during the spouse’s lifetime. Oregon Special Marital Property will consist of any trust or other property interest, or portion thereof, in which principal or income may be accumulated or distributed to or on behalf of only the surviving spouse during his or her lifetime, and in which no one may transfer or exercise a power to appoint any part of the trust or other interest to someone other than the surviving spouse during his or her lifetime. In addition, the executor of the estate is required under this provision to make an election in order to qualify the trust as Oregon special marital property.

(A) Provided, however, that the OSMP election is only available if the surviving spouse waives the right to allow distributions to anyone other than the spouse during the spouse’s lifetime.

(B) The named beneficiaries also must agree not to accept distributions of either income or principal during the surviving spouse’s lifetime.

2. ORS 118.016(1)(a) requires a written election to take advantage of the OSMP election to be attached to the OR-706. Originally, the statute required a statement.

a. The statute required that the election be made by attaching a statement to the Oregon return:

i. Identifying the property interest constituting OSMP;

ii. Confirming that it meets the requirements of OSMP; and
iii. Confirming that the property will be administered as OSMP or that it will be administered in such other manner as the Department of Revenue may require.

3. Since the time the statute was initially passed, the Department of Revenue has now created a form called “Schedule OSMP,” to be attached as part of Form OR-706.
   a. Watch out, though, because the form automatically presumes that the estate wants the maximum allowable OSMP deduction.
   b. The form applies to the entire trust, unless the estate designates a smaller fractional or percentage share.
   c. The election is irrevocable, once made by filing Form OR-706.
   d. Since there is no specific law on point, it is arguable that the OSMP election can be made on an asset by asset basis, a percentage basis or a fractional share basis. This seems to be reinforced by the OSMP Schedule itself, which seems to provide for partial asset or fractional elections.

4. If a decedent’s trust or other interest in property will qualify as OSMP qualifying property, except that the principal or income is distributed under the trust to someone other than the surviving spouse, then an OSMP election is generally unavailable.
   a. However, if the executor makes the OSMP election, and if the surviving spouse and each living beneficiary who is entitled to distributions during the lifetime of the surviving spouse make the special election, then OSMP qualification is available.
   b. The statute requires that the elections be attached to the OR-706 or filed or maintained as records otherwise prescribed by the ODR through its rule making authority.
   c. Subsequent to the passage of the statute, the ODR added language to Schedule OSMP which contains consents to be signed by the surviving spouse and the children, to ensure that the trust will provide distributions only for the benefit of the surviving spouse during his or her lifetime.
   d. Query: Who polices this?
      i. If a distribution is made to a non-spouse, what is the tax effect?
      ii. What are the procedural requirements to enforce the same?
      iii. Is it an Oregon gift? How is it reported? Who is the donor?
      iv. Is it subject to an Oregon per donee exclusion?
   e. To be safe, if the surviving spouse wants children to share in the credit shelter trust as originally intended, the spouse should withdraw funds from the credit shelter trust and then make the gift.

5. Any election to be made by a minor can be made by the custodial parent or court appointed guardian on behalf of the minor and on behalf of
unborn lineal descendants of the minor. This obviates the necessity of appointing a Special Representative under Oregon law

6. An important distinction between the OSMP rules and the QTIP rules should be noted. Under IRC §2056(b)(7), all income of a QTIP trust must be payable to the surviving spouse at least annually. Under ORS 118.013, income may be accumulated for the benefit of the surviving spouse, and the surviving spouse only, during his or her lifetime. There is no requirement that the income be disbursed as regular intervals.
   a. This begs the question - Does accumulated income have to be paid to the surviving spouse at his or her death?
   b. It appears that question has been answered in ORS 118.019, providing that the gross estate of a decedent who is the surviving spouse with respect to property that is OSMP property shall include the OSMP property, valued as of the date of death of the surviving spouse (emphasis added). Therefore, whether distributed to the spouse or retained in trust, the OSMP accumulated income will end up being taxed in the spouse’s estate at fair market value at his or her death.

D. Making Oregon Election.
Under DOR Rules, rule no. 150-118.010(7) provides for special elections under IRC sections 2031(c), 2032, 2032A, 2033A, 2056 and 2056(A). An Oregon election, once made, will be irrevocable. If a 706 is not required and if the election is made for Oregon purposes only, the Oregon election must be made on the Oregon return in the same manner as required under the Code as though made on the 706.

1. If a QTIP election is allowed at the death of the first spouse, then the estate of the surviving spouse must include the value of the property subject to the Oregon QTIP election. The Administrative Rule specifically provides that at the second death, the surviving decedent’s gross estate for Oregon and Federal purposes will be different because of the “Oregon only” QTIP election. In other words, the GAP amount will be taxable in Oregon at the second death.

E. Administrative Expenses.
A separate issue arises, as well, under IRC §642(g), which states:

“Amounts allowable under section 2053 or 2054 as a deduction in computing the taxable estate of the decedent shall not be allowed as a deduction (or as an offset against the sales price of property in determining gain or loss) in computing the taxable income of the estate or of any other person, unless there is filed, within the time and in the manner and form prescribed by the Secretary, a statement that the amounts have not been allowed as deductions under section 2053 or 2054 and a waiver of the right to
have such amounts allowed at any time as deductions under section 2053 or 2054."

Generally, the personal representative will elect not to take deductions on the 706 for the estate of a first spouse to die with a “reduce-to-zero” federal funding formula, since this will result in no benefit being derived from the deduction for administrative expenses on the 706. Instead, the personal representative will elect to deduct these expenses against income on the fiduciary income tax return for the estate or trust.

1. These considerations may be quite different, however, if the personal representative or trustee is working with a document which funds the credit shelter amount to the Federal Exemption, and as a result, is facing OTax. It may be more beneficial for the personal representative in that case to deduct expenses of administration on the OTax return, while deferring the deduction for those expenses of administration for federal purposes until the filing of the federal fiduciary income tax return.

2. This will result in an Oregon fiduciary adjustment on the Oregon fiduciary income tax return for the estate or trust.

3. Under OAR 150.312.272, certain deductions may not be taken on both the OTax and fiduciary income tax returns, but an election must be made to take advantage of those deductions on one return or the other.

4. Although Oregon has not yet promulgated administrative rules to this effect, Oregon has issued a new Schedule K-1 to form 1041. The schedule is attached to the outline as an exhibit. In reviewing the form, it can be seen that accommodation is made for different deductions on the Oregon 41 than those on the Oregon 1041. In the past, these deductions have been accommodated through a fiduciary adjustment on the Oregon return, which will still be necessary. However, the Schedule K-1 will identify how deductions are to be treated by the beneficiaries on their individual returns, and the difference in deductions between the federal and Oregon K-1s.

F. Some Issues to Consider Under Current Oregon Law.

Even though the OSMP election provides a safe harbor, it is not without its kinks. For instance:

1. How does one continue to identify Oregon special marital property? Is there a requirement that the property be maintained in a special share of the credit shelter trust and held and administered as a separate trust by the Trustee during the surviving spouse’s lifetime? It appears that no such requirement exists under the law. The standard practice of many attorneys and accountants is to actually treat the OSMP share as a separate trust both for tax and administrative purposes. Because of this, the fully federal and/or Oregon exempt share (up to $1 million) can be invested more in growth-type assets, and the OSMP share can be the share from which more fixed income options are chosen and from which, if distributions
must be made from the federal exempt share, those distributions would be made.

2. What if the trust changes its situs to another state like Nevada or Texas, where there is no inheritance tax? How does Oregon enforce inclusion of the trust in the surviving spouse’s Oregon estate at the time of the surviving spouse’s death?

3. What if the surviving spouse changes his or her domicile to a state other than Oregon? Will the Oregon special marital property lose its character as property subject to tax in the state of Oregon? Under §3 adopted by the Oregon legislature in 2011, ORS 118.010 has been amended to provide that the numerator of the fraction determining what share of an estate is taxable in Oregon does not include intangible personal property located in Oregon if owned by a non-resident decedent. Presuming a trust might be construed to be intangible property, the statute could be interpreted to exclude OSMP property from the surviving spouse’s estate if the surviving spouse chooses to leave the state of Oregon before death.

4. What if the spouse moves to Nevada but keeps the OSMP trust in Oregon? Since the Oregon estate is less than $1 million will the surviving spouse escape Oregon inheritance tax? Because of the changes under HB 2541, if the trust is taxed in another state and is deemed to be intangible personal property, it would probably escape tax in Oregon. However, if not, it may well be subject to Oregon tax. The real question is whether a trust would be construed to be intangible personal property under Oregon law.

5. Although nothing has yet been promulgated in statute, representatives of the Department of Revenue have at least verbally indicated that if the surviving spouse moves to another state and leaves no property in Oregon, then Oregon probably has no jurisdiction to chase after the spouse for any Oregon estate tax attributable to an OSMP or QTIP trust.

6. Will Oregon allow a total return unitrust to serve as a qualifying interest for QTIP purposes?
   a. The Department of the Treasury, in TD 9102, provided that a total return unitrust which, if administered under applicable state law, provides for a reasonable apportionment of the total return of a trust between the income and the remainder beneficiary, will meet the requirements of the QTIP regulations for both gift and estate tax purposes.
   b. Oregon authorizes the use of 4% total return unitrusts in lieu of mandatory income trusts. ORS 129.225(4).
   c. Questions have arisen regarding whether or not these types of trusts would qualify for an Oregon QTIP election or would qualify as Oregon special marital property.
G. Other Oregon Elections.
If the practitioner faces a tax on the GAP, OAR 150-118.010(7)(1) provides for additional special Oregon elections which would otherwise be available under the federal law.

1. Under IRC §2031(c), an exclusion of up to $500,000 is available for the applicable percentage of land subject to a qualified conservation easement.
   a. The “applicable percentage” is 40% reduced by 2 percentage points for each percentage point by which the conservation easement is less than 30% of the value of the land (but not below 0).
   b. A number of certain other restrictions and definitions apply.
   c. If an executor or decedent is contemplating a conservation easement, even though there may be no federal estate tax due, depending upon the size of the estate the executor may wish to make a qualified conservation easement election against the GAP portion.

2. Alternate valuation date. IRC §2032 provides for the alternation valuation date determination, which basically fixes the value of an estate for federal estate tax purposes as the fair market value of the assets six months following the date of the decedent’s death. The election is only available to the extent the election reduces federal estate taxes.
   a. Under the administrative rule, a separate section 2032 election can be made for Oregon purposes only. Since the administrative rule specifically refers to IRC §2032, it can only be presumed that IRC §2032(c) will not apply. That is the provision which authorizes alternate valuation date to be used only if the gross estate is reduced and federal estate tax is reduced.
   b. If section 2032 is elected for Oregon purposes, does that mean that we now have different tax bases in assets for federal and Oregon purposes? It appears that the answer is “yes.” This would mean that depreciation and gain and loss and computations would be different for federal and Oregon purposes. These federal/Oregon differences would create additional bookkeeping headaches and significantly impact decisions regarding the sale or exchange of certain assets.

H. Special Use Valuation.
IRC §2032A provides for a reduction in the value of certain qualified use property not to exceed $750,000 multiplied by a cost of living adjustment from 1997. The current potential reduction is $1,100,000.

1. Although a qualified use election may not be appropriate for federal purposes, it may be appropriate to consider a section 2032A election for the GAP for OTax purposes.

2. Because the section 2032A rules are so restrictive and require continuous reporting, it may not be worthwhile to take advantage of these rules for the sole purpose of reducing the Oregon GAP. If, however, the estate is large
enough to be subject to federal tax, the section 2032A election may be useful to allocate more empirical value to the credit shelter trust and less to the marital share, thereby reducing eventual estate taxes at the second death.

I. Basis Adjustments.
Under SB 301 passed in 2011, the Oregon legislature has now answered a nagging question regarding adjustments to basis for property of decedents dying after December 21, 2010. Since basis is stepped up to date of death value under section 1014(b) for decedents dying after September 17, 2010, then the tax basis of any property owned by a decedent who dies after that date will be stepped up to fair market value on date of death. The Oregon Department of Revenue has indicated that for estates that have chosen to use the 2010 rules with respect to modified step up in basis under IRC §1022, basis for Oregon purposes will be the same as basis for federal purposes.

III. Oregon Natural Resource Credit.
A. History of the Exclusion.
On July 31, 2007, Governor Kulongoski signed Oregon HB 3201, which is the 2007 legislature’s Oregon tax “fix-all.” Included in the bill was Section 68, which created an exclusion from computing the gross estate in an amount not to exceed $7.5 million, to the extent that the value of such property is either natural resource property or property used in commercial fishing operations, which includes property used in processing or marketing of the products of those commercial fishing operations.

1. Natural resource property means real property designated either as:
   a. Farm use property or as one or more farm use homes site related to the real property; or
   b. Forest land or one or more forest land home sites, not to exceed 5000 acres.

2. These rules looks very much like the section 2032A rules under the Internal Revenue Code. Specifically, the $7.5 million exclusion applied only if property excluded from the gross estate is transferred to:
   a. The decedent’s spouse;
   b. A natural or adopted child of the decedent;
   c. A natural or adopted grandchild of the decedent;
   d. A natural or adopted brother or sister of the decedent; or
   e. A natural or adopted niece or nephew of the decedent.

3. Recapture rules also existed under these provisions. If the natural resource property was not used for at least 5 out of the eight calendar years following the decedent’s death, or if the property was disposed of by the transferee other than a disposition to another eligible family member, additional tax was imposed.

4. The rules applied only to decedents dying on or after January 1, 2007.
5. In addition to natural resource properties, properties producing bio-fuels also fall under the statute. The Department of Justice, however, has felt that the definition of “lawfully qualified” for bio-fuel production purposes means that it must qualify as of date of death. Therefore, the law changes as they affect bio-fuel production probably do not qualify for the exclusion for decedents dying prior to June 30, 2008.

6. What if an election is made after the due date for the return? The Department of Revenue has taken the position that the election must be made only on an Oregon Inheritance Tax Return, but the election can be made either on a late filed or an amended return.

7. What about tax basis? Since the law specifically does not provide for a reduction in basis, and since IRC §1014 provides that basis is deemed to be date of death value, the Department of Revenue has taken the position that even though the exclusion applies, full step up in basis will still apply, subject to the changes in federal law.

B. The 2008 Legislative Changes.

1. In 2008, Oregon’s legislature had a special session which, among other things, amended the natural resource exclusion and changed it to a credit. Under the original language of ORS 118.140, the first $7.5 million in value of natural reserve property was actually excluded from the estate as an exclusion. A number of mistakes and oversights existed in connection with the initial law, and those were largely addressed in the 2008 legislation. In 2008, the legislature passed HB 3618, Chapter 28, Oregon laws 2008. The 2008 version of the statute was made retroactive for decedents dying on or after January 1, 2007, which was the effective date of the original act. The credit is now reported on schedule NRC of form IT-1.

C. The 2011 Legislative Changes.

1. In 2011, the Oregon legislature passed HB 2541 which made major changes to the Oregon inheritance tax, including the Natural Resource Credit. This new law substantially rewrites the law to clarify and improve the existing natural resource property credit for farm, fishing, and forestry businesses by providing definitions for each of these businesses and also by further clarifying the definition of natural resource property. Prior law provided a credit for both real and personal property used for farm, forestry and fishing businesses, but the definition of “natural resource property” was only focused on real property. The new law revises the definition of “natural resource property” to include both real property and personal property (tangible and intangible).

2. Formula for Credit and Cap on Credit. The new law provides a new formula for calculating the natural resource credit and repeals the existing credit schedule. The existing schedule was odd in that the schedule provided for claims of natural resource property up to $15 million, but no professional would ever advise a claim greater than $7.5 million due to the
decreases in the credit that the schedule provides for claims over $7.5 million. The curve in the schedule, which increased and then decreased, simply did not work well in practice as prior law also allows estates to claim a partial credit. The schedule raised equity concerns as well. After the Oregon estate tax is computed, the new law’s new formula gives a credit based on the percentage of the adjusted gross estate that is claimed natural resource property. This new formula focuses on the ratio of natural resource property compared to the adjusted gross estate rather than focusing solely on the amount of natural resource property claimed. This calculation is quite easy. 3. **Overlap with Federal Marital Deduction.**

This new law provides that an estate can take a credit for Oregon natural resource property on the state return for qualifying property, despite using a marital deduction for the same property on the federal return. That is, a personal representative is not bound by federal elections on the Oregon return in the overlap area of natural resource property and marital deductions. This is a policy change from the existing Department of Revenue administrative rule (the prior statute did not speak to the issue).

This policy change ensures that every Oregon estate will have a true opportunity to use the natural resource property credit, not just the second spouse. Prior to the new law, the first spouse would generally take a marital deduction on the federal return due to the high federal tax rate. If that election was made, the natural resource credit on the Oregon return could not be made.

4. **Working Capital Changed to Operating Allowance.**

   a. The new law also repeals the term “working capital” within the natural resource property credit provision and instead provides for an “operating allowance” within the definition of “natural resource property.” The new law defines “operating allowance” instead of leaving it to be defined by administrative rule under the previous law. The new law defines “operating allowance” as “cash or a cash equivalent that is spent, maintained, used or available for the operation of a farm business, forestry business or fishing business and not spent or used for any other purpose.” Basically, it was not practical to try to keep a “working capital” concept because the plain meaning of that term is “current assets minus current liabilities.” To arrive at such a number would require an individualized and complicated accounting exercise for each estate. In addition, the growing cycle for timber, animals, crops, etc. can vary a great deal. Thus, the time frame chosen from which to calculate the cash on hand for working capital would greatly influence how much working capital would be required. In the end, it was concluded that the goal is really to allow an estate with a farm, forestry, or fishing business to claim a reasonable amount of cash or cash equivalents on hand as natural resource property if it
will be used for the farm, forestry, or fishing business. That is, many such businesses operate on debt, but those who do operate with cash should be able to count it as part of the electable natural resource property.

b. A couple of safeguards were added to the new law to prevent abuse of the operating allowance provision. The two safeguards include the following:

i. First, the operating allowance is subject to the same disposition rules as other elected property, and thus an additional tax is due if the operating allowance is not used for the farm, forestry, or fishing business for the required five year period. The idea here is that requiring that the elected operating allowance be tracked and used for the business for five out of the next eight years, will cause many to not elect or at least not elect too much operating allowance. Heirs often do not want to “lock up” cash.

ii. Second, the new law places a limit on the operating allowance of cash and cash equivalents that an estate can claim for the credit as the lesser of 20% of the other natural resource property for which a credit is claimed or $1.5 million. This limit helps ensure that the ratio of cash to other elected property is reasonable. The 20% choice is not any “magic number”, but rather a compromise that represents what was considered reasonable and workable. Sometimes it could be argued that 20% will allow a particular estate to elect too much cash and cash equivalents, but other times, the 20% may be too small. A death may occur just after a crop has been harvested and before it has been reinvested back into the farm, forestry or fishing business. Depending on the commodity or product, the amount of cash on hand could be a very large percentage of the natural resource property.

5. Replacement Property.

a. This new law provides explicitly that real property and personal property that was claimed for a natural resource property credit can later be replaced with other qualifying natural resource property without causing a disposition with additional tax due. For example, a farmer should be allowed to carry on the business operations and that may mean that he decides to sell a tractor that isn’t needed anymore. However, if the value of the tractor was claimed under the natural resource credit, the proceeds of that tractor sale need to be used in the business—perhaps to purchase another tractor, buy seed, etc. The proceeds cannot be converted out of the business. The issue of replacement was silent in the prior law.
b. The new law provides that property can be replaced as long as the replacement property also meets the new law’s definition of “natural resource property.” In addition, the new law requires that elected property must be tracked on an annual report with a confirmation that elected property is either still in use, has been replaced with qualifying property, or has been subject to a disposition. While the new law does allow replacement of real property, the new law requires that elected real property may only be replaced with qualifying real property, and to avoid additional tax, the real property must be replaced within one year (except for involuntary conversions that have two years). The new law provides that personal property can be replaced with any kind of other qualifying natural resource property, including real property, personal property, and operating allowance.

6. Consistency in Look Forward Requirement. This new law treats all types of elected natural resource property the same for the look forward requirement. That is, any elected natural resource property is subject to additional tax if it is not used in the operation of the farm, forestry, or fishing business or if it is transferred (i.e. converted) to a nonqualified person. Prior law was confusing and did not appear to put the future use requirement on elected personal property or the “working capital,” instead putting the look forward requirement only on real property.

7. Look Back Requirements. This new law clarifies and revises the look back requirements. First, the new law provides that a natural resource credit may be claimed only if during the five out of eight years prior to the decedent’s death, the decedent or a family member operated a farm, forestry, or fishing business and the property for which a credit is claimed is part of the business. Due to the new law’s new definitions in ORS 118.140, these changes and clarifications that focus on the business were possible; it was believed that this approach addressed the policy intent of protecting family businesses better. The prior law seems to require ownership of all property for which the credit is claimed for five out of the eight years prior to the decedent’s death. Such a requirement did not make sense for personal property or operating allowance, since personal property is often not durable and is changing in the business, and cash and cash equivalents are also in constant flux. For example, crops are generally sold each year and equipment is often replaced before five years. The new law removes any look back requirement for personal property. Instead, this new law imposes a look back requirement only on the real property by providing that real property may be claimed for the credit if it was owned by the decedent or a family member for 5 out of 8 years prior to the decedent’s death and the real property must have been used in a farm or forestry business. This requirement is intended to prevent land grabs prior to death and other unintended behavior designed specifically to
qualify for the natural resource credit. There are two potential unintended consequences arising out of requiring real property ownership for five out of eight years. Those deal with exchanged property and involuntarily converted property. For example, a farmer may have farmed for the required five years but shortly before the decedent’s death the farmer exchanged the north 40 acres for the south 40 acres. The new law allows for limited tacking for meeting the five year ownership requirement. The law provides that when property was received in an exchange under section 1031 of the Internal Revenue Code or acquired as a result of an involuntary conversion under section 1033 of the Internal Revenue Code, the holding period for ownership of the exchanged or acquired real property may be “tacked” if it was also used in the farm or forestry business.

8. **Fishing Business Qualifications.** Prior law allowed a natural resource credit for the value of listed fishing-related property if the decedent or family member was licensed under ORS Chapter 508.46. Prior law required the following additional qualifications for the credit based on having the fishing license: the value of the fishing property must be at least 50% of the total adjusted gross estate, the adjusted gross estate may not exceed $15 million, and the fishing property must be transferred to a family member. Unlike the farm and forestry business qualification provisions, prior law required no look back for fishing property to qualify and no real operation of a fishing business. The new law tightens up these rules by requiring operation of a fishing business. In addition, the decedent or a family member must have owned a vessel used for commercial fishing purposes, held a boat license, held a commercial fishing license, and held one or more restricted fisheries permits as provided in ORS Chapter 508.47. Each of these new qualifications must have been maintained for 5 out of the 8 years prior to the decedent’s death. Such new requirements prevent death bed purchases and seem to provide an estate tax break for those true fishing businesses that the law was intended to cover. In addition, these requirements are consistent with the natural resource credit qualifications for farm and forestry businesses.

9. **Accountability and Disposition Clarity.** There was an enforcement problem with the natural resource credit under prior law. Both prior law and the new law require the personal representative of an estate to make the natural resource credit election and also notify the transferee (heir) of the potential for tax consequences to the transferee if there is a later disposition of the property. That is, if the heir causes a disposition of the natural resource property (for example, by selling it) and doesn’t complete the five year requirement, an additional tax will become due.

a. That additional tax is the responsibility of the heir of the natural resource property at the time of the disposition.
b. The problem under the prior law was that there was no required tracking of the elected natural resource property once the estate tax return was filed. In addition, the language defining what triggers the additional tax was unclear, and there was no due date for the additional tax. The prior law really was a very loose honor system that was nearly impossible for the Department of Revenue to track or enforce.

i. The new law spells out what events will cause a disposition. The new law specifically provides that payment of federal estate taxes or state inheritance taxes is not an expense incurred in operation of the natural resource business.

ii. As explained earlier, the new law clarifies that natural resource property that is replaced with qualifying natural resource property will not cause a disposition.

iii. The new law also imposes a new tracking provision by requiring the personal representative to file a statement with the estate tax return that identifies the property for which the natural resource credit is claimed. After the return is filed, the new law then turns the tracking responsibility over to the transferees, by requiring the transferees (heirs) of the natural resource property to file an annual report of the natural resource property with the Department of Revenue until the five year requirement is met. This annual report requires tracking of each asset for which the credit was claimed with confirmation that each asset falls into one of three categories:

(AA) the asset is still used in the operation of the a farm, forestry, or fishing business;

(BB) the asset has been replaced with other qualifying natural resource property; or

(CC) the asset has been subject to a disposition and additional tax is due.

iv. Finally, the new law provides for the tax due date for additional tax if there is a disposition of the natural resource property or it is not used for the required five years. The new law provides that due date is six months after the date on which the disposition or event occurs.

v. The due date for this report is April 15 of the following year.
IV. Request for Liability Release – Closing Letter.

A. Prior Law.
Prior to the passage of HB 2308 in 2009, there were no provisions authorizing the Oregon Department of Revenue (“ODR”) to issue inheritance tax clearance or closing letters similar to the closing letters issued by the IRS. In addition, there are no statute of limitation provisions in the OIT (ORS Chapter 118) that would give fiduciaries a timeline to follow.

B. ODR Tax Receipt Practice.
The ODR issues tax receipts, which are thought by some to be tax clearance notices, but they are not. The tax receipt does not represent any indication that ODR has accepted the return or whether or not any further taxes are due. Even after the issuance of a tax receipt, the ODR can still audit the return at a later date.

C. Application for Discharge.
After January 1, 2010, an executor, personal representative, or trustee of an estate may now file a request with ODR for a determination of the tax due under Chapter 118 and request a discharge from personal liability.

1. Discharge Request After Tax Return Filed. If the tax return has been filed prior to or concurrent with the discharge request, then the ODR has 18 months to notify the executor, personal representative, or trustee of the amount of tax due.

2. Discharge Request Before Tax Return Filed. If the discharge request is filed before the return is filed the ODR is required to provide its tax notice upon the earlier of:
   a. 18 months after the return is filed;
   b. the expiration of the assessment period under ORS 305.265; or
   c. the expiration of the period for issuing a notice of deficiency under ORS 314.410.

3. Practice Note: A fiduciary can now apply for a discharge of any OIT return even if it was filed prior to January 1, 2010. There are no limitations based on when the OIT return was filed. After a discharge is requested the ODR is obligated to respond within 18 months.

4. Caveat: Although the personal representative or executor has been discharged from personal liability, the OIT statutes of limitation are not terminated; thus if there was a subsequent audit and increase in the OIT, the assets of the estate, even though distributed, could still be subject to levy.

D. Discharge Form
The Discharge Form is available online at http://www.oregon.gov/DOR/BUS/docs/103-005.pdf.

V. Deficiency and Refund Statutes of Limitation.

A. OIT Statutes of Limitation.
Prior to 2010, the OIT had no statutes of limitation. 2009 HB 2308 addressed this issue.
B. Notice of Deficiency.

The time period for issuing a notice of deficiency for any OIT is tied to ORS 314.410

1. The standard is three years.
2. The statute is five years for a 25% omission of gross income.
3. The period is nine years for a listed transaction.

C. Refund Requests

The time period for requesting an OIT refund is tied to ORS 314.415 (the later of 3 years after the return filed or 2 years after the tax is paid).

VI. Gifts in Contemplation of Death – Oregon Style.

Back in 2006, Oregon issued revised instructions for the Oregon inheritance tax return. On page 1 of those instructions, the Department of Revenue provided “The gross estate of the decedent is the true cash value of all real and personal property, tangible or intangible, as of the date of death, wherever situated. This includes all transfers of property made by the decedent within the 3-year period ending on the date of death.” The instructions for the 2005 return and prior periods did not include the second sentence dealing with transfers made within 3-years of death.

A. The Background.

The Oregon administrative rules dealing with inheritance tax at OAR 150-118.005(2)(f) provide that the gross taxable estate is the total true cash value of property and any interest therein subject to inheritance tax on the date of the decedent’s death. The property and any interest therein subject to inheritance tax includes, among other things “Gifts made within the 3-year period ending on the date of death.”

B. History of the OAR.

The administrative rule was in effect since December 31, 1977, when the federal rules were enacted to bring into the estate all taxable gifts made within 3 years of death.

C. IRC §2035 Repeal.

However, this law was later repealed by the enactment of the modern form of IRC §2035 in the 1981 Tax Reform Act. Under the new IRC §2035, the only items includable in the gross estate in connection with transfers made within 3 years of death are:

1. Policies insuring the life of the decedent transferred within 3 years of the decedent’s date of death; and
2. The release of certain “string” powers held by a decedent within 3 years of death, which would otherwise be taxable under IRC §§2036-2038.
3. Presumably, since Oregon has conformed to federal tax law, then this change is a part of Oregon law. However, the Department of Revenue’s 2006 Instructions to the Oregon Inheritance Tax Return (“Form IT-1”) seemed to contradict this presumed result.

D. The Department of Revenue Misread the Law.

ORS 118.007 specifically provides that any term used in ORS 118.005-118.840 has the same meaning as when used in a comparable context in the laws of the
Federal Internal Revenue Code relating to federal estate taxes, unless a different meaning is clearly required or the term is specifically denied in ORS 118.005-118.040. (Emphasis added). That statute goes on to provide that any reference in ORS 118.005-118.840 to the Internal Revenue Code means the Code as amended and in effect on December 31, 2000. In other words, Oregon’s definition of the gross estate conforms to the federal definition. ORS 118.005(5) specifically defines “gross estate” as the meaning given that term in §2031 of the Internal Revenue Code. Under IRC §2031, the gross estate does not include gifts made within 3 years of death.

E. The Statute.
ORS 118.160(b)(D) provides that “An estate tax return is not required with respect to the estates of decedents dying on or after January 1, 2006, unless the value of the gross estate (emphasis added) is $1 million or more.”

F. Confusion.
Herein lies the rub: The federal estate tax applicable exclusion amount under IRC §2010 for the years 2006-2008 was $2 million. The Oregon exemption amount was $1 million. Therefore, for estates of decedents with more than $1 million but less than $2 million, an Oregon tax would apply but not a federal estate tax.

1. Since the law did not require the filing of an Oregon return unless the gross estate was $1 million (and if no return was required, no tax was due), practitioners have taken the position, based upon a reasonable interpretation of the statute, that a deathbed gift to bring the gross estate down to below $1 million would obviate the need to file an OR-706. If the return is not required, then obviously, no tax will be due.

2. In an effort to avoid this result, the Department of Revenue added the language to the instructions for the 2006 return to the effect that gifts made within 3 years of death are includable in the gross estate.

3. This would have solved their problem, to the extent that a person does not survive 3 years after making a substantial transfer to reduce his or her estate to below the $1 million threshold for Oregon estate tax purposes.

4. However, it created even greater problems than it attempted to resolve:
   a. First of all, what right does the legislature have to impose a tax collection process which is contrary to the clear language of the statute?
   b. What about birthday gifts? Are these brought into the estate?
   c. The Internal Revenue Code specifically excludes gifts made pursuant to the section 2503(b) per donee exclusion (e.g. currently $14,000 per donee per year 2016) from inclusion in a decedent’s gross estate, whether or not made within 3 years of death. The Department of Revenue seemed to be trapping these gifts, in contravention of the clear language under Oregon law.
   d. Did gifts made to friends have to be included?
   e. Did gifts to employees have to be included?
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5. As a result, the author and others were invited to participate in an Oregon inheritance tax advisory committee meeting, to discuss the application of the 3-year rule for Oregon inheritance tax purposes. At the previous meeting discussing HB 3201, the author and those practitioners in attendance made it clear to the Department of Revenue that their position on gifts within 3 years of death was not supported by statute and was clearly wrong. On September 18, 2007, members of the advisory committee received an email from the Department of Revenue to the effect that the Department was backing off on its position regarding gifts within 3 years of death, and the provision was later removed from the Oregon form.

   a. The Department of Revenue has since revisited its position. ORS 118.007, connecting Oregon estate tax with the Code as it existed on December 31, 2000, is not consistent with the inclusion of gifts within 3 years of death.

   b. Therefore, the Department of Revenue removed the requirement from the instructions, eliminating gifts within 3 years of death from the gross estate. The rules under IRC §2035 as it currently exists, however, still apply.

VII. Portability.

A. Under ATRA 2012, the concept of “portability” became the law of the land for federal purposes. On June 15, 2012, temporary regulations (T.D. 9593, 77 Fed Reg. 36150 (June 18, 2012)) and the proposed regulations regarding portability, which are identical to the temporary regulations, were made retroactively effective as of January 1, 2011.

1. The basic concept of portability is simple. A deceased spouse, if leaving his or her assets in such a way as to qualify for the marital deduction, can also “bequeath” his or her unused exemption amount to his or her surviving spouse.

   a. In other words, in a simple “winner take all” situation with a husband and wife, each of whom have a full $5.45 exemption, if the husband dies first, he can simply leave all of his assets to his wife, and give his wife his $5.45 million exemption. When the wife dies, if the estate is $10.9 million or less and she is left with her $5.45 million exemption and his $5.45 exemption, because of the marital deduction, there would be no tax at the husband’s death.

   b. Congress loved the idea of portability. It made estate planning so much less complicated. Spouses could once again revert to “winner takes all” wills, and all would be right in the world.

2. However, this does not work for Oregon purposes. With its $1 million exemption, over-funding of the marital deduction with no Oregon portability would cause unnecessary Oregon estate tax at the second death.
3. In addition, with all the second marriages in America today, many clients want to set aside a separate credit shelter trust for the benefit of their spouse, going to their children and not their spouse’s children. The credit shelter trust can also provide discretionary income and principal to the spouse, so that mandatory distributions need not be made. It is for these principal reasons that marital share/bypass trust planning is still probably the most effective method to employ when dealing with Oregon clients.

4. Even though the use of portability should be planned before the first death, the election to take advantage of portability is actually not made until the estate tax return of the first spouse to die is filed. That election must be made on a timely filed return. Reg §20.2010-2T(a)(1)-(4).
   a. Therefore, even if a return is not required, it must be filed in order to elect portability.
   b. The return must be filed on a timely basis, under normal rules.
   c. The election is automatically deemed made by the filing of a return unless it is affirmatively repudiated.
   d. The election is irrevocable.
   e. Once determined, there are no subsequent adjustments to the unused exemption amount of the deceased spouse.

5. The preamble to the regulations makes it clear that the election must be made on the estate tax return of the first spouse to die, because it would be too difficult to track the election if made on the return of the second spouse to die or on intervening gift tax returns of the second spouse.

6. Generally, the election is made by an executor or administrator. Under the regulations, if no executor or administrator exists, then any person, in actual or constructive possession of property of the decedent can make the election. If such an election is made by a “statutory executor,” it cannot be superseded by a contrary election made by another statutory executor. The law is not clear, however, regarding what happens if an officially appointed executor rescinds the election. Based upon the fact that the election is deemed to be irrevocable, it is likely, once made, the election simply cannot be superseded by anyone.

7. Regs §20.210-2T(a)(7)(ii) includes relaxed rules for returns that are filed only to take advantage of portability and nothing else. In other words, these rules apply to estates of less than $5.45 million. If the executor exercises due diligence in evaluating the estimated value of the gross estate, then property that will qualify for a marital and charitable deduction anyway need not be appraised. With respect to this property, the executor’s due diligence can be established by a best estimate rounded to the nearest $250,000 of the value. Of course, these rules do not apply with respect to formula spousal bequests, disclaimers, partial QTIP elections, and charitable split interest trusts.

8. The Regulations require the reporting of description, ownership and/or beneficiary of the property along with other information necessary to
establish the right of the estate to portability. For example, with respect to
insurance, evidence the spouse is the sole beneficiary should be included.
In essence, this makes the requirement to file an estate tax return much
less onerous.

9. However, given these “relaxed” requirements, the proposed regulations go
on to provide that the IRS has the right to examine the returns of a
decedent even after the statute of limitations has run, for purposes of
determining the decedent’s spouse’s unused exemption (DSUE) amount.
   a. What about gifts in prior years where the federal gift tax exemption
      was $1 million but the estate tax exemption was much more?
   b. If a decedent made taxable gifts and paid gift tax on those gifts, do
      those gifts get added back for purposes of determining the DSUE
      amount? The answer, as stated in Regs §20.210-2T(c)(2), is that
      these gifts will be disregarded in determining the DSUE amount.

10. Remember, the DSUE amount is available both for the surviving spouse’s
    estate and for gift tax purposes.

11. What about the case of remarriage? If the surviving spouse remarries or
divorces, generally that will not affect availability of the DSUE amount
    from the most recent deceased spouse. In other words, the “black widow”
cannot stack DSUE amounts based upon the number of deceased spouses.
    He or she will only be entitled to the unused DSUE amount of the most
    recently deceased spouse, and the DSUE amount of all previous deceased
    spouses disappear.
    a. However, if the DSUE amount of the most recently deceased spouse is
       greater, it appears that this amount will be available.
    b. This may promote “sick new spouse” shopping.
    c. It does not matter that there still may be unused DSUE amount from
       the previous last deceased spouse, or even whether the most recent
decedent deceased spouse has any DSUE amount to bequeath or whether or not
       a portability election was made on the return of the most recently
decedent spouse. Death of the most recent spouse cancels the DSUE
       amount of the previous deceased spouse.

12. When the surviving spouse makes a taxable gift, the DSUE amount of the
    most recent deceased spouse is applied to the surviving spouse’s taxable
gifts before the surviving spouse’s own exemption is applied. However,
    the DSUE amounts from an earlier deceased spouse applied to gifts of the
    surviving spouse will not be rescinded, with the effect being that a
    surviving spouse who has numerous previous surviving spouses can make
    multiple gifts and use those DSUE amounts.

13. With respect to QDOTs the DSUE amount can only be applied to the
    assets in the QDOT, and not to the spouse. In other words, the DSUE
    amount is only available at the time of the final distribution or termination
    of the QDOT trust. These rules provide a bar to the surviving spouse
    making gifts of property during his or her lifetime.
14. On October 12, 2012, the new 2012 form 706 was released. This form takes into account the addition of the DSUE amount to the basic exclusion amount. At part 6, section (a) of the return, there exists a box that can be checked to opt out of electing portability. This is very important in cases where credit shelter trusts are created at the first death. It is imperative to opt out of the portability election so that the credit shelter trust avoids tax.

15. Note that if no return is required, then failing to file a form 706 is not deemed to be making the election.

B. Why do credit shelter trusts still make sense?

1. Intervening appreciation will be sheltered from the estate tax.

2. Income, at least to the extent it does not exceed $11,950, may be taxed at a lower bracket.

3. Credit shelter trusts may provide for appropriate asset management and creditor protection.

4. Credit shelter trusts work extremely well in second marriage situations where there are children of the first marriage.

5. There is no guarantee portability will stick around.

6. GST exemption must still be allocated to a credit shelter trust because GST contains no portability rules.

7. If the first decedent’s estate is less than $5.45 million and a return would otherwise not be required, establishing a credit shelter trust obviates the need to file the return.

8. Probably the best argument in favor of portability deals with the ease in administering retirement assets, which often creates problems if they are payable to a trust.

9. Portability also enables the estate to receive a double step up in basis, one at the first spouse’s death and one at the second spouse’s death.

C. What if you missed the Portability deadline: Rev Proc 2014-18. On January 27, 2014, The Internal Revenue Service simplified the process for estates seeking an extension of time to make a portability election of a decedent's unused exclusion amount. This Rev Proc provides an automatic extension of time to file an estate tax return to elect portability for estates that meet the following criteria:

1. The taxpayer is the executor of the estate of a decedent who:
   (a) had a surviving spouse,
   (b) died after December 31, 2010, and before January 1, 2014, and
   (c) was a citizen or resident of the U.S. on the date of decedent's death.

2. The estate was not otherwise required to file an estate tax return (based on the value of the decedent's gross estate and adjusted taxable gifts made by the decedent during the decedent's life).

3. The estate tax return was not timely filed.

4. An estate tax return is filed on or before December 31, 2014.
5. The estate tax return states at the top of the form that the return is "FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER §2010(c)(5)(A)."

6. This revenue procedure will be particularly helpful to executors of estates that missed the filing deadline because the value of the decedent's gross estate was below the threshold requirement for filing an estate tax return. Additionally, this revenue procedure will assist executors of estates of married same-sex couples whose legal status may not have been recognized at the time the estate tax return had been due.

7. Note: estates that have pending requests for private letter rulings seeking an extension of time to file an estate tax return to elect portability (as long as the estate meets the criteria outlined above), the executor may rely on the revenue procedure, withdraw the letter ruling request, and receive a refund of the user fee. If the executor does not withdraw the letter ruling request, the IRS will issue the letter ruling.

VIII. Planning under the current estate tax law.

A. Evaluate Funding Clauses.

Marital deduction clauses have to be evaluated in light of the existing tax law. If a will divides the estate into a marital share and a bypass share, the language has to be closely analyzed.

1. Presume the language in a will says to give the maximum amount to the spouse taking into account all exemptions and credits. If there are no exemptions, then the entire estate would go to the spouse.

2. Presume a different funding clause that creates a bequest to the credit shelter trust equal to the maximum unified credit. If the unified credit is $5.45 million in 2016, and if the estate is $5.45 million or less, then the bequest to the spouse would be zero, again leaving everything to the credit shelter trust.

3. If a bequest is formulated to give the entire estate to the credit shelter trust to the extent that no estate tax is generated, then the first $5.45 million of the estate would go to the credit shelter trust, and only the balance, if any, would be left for the spouse.

5. If an election is made to follow the 2016 rules, then the first $5.45 million would be transferred to the bypass trust, with the balance to the marital share.

6. Because of these rules, it is essential to closely evaluate marital funding clauses and determine whether it is the bypass share or the marital share that is funded first, and whether that funding is dependent upon a bequest reducing estate tax to zero or a bequest equal to the “exemption amount.”

a. In 2016, for estates in excess of $5.45 million, funding will probably be similar in practice to the funding which was made when the estate tax exemption was less.
b. In 2016, for estates under $5.45 million, funding may have drastic results. This is because either the marital share or the bypass share may “suck up” the entire estate, leaving nothing for other intended beneficiaries. Careful planning is essential.

B. **GST Gifts.**

The rules may be different with GST gifts under a will. Many documents, especially for single individuals, disburse to a GST trust the maximum amount that can pass free of GST taxes, with the balance going outright to the children.

1. Under the 2016 law, the GST bequest would be funded with $5.45 million. This may be substantially more than the testator intended when drafting the will. Many wills that were drafted when the GST exemption was $1 million were designed to help grandchildren and escaped generation skipping taxes, ensuring there was adequate property going to the children. With a $5.45 million GST exemption, it is possible that a husband and wife could transfer their full $10.9 million estate to a pre-residuary GST bequest, leaving little or nothing for their children. These wills should be reviewed, and amended if necessary.

2. If the estate is greater than $5.45 million, then the GST bequest would be funded with $5.45 million, with the residue going to other beneficiaries. Careful planning should prevail.

3. Similar problems exist with respect to the reverse QTIP elections, providing for a gift to go to a QTIP trust, with maximum GST exemption allocated to the gift. This is normally described as the difference between the deceased trustor’s available GST exemption and the amount of the bypass share, which is already subject to the GST exemption.

C. **Trusts Created in 2010.**

With respect to a GST trust, there is a question as to whether a GST trust created in 2010, for which exemption would be otherwise available, would be exempt from GST tax. This is because in 2010, the GST rate was zero. Watch out though for automatic application of the $5.45 million GST exemption. If taxable distributions or taxable terminations are made in later years, they will be subject to GST tax in excess of the $5.45 million exemption.

D. **ILITs.**

What about irrevocable life insurance trusts for grandchildren with crummey provisions? Generally, gifts to ILITs have the potential of being GST gifts, because if the child dies the grandchild will be the ultimate beneficiary of the trust. Therefore, gift tax returns are generally filed in order to allocate GST exemption to the ILIT in the year of the gift.

E. **GST Planning in General.**

In many cases, a generation skipping trust may have been established at an earlier time, with no exemption allocated to such trust. Trusts may or may not give the trustee the right to allocate the GST exemption at a later time.
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1. If the trust requires distribution to the beneficiary at a certain date, perhaps the trustee should seek a modification of the trust to enable the property to be retained inside the trust.

2. This could require a number of steps, including moving the trust situs to a jurisdiction which does not conform to some rendition of the old common law rule against perpetuities.

3. Some trusts have provisions allowing trust protectors or trust advisers to modify trust to accommodate changes in the tax law.

4. Other trusts have provisions authorizing distributions to be delayed or made at times other than those set forth in the trust for schedule distributions, if doing so would achieve significant tax benefits.

5. Under the Oregon Uniform Trust Code ("UTC") trustees may have the power to amend a trust with the consent of all beneficiaries in order to accomplish a significant tax purpose/

6. This might also be accomplished through a non-judicial settlement agreement under the Oregon UTC.

7. If a trustee fails to take action to avoid pending GST taxes, would the beneficiary have a cause of action against the trustee for breach of fiduciary duty?

F. Testator’s Intent.
In all of these cases, intent is paramount.

1. Perhaps a trust modification action could be brought to ensure that the decedent’s intent could be carried out.

2. However, under the reasoning in Estate of Bosch, 387 US 456(1967), federal courts are not bound by determinations of the state court interpreting an instrument.

G. Planning for the Terminally Ill.
What if we know one spouse is terminally ill?

1. Estates under $5.45 million. In the case of deaths in 2016, if the total estate is less than $5.45 million, it probably does not matter whether the assets are held by the decedent or the surviving spouse. The parties may wish to transfer assets to the surviving spouse in order to avoid probate. They may wish, as well, to transfer the assets to a terminally ill spouse in order to receive an earlier step up in basis. If the assets from the deceased spouse go back to the surviving spouse, then the basis step up will be precluded under section 1014(e). However, keep in mind that section 1014(e) only applies to outright gifts and not to gifts in trust.

a. An effective current planning tool involves creating a disclaimer will. In this case, the terminally ill spouse could give his or her whole estate to the surviving spouse. A disclaimer provision would then be added. The disclaimer would provide for any assets disclaimed by the surviving spouse to be distributed to a disclaimer trust. This trust could take the form of a QTIP so it qualifies for the Oregon QTIP election. The surviving spouse could then use 20/20
hindsight to determine exactly how much should be disclaimed into a federal and federal/Oregon bypass share.

b. A similar methodology is the use of a “Clayton QTIP.” In this scenario, everything goes to a surviving spouse under a QTIP share. The surviving spouse then has the right to make a QTIP election against all or a portion of the trust. Any share which is not treated as being subject to the QTIP election automatically falls into a bypass share for the surviving spouse. Again, planning for both federal and Oregon law under these scenarios is essential.

2. Estates over $5.45 million. This presents an interesting scenario. Just as we used to do an estate planning prior to the craziness in the estate tax law, the best planned estate in first marriages is an estate where the assets are fairly equally divided between husband and wife. That continues to be the case with estates over $5.45 million.

a. One alternative would be for the healthy spouse to create an inter vivos QTIP for the surviving spouse. This would not be a taxable gift because of the marital deduction. The assets would be included in the estate of the surviving spouse under IRC § 2044. The trust could provide income to the surviving spouse for his or her lifetime, the balance going to the children. In this way, the surviving spouse could continue to live off all the assets, it would act as a bypass for the terminally ill spouse, and up to $10 million could escape tax.

H. Change of Domicile.
If clients living in Oregon are facing a substantial estate and are concerned about Oregon estate tax, and if death of one of the spouses is imminent, it may be worthwhile to change domicile to California, Nevada, or some other state in which no estate tax exists.

IX. Basis Allocations and Increases
A. The Oregon Tie-In.
2011 SB 301 tied Oregon tax law to the Internal Revenue Code as of December 31, 2010. Therefore, for basis adjustment purposes, we now apply The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act ("TRUIRJCA"), which was signed into law on December 17, 2010. Under this law, the estate tax applies retroactively in 2010. This is the default rule. However, estates of 2010 decedents may make an election to be subject to carryover basis instead of the estate tax.

B. How Election is Made.
IRS Release on March 2, 2011 states that the carryover basis election under TRA 2010 is made by filing Form 8939. Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent, has recently been released.
Chapter 3—Planning for the Oregon Taxable Estate


Although we are well past 2010, we still may be administering estates of
decedents who died in 2010. In addition, beneficiaries may be selling assets
acquired from decedents who died in 2010.

1. If the decedent died in 2010 an election was made under IRC §1022 to
avoid federal estate tax and retain carryover basis, then the decedent
would have filed Form 8939, Allocation of Increase in Basis for Property
Acquired from a Decedent. The beneficiaries’ basis should be
ascertainable from the form which was required to be submitted to each
beneficiary of the estate receiving property from the estate.

2. In the alternative, if the decedent elected to take advantage of the $5
million estate tax exemption otherwise available in 2010 and pay estate
tax, then the beneficiaries would have received a full step-up in basis
under IRC §1014(b). Remember, though that some basis increase was
allowable if the decedent elected to forgo estate tax in 2010. The basis
increase was $3 million for anything passing to a surviving spouse or
QTIP trust and $1.3 million for any gift, for a total potential $4.3 million
basis adjustment.

D. Basis Adjustments.

If the carryover basis system applies, the estate is entitled to the $1.3 million basis
adjustment for assets passing to any beneficiary and the $3.0 million basis
adjustment for assets passing to a surviving spouse or a “QTIP-type” trust.

E. Holding Period.

The holding period is not automatically long term under section 1022, but there is
tacking of the decedent’s holding period if the basis is determined in whole or in
part by reference to the decedent’s basis. However, the basis is the lesser of the
decedent’s basis or fair market value, and if the asset is depreciated and the basis
equals the fair market value at death, there may be no tacking of the decedent’s
holding period. That has been the position of the IRS in the past in other contexts,
but we do not know if the IRS will apply that same argument in the context of the
carryover basis regime.

F. Adjustments to $1.3 Million Basis Adjustment.

1. The $1.3 million amount is increased by net operating losses and capital
loss carryovers. These generally would appear on the decedent’s final
Form 1040. A complexity occurs when a joint return is filed, and the
surviving spouse may have gains that offset some of the losses and there is
no guidance on how to determine the decedent’s share of the losses.

2. In addition, the $1.3 million amount is increased by any losses that would
have been allowable under section 165 if the decedent’s property had been
sold at fair market value before the decedent’s death. Section 165 allows
both business losses and investment losses, excluding only personal
losses. The adjustment for depreciated business and investment property
can be quite significant, probably a much bigger factor than the adjustment
for net operating losses and net operating loss carryovers. It is not clear
how this rule will apply to passive losses. That would be deductible under
section 165 so they would seem to increase $1.3 million amount. However, section 469(g)(2) describes how unused passive losses at death are treated, and the section 1022 and section 469 treatment is inconsistent. Fortunately, both sections grant full regulatory authority to the IRS, so the IRS will need to provide guidance.

G. IRS Guidance is Now Here.
The Treasury and the IRS have released Publication 4895, “Tax Treatment of Property Acquired From a Decedent Dying in 2010.”

H. Community Property.
Both halves of community property can qualify for receiving basis adjustments and are subject the modified carryover basis system under IRC §1022. (i.e., subject to a potential reduction in basis for depreciated assets). If there is substantial appreciation in community property, being able to get both halves of the community property stepped-up may be critically important in the election decision.

X. Elective Share of Surviving Spouse.

A. Current Law.
The 2009 Oregon Legislature changed the law regarding the elective share of the surviving spouse. Generally, the elective share is the modern version of the English common law concepts of dower and curtesy, both of which reserved certain portions of a decedent's estate which were reserved for the surviving spouse, in order to prevent them from falling into poverty and becoming a burden on the community. The 2011 Oregon Legislature made further changes to clarify certain sections of the Act and to simplify other sections. These 2011 changes are retroactive to the beginning of the year.

B. Generally, the amount to be reserved for a spouse is determined by the law of the state where the estate is located. In most states, the elective share is between ½ and ½ of all the property in the estate, although many states require the marriage to have lasted a certain number of years for the elective share to be claimed, or adjust the share based on the length of the marriage, and the presence of minor children. Some states also reduce the elective share if the surviving spouse is independently wealthy.

1. In some jurisdictions, if the spouse claims the elective share, he or she will receive that amount, but nothing else from the estate. In other states, claiming an elective share has no effect on gifts under a will or through a trust (though things given by will or trust may fulfill in part the elective share portion). Obviously, there would be no point in seeking an elective share if the surviving spouse has already been bequeathed under the Will more than he or she would receive under the statute. Furthermore, some assets held by the estate may be exempt from becoming part of the elective share, so their value is subtracted from the total value of the estate before the elective share is calculated.
C. Oregon Law Prior to January 1, 2011 (ORS 114.105 thru 114.165)

1. If an Oregon deceased spouse died with a will, the surviving spouse could have elected to take the elective share. In Oregon, the elective share was ¼ of the value of the net estate of the deceased spouse, reduced by property given to him or her outright, by the present value of any life estate, and the value of income from an annuity or trust.

2. If the surviving spouse made the election, he or she would forfeit any other bequest under the will, except for the three offsetting items listed above.

3. A husband and wife could agree to restrict each other from making this election by either a pre or post nuptial agreement.

4. Generally, the surviving spouse could not use the election to receive greater than half of the net estate of the deceased spouse.

5. The court could deny the election if the couple was separated at the time of death, whether the separation was legal or not.

6. In order to make the election, the surviving spouse had to serve a notice on the personal representative of the deceased spouse’s estate the later of 90 days after the admission of the will or 30 days after the inventory is filed. The election could also have been filed by a conservator of the surviving spouse and by a court if the surviving spouse was incapacitated.

7. The elective share was first taken out of any intestate property, and then from each devisee ratably.

D. Oregon Law On and After January 1, 2011 (ORS 114.600 thru 114.725)

1. Just as with the prior law, for the Oregon elective share rule to apply, the deceased spouse must be domiciled in Oregon at the time of death. The amount received under the new law is a percentage of the augmented estate based on the length of the marriage.

<table>
<thead>
<tr>
<th>If the decedent and the spouse were married to each other:</th>
<th>The elective-share percentage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 2 years</td>
<td>5%</td>
</tr>
<tr>
<td>2 – 3 years</td>
<td>7%</td>
</tr>
<tr>
<td>3 – 4 years</td>
<td>9%</td>
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<tr>
<td>4 – 5 years</td>
<td>11%</td>
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<tr>
<td>5 – 6 years</td>
<td>13%</td>
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<tr>
<td>6 – 7 years</td>
<td>15%</td>
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<td>7 – 8 years</td>
<td>17%</td>
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<tr>
<td>8 – 9 years</td>
<td>19%</td>
</tr>
<tr>
<td>9 – 10 years</td>
<td>21%</td>
</tr>
<tr>
<td>10 – 11 years</td>
<td>23%</td>
</tr>
</tbody>
</table>
2. In order to make the new spousal share election, the surviving spouse must do one of the following:
   a. File a petition with the court for the appointment of a personal representative and make a motion for the exercise of the election. The motion must be made within nine months of the death of the decedent.
   b. File a motion in an already existing probate of the estate of the decedent within nine months of the date of death of the decedent. This motion must be served on the personal representative and anyone else with an interest in the estate. This motion may be withdrawn before the court order is signed.
   c. File a petition for the election within nine months of the date of death.
3. If the court determines that the elective share is payable, the court’s ruling will include the amount of the share and order its payment. If the personal representative does not have the property because it has not yet been received or because it has been distributed, the court will fix liability on the person who is in possession of the property, such as the trustee of property held in trust.
4. In determining the amount of the elective share, the court will consider the values of the decedent’s probate estate, the decedent’s nonprobate estate, the surviving spouse’s estate, the decedent’s probate transfers to the surviving spouse and the decedent’s nonprobate transfers to the surviving spouse. (These are defined below.) If the elective share amount is not satisfied by the decedent’s transfers of probate and nonprobate assets to the surviving spouse, then the remaining amounts shall be paid out of the decedent’s probate and nonprobate assets.
5. As with the prior law, the right of election may be waived by a pre or post nuptial agreement. Waivers of the prior law will count as waivers of the new law.
6. The election may be made by the spouse, by a conservator, a guardian, or an agent acting under a power of attorney.
7. The augmented estate includes the decedent’s probate estate, the decedent’s nonprobate estate, and the surviving spouse’s estate. The value of the augmented estate is reduced by any enforceable claims against the estate and all encumbrances of the property in the estate. The value of the
augmented estate includes the present value of any payments to be made to the estate. For valuation purposes, the value of an asset is the same value as would be used on the estate tax return. Finally, property may only be included in the estate once.

8. The augmented estate does not include any value attributable to the future income of either spouse, gifts made before the death of the decedent or after the death of the decedent with the consent of the surviving spouse, any community property, or property held in a fiduciary capacity.

9. The decedent’s probate estate includes the value of all estate property that is subject to probate and that is available for distribution after payment of claims and expenses of administration.

10. The decedent’s nonprobate estate includes:
   a. The decedent’s fractional interest in property held by the decedent in any form of survivorship tenancy immediately before the death of the decedent.
   b. The decedent’s ownership in any payable on death accounts.
   c. The property owned by the decedent where the decedent had a power to appoint the decedent or the decedent’s spouse as a beneficiary.
   d. Property that could have been acquired by the decedent by a revocation immediately before the decedent’s death.

11. The decedent’s nonprobate estate does not include life insurance proceeds on the death of the decedent.

12. The decedent’s nonprobate estate is reduced by debts and liabilities that are not paid in probate, and further reduced by all costs in administration of the nonprobate estate.

13. The surviving spouse’s estate includes:
   a. All property received by the surviving spouse from the decedent in a probate transfer.
   b. All property received by the surviving spouse from the decedent in a nonprobate transfer.
   c. All other property of the spouse.
   d. Any property from the decedent disclaimed by the surviving spouse.
   e. The value of the corpus of a trust created by the decedent spouse where the surviving spouse is the sole income beneficiary or a trust where the surviving spouse has a general power of appointment.
   f. The value of the corpus of a trust created by the decedent spouse where the surviving spouse is the sole income beneficiary and where the surviving spouse has a general power of appointment.
   g. The value of the corpus of a trust created by the decedent spouse where the surviving spouse is the sole income beneficiary and where the surviving spouse may receive distributions from the corpus for health, education, support and maintenance.
h. One half the value of the corpus of a trust created by the decedent spouse where the surviving spouse is the sole income beneficiary and has no remainder interest.

14. The decedent’s probate transfers to the surviving spouse include all estate property that is subject to probate and passes to the surviving spouse.

15. The decedent’s nonprobate transfers to surviving spouse include:
   a. Decedent’s fractional interest in property held in survivorship tenancy that passes to the surviving spouse.
   b. Decedent’s co-ownership of property or accounts that passes to the surviving spouse on death.
   c. Insurance proceeds payable to the surviving spouse by reason of the death of the decedent.
   d. All other property that would have been included in the decedent’s nonprobate estate had it passed to someone other than the surviving spouse.

16. The decedent’s nonprobate transfers to the surviving spouse do not include any property passing to the surviving spouse under the federal Social Security Act.

17. In order to satisfy the elective share, the surviving spouse’s estate is applied, i.e., the share is reduced by the value of the surviving spouse’s estate.

18. If the dollar amount of the elective share is still not satisfied, the remaining amounts shall be paid from the decedent’s probate estate and the decedent’s nonprobate estate in proportionate amounts, unless otherwise indicated by will or trust.

19. The surviving spouse may petition the court for a protective order to make sure assets are not distributed prior to the court’s order regarding the elective share.

20. Any person who has received a distribution from the estate may petition the court for a determination of the proportionate amount that he or she must pay the surviving spouse.

21. The filing of a petition or motion for an elective share causes a restraining order to be issued to protect the surviving spouse’s elective share. Those who receive notice may seek relief from the notice or order by providing a bond or other security to the court.

XI. **Spousal Rights to a Share of Inheritance.**
   
   A. **Premarital Agreements.**

   There is little doubt that property received by inheritance, if identified in a properly drafted premarital agreement, is protected in the event of dissolution of a marriage. See Oregon Uniform Premarital Agreement Act, ORS 108.700-108.740.
B. No Premarital Agreement.

Generally, the extent to which a beneficiary’s inheritance or gift is subject to division in the event of dissolution, whether received prior or subsequent to the date of the beneficiary’s marriage, depends upon the facts and circumstances at the time of the dissolution. Those facts and circumstances include:

1. Length of the marriage;
2. Number of years since one of the spouses received the inheritance or gift;
3. Whether the inherited or gifted property was commingled;
4. The extent to which the married couple used income or principal from inherited property for their day-to-day living expenses;
5. The understanding between the parties regarding the treatment of inheritances and gifts;
6. Whether there has been commingling of inheritances with marital assets.

C. The Court of Appeal Decision in Olesberg.

In Olesberg and Olesberg, 206 OR APP 496, 136 P3d1202, Rev Den, 342 Oregon 633 (2007), the Oregon Court of Appeals was faced with the issue of how to divide inherited property in the event of a divorce.

1. The case cannot be discussed without a thorough understanding of ORS 107.105 (1)(f), which earlier provided in pertinent part:

   “Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

   ...(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all circumstances. A retirement plan or pension or an interest therein shall be considered as property. The court shall consider the contribution of a spouse as homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held. (Emphasis added).”

   a. Stated succinctly, there is a rebuttable presumption that property acquired during the marriage, even by way of gift or inheritance, is deemed to be owned equally by both spouses.

   b. However, this presumption is subject to rebuttal. Prior to the Olesberg decision, most practitioners presumed that a bequest from a third person to only one spouse served to rebut this presumption. That was, of course, until Olesberg came along.

2. The facts under the Olesberg case are as follows:

   a. In 2001, after 25 years of marriage, Dr. and Mrs. Olesberg separated.

   b. Dr. Olesberg was a dentist, his wife having helped him through school while she worked at Safeway. Dr. Olesberg’s parents also helped the parties financially during the embryonic years of their
marriage. After 9 years of marriage, when Dr. Olesberg’s dental practice finally started to produce sufficient income to support the family, Mrs. Olesberg quit working.

c. Shortly before the parties separated in 2001, Dr. Olesberg’s mother died. Dr. Olesberg’s inheritance from his mother was approximately $65,000. He immediately segregated the assets once his mother died and never commingled the funds with any marital assets. At the time of trial, the account balance had grown to $87,000.

d. The court was faced, inter alia, with a question regarding whether Dr. Olesberg’s inheritance was deemed a marital asset because it was “acquired” during the marriage. Dr. Olesberg conceded that, like any other acquisition during the marriage, his inheritance was subject to the rebuttable presumption of equal contribution under ORS 107.105(1)(f).

e. Dr. Olesberg argued, however, that under Kunze and Kunze, 337 OR 122, 92 P3d 100 (2004), the presumption of equal contribution is rebutted by evidence that the asset was acquired “free of any contributions from the other spouse.”

f. In Tsukamaki and Tsukamaki, 199 Or App 577, 112 P3d 416 (2005), the Oregon Court of Appeals held that a spouse may rebut the presumption of equal contribution regarding gifts by evidence that (i) the non-recipient spouse did not contribute to the acquisition of such gifted assets; and (ii) the non-recipient spouse was not the object of the transferor’s donative intent. The Court of Appeals in Olesberg therefore concluded that in order to rebut the presumption of equal contribution, husband had to show that wife did not contribute to the inheritance and that she was not the object of husband’s mother’s donative intent.

g. Mrs. Olesberg argued that because she and her husband provided money to his parents over the years, she somehow contributed to the inheritance. The court was not impressed with that argument.

h. The trial court found that because husband’s mother’s estate was divided in 3 ways between her 3 children, there was no donative intent from husband’s mother to wife. The Court of Appeals indicated, however, that there was no evidence husband’s mother intended wife not to benefit from the inheritance. “We agree with wife that to rebut the presumption of equal contribution, it is not sufficient to show simply that the inheritance devolved only to husband and his siblings in equal shares. The fact that the mother’s estate was divided three ways among her children does not establish that she had no intention to benefit wife, her daughter-in-law of 25 years. If that evidence were sufficient to overcome the presumption of equal contribution, the presumption would not only
be rendered meaningless, but it would also incorrectly place the burden on the nonrecipient spouse to rebut it.” Olesberg, supra at 503.

i. Is there something wrong with that? Why shouldn’t the wife have to rebut the presumption when there is no evidence that any other result was intended? The presumption would be rendered meaningless only as it applies to inheritances, and not other “acquisitions” by the parties during marriage.

ii. The court’s apparently flawed reasoning is further apparent from the fact that the mother’s will clearly evidence intent when she named only her son and not his wife. Wills need not specifically name unintended beneficiaries. The presumption should be satisfied when the will names only one of the two spouses.

i. The court ruled, quoting Wilson and Wilson, 155 Or. App. 512, 516-517, 964 P2d 1052 (1998) that a mere lack of evidence tending to reinforce the presumption is insufficient. In order to defeat the presumption, the husband had to provide affirmative evidence that his wife was not an object of the husband’s mother’s donative intent, and that no such affirmative evidence existed in the Olesberg case. The court therefore held that the presumption of equal contribution was not rebutted.

j. The court went on to provide that once the presumption of equal contribution is not rebutted, then the next question to be faced by the court is what constitutes a just and proper division of the inheritance. Citing Kunze and Kunze, 337 Or. 122, 92 P3d 100 (2004), the court held that a just and proper division of the inheritance is an equal division. Mrs. Olesberg was therefore awarded an equal share of Dr. Olesberg’s account which held the proceeds of the inheritance from his mother.

D. A Second Try: Erde vs. Shapiro.
On December 12, 2007, a judgment of dissolution was entered in connection with the marriage of Alison Erde and Matthew Shapiro, a Eugene couple. In the judgment of dissolution, the trial court held that the wife’s inheritances from both her mother and her sister, since occurring while the parties were married and living together, were subject to the ORS 107.105(1)(f) presumption of equal contribution. The judge ruled that the wife had not produced affirmative evidence to the effect that her husband was not an object of her mother’s or sister’s donative intent, concluding that the presumption of equal contribution was not rebutted. The judge ruled in favor of husband, providing an award in the amount of $200,000.
E. **Nuances of the Case.**
What is interesting to note in *Erde v Shapiro* is the fact that husband never exercised any control over funds to be received by the wife. In fact, the wife’s share of her mother’s estate was not distributed to her until after the husband and wife had separated. To further exacerbate the facts, the wife’s share of the sister’s estate had still not been distributed to her at the time the divorce trial ended.

1. The wife’s mother had been very secretive about her assets. In fact, she was actually on the waiting list for HUD housing at the time she died. The parties were shocked to learn that wife stood to inherit approximately $400,000.
2. The wife’s mother executed a holographic will and trust naming her 3 children as heirs and beneficiaries of her estate. Neither document mentioned any of the 3 children’s spouses.
3. Since the Will was not properly witnessed, it was held to be invalid and the wife’s mother died intestate.
4. Money inherited by wife from her mother was never used for family purposes and was always separately invested.
5. Shortly after the wife’s mother died, her sister died unexpectedly. The sister also died intestate. Under the laws of intestacy, the wife was entitled to 1/3 of sister’s estate.

F. **The Amicus Brief.**
On November 3, 2008, 11 practicing Oregon attorneys filed an Amicus Curiae brief in the *Erde v Shapiro* appeal. The intent of the Amici was to convince the court that the decision in *Olesberg* was incorrect, and that *Erde v Shapiro* should be reversed. The Amici relied upon the following arguments:

1. The *Olesberg* doctrine was contrary to the normal wishes of estate planning clients.
2. In the landmark case of *In re Jenks*, 294 OR. 236, 656 P2d 286 (1982), the Supreme Court held that if a gift passes to one spouse only, and the other spouse fails to establish that he or she was also an object of donative intent, then the recipient spouse has rebutted the presumption under ORS 107.105(1)(f).
3. Beginning in 1999, the Court of Appeals began to venture away from the clear ruling in *Jenks*, providing that there must be some type of affirmative evidence provided by the inheriting spouse. The Amici argued that this was often impossible to produce.
4. The result in *Olesberg* injected unintended persons as beneficiaries of estates and trusts, contrary to the intent of virtually all testators and settlors.
5. *Olesberg* was inconsistent with the wishes of most estate planning clients.
   a. The Amici argued that the presumption makes no sense, because it is contrary to normal practices and normal experience.
   b. The Brief went on to argue that this presumption was simply incorrect, when viewed in light of the thousands of wills and estate
planning meetings with clients that the Amici had held over an average of 30 years each.

6.  *Olesberg* contradicted legislative findings in Oregon’s intestate succession laws.
   a. Oregon intestate laws, which provide for children only (and not their spouses), were designed to be consistent with modern practices and distribution schemes.

7.  *Olesberg* contradicted Oregon will and trust law.
   a. Under Oregon law, one does not inherit unless one is a named beneficiary.
   b. Under ORS 112.227, a testator’s intent expressed in the will controls a legal effect of his or her dispositions.
   c. The Amicus Brief relied upon a long line of cases holding that if a settlor’s intent is plain from the face of a document, the court must enforce the trust or will by its terms, and cannot use extrinsic evidence to vary the plain meaning.

8. An ambiguity is only present when the words of the document are reasonably capable of more than one plausible interpretation. In the absence of an ambiguity, extrinsic evidence is inadmissible.

9. The structure of the estate plan in *Erde vs. Shapiro* was sufficient to rebut the presumption of equal contribution.
   a. The mother provided that if a child was deceased, his or her share went to his or her descendants.
   b. The child’s surviving spouse was never mentioned. This should provide adequate evidence of the intent of the mother not to include spouses of her children in her estate plan, even if she died intestate.

10. The Court of Appeals decision in *Olesberg* was inconsistent with prior rulings.
    a. The Amicus Brief pointed out a number of prior rulings of the court of appeals that were inconsistent, or, at the least, could not be reconciled with the *Olesberg* decision.

G. The Decision.
The Court of Appeals affirmed the *Olesberg* decision and held for the respondents in *Erde v Shapiro*, 234 Or App 218, 227 P3d 1242 (2010). As a result, inheritances were deemed to be marital property under Oregon law.

H. The Epilogue: SB 386.
Finally, the issue was settled by statutory change. With the approval and assistance of the Oregon State Bar Estate Planning Section and Family Law Sections, this author and a group of other attorneys drafted SB 386 which was submitted to the Oregon legislature during the 2011 session, and was later passed and signed by the Governor. The Bill removed from the rebuttable presumption of contribution any property received by a spouse as a gift, inheritance, bequest or
by operation of law or beneficiary designation. SB 381 provided that it is up to
the non-beneficiary spouse to prove that the gift or inheritance was marital
property. This does not preclude the non-beneficiary spouse from sharing in
the inheritance. It only removes the rebuttable presumption that an inheritance is
automatically deemed to be marital property.
1. In order to avoid the statute, however, the property must be maintained
separately and invested separately on a continuing basis by the beneficiary
spouse.
2. If commingling occurs, then the rebuttable presumption may well manifest
itself once again.
3. This leaves practitioners with an opportunity to plan effectively for their
clients. Practitioners should remember to always advise their clients to
continue to invest their inheritances separately, should they wish to keep
them safe in the event of a marital dissolution. This is especially true when
a premarital agreement is involved.

XII. Oregon Taxation of Out-of-State Property.
A. The Problem.
The exemption for OTax purposes is $1 million. However, residents from outside
the state of Oregon who own real property in Oregon may be forced to pay OTax,
even if the value of property they own in Oregon is far less than $1 million.
1. Presume John, a California resident, has a $5 million California taxable
estate. As part of his $5 million total, John owns a $500,000 home on the
Oregon coast.
a. The OTax return computes tax based upon the federal net taxable
estate, not the Oregon estate. As a result, on a $5 million taxable
estate, the OTax is $425,000
b. The Oregon pro-ration of tax, however, then comes into play. The
proration of tax is computed as follows: [federal estate tax value of
property located inside Oregon ÷ federal estate tax value of total
estate] x [total tax computed for Oregon purposes].
c. In John’s case, the computation is [$500,000 ÷ $5 million] x
[$425,000] = $42,500.
d. Therefore, even though John did not have sufficient assets to
comprise a taxable estate under Oregon law, tax is still assessed
under the computation set forth on the Oregon return.

B. Solutions to the Problem:
1. One solution would be to transfer the property to others immediately prior
to death, so that there is no property located in Oregon at death.
a. However, the transferor must be mindful of federal gift taxes in
this case.
b. This may or may not conform to the transferor’s estate plan.
2. The better solution is to transfer the property into an entity owned by the
transferor.
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a. For instance, the transferor could create a family LLC and transfer his or her interest in the Oregon real estate into the LLC. This could even be a single member LLC.

b. Similar arrangements could be undertaken with partnerships, trusts or corporations.

c. Under this arrangement, it is arguable that the decedent’s interest is no longer an interest in real property, but instead the interest is magically converted into an interest in intangible personal property. Under federal and Oregon law, personal property is taxable not in the state where the personal property is located, but in the state of the decedent’s primary domicile.

d. Therefore, under our example, if John transferred his Oregon beach home to an LLC, then at the subsequent death of John, a California decedent, he will have owned a personal property interest in the LLC, which itself owned the Oregon real property. However, John’s only ownership interest is an interest in intangible personal property, which is deemed to be located in the state of California. As a result, no OTax return would need to be filed, and no tax would be due.

e. This rule has not been tested in any recent case under Oregon law. However, it appears that the Department of Revenue is aware of this rule, and they have acquiesced in its application. This is because a recent attempt was made by representatives of the Oregon Department of Revenue to tax this intangible property for Oregon purposes as part of 2011 HB 2541. After some debate, it was determined that the rules should not be changed. Therefore, under HB2541, which became effective January 1, 2012, the state of Oregon will no longer tax intangible personal property of out-of-state decedents.

XIII. Oregon Domestic Partnerships.

A. Background.

The Oregon Domestic Partnership Act results from the Report of Task Force on Equality submitted to Governor Kulongoski on December 15, 2006. The task force was formed in response to Executive Order 06-03 issued by the governor, designed to evaluate new legislation necessary to guarantee that all Oregonians are adequately protected from discrimination in employment, housing, public accommodations and other opportunity regardless of sexual orientation or gender identity.

1. At the time the task force was issued, 17 states had enacted legislation protecting against discrimination based upon sexual orientation.

2. Based upon the findings of the task force, the following recommendations were made to the governor:
a. Recommendation 1: The public policy of the state of Oregon should prohibit discrimination based upon sexual orientation.

b. Recommendation 2: The state of Oregon should recognize same sex relationships in a manner that confers important rights, benefits and responsibilities on committed same sex couples. Citing the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Voting Rights Act of 1965, the Age Discrimination and Employment Act of 1967, and other numerous federal acts, the task force concluded “The federal government, which has adopted numerous civil rights laws in other areas, has shown little interest in establishing a national standard to protect gay, lesbian, bi-sexual and transgender persons from discrimination.”

3. Based upon its findings, the task force recommended that “a civil union” law, comparable to that adopted by the Vermont legislature effective January 1, 2001, is the best approach. The new law would provide same sex couples with rights, benefits and responsibilities comparable to those provided by marriage, without altering the traditional marriage definition. The task force recommended:

a. Civil unions should be available to two persons of the same sex who are both age 18 or older.

b. Civil unions should be prohibited for anyone who has a living spouse or civil union partner or between persons who are first cousins or nearer of kin to each other, whether of the whole blood, half blood or adoption.

c. A formal registration system for civil unions should be adopted.

d. The rights and responsibilities of partners to a civil union with respect to any child of whom either becomes the parent during the term of the civil union or is in legal custody of a partner during the term of the civil union are the same as those of a married couple with respect to a similar situated child, and the rights of the child are to be protected accordingly.

e. Dissolution of a civil union should be the same as dissolution of a marriage.

f. The partners entering into a civil union must both be Oregon residents.

3. And most notably, the Vermont statute’s inclusion of a non-exclusive list of legal benefits to civil unions is unnecessary and not recommended.

h. Finally, the task force recommended that civil union be addressed in a separate chapter of Oregon law, and not included in the marriage statutes.

4. The Oregon statute itself is found in ORS 106.300 et seq., the Oregon Domestic Partnership Act. It is the ambiguity laden through the statute that
creates the opportunity for numerous lawsuits and civil actions, and raises into question whether the law can be appropriately applied at all.

5. Section 2 of HB 2007, which is embodied in ORS 106.305(1), act provides “...it has long been the public policy of this state that discrimination against any of the citizens of this state is a matter of state concern that threatens not only the rights and privileges of the state’s inhabitants but menaces the institutions and foundation of a free democratic state. These fundamental principles are integral to Oregon’s constitutional form of government, to its guarantees of political and civil rights, and to the continued vitality of political and civil society in this state.”

6. Under ORS 106.305(7), the legislature recognized that the Oregon constitution limits marriage to the union of one man and one woman. The statute specifically does not intend to alter this definition; the legislature recognized that they could not bestow marital status on partners in a domestic partnership.

7. No ceremony of solemnization is required for the establishment of a domestic partnership. Individuals are left to solemnize their domestic partnerships in any way, either religious or otherwise, that they deem appropriate.

8. A domestic partnership is defined as:
   a. a civil contract entered into in person between two individuals;
   b. of the same sex;
   c. both of whom are at least 18 years of age;
   d. who are otherwise “capable”;
   e. at least one of whom is an Oregon resident.

9. A domestic partnership is void when:
   a. either of the parties to the domestic partnership has a living wife, partner, or husband;
   b. the partners are first cousins or nearer of kin to each other
      i. whether of the whole or half blood
      ii. whether by blood or adoption
      iii. However, first cousins by adoption only may be domestic partners.

10. If an individual is incapable of entering into the civil contract or consenting to the contract because of lack of capacity, or when consent is obtained by force or fraud, a domestic partnership is void once a judgment of a court of competent jurisdiction rules to that effect.

11. If individuals want to become domestic partners, they must complete and file a Declaration of Domestic Partnership with the county clerk. The clerk is required to maintain a domestic partnership registry and file all Declarations of Domestic Partnership. The clerk issues a Certificate of Registered Domestic Partnership to the partners.
12. Once a domestic partnership is established under Oregon law, neither of the partners may enter into a marriage or other domestic partnership with someone else unless a judgment of dissolution or annulment has been entered.

13. Domestic partners must pay a $25 fee to become registered under a Declaration of Domestic Partnership. Fees generated in connection with Declarations of Domestic Partnership are to be paid to the state director of human services to be credited to the domestic violence fund under Oregon law.

14. Each domestic partner is entitled to change his or her surname to that of his or her partner.

15. ORS 106.340 contains the guts of the Domestic Partnership Act. Basically, any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law, or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because that individual is or was a domestic partner or because the individual is or was, based upon a domestic partnership, related in a specified way to another individual.
   a. This basically means that a registered domestic partner is treated as a spouse under Oregon law for Oregon estate tax purposes.
   b. Therefore, the OSMP election, the Oregon QTIP rules and all other rules dealing with spouses in connection with the Oregon inheritance tax apply to domestic partners.

16. ORS 106.340(6) specifically provides that any benefit under a retirement or related plan to a domestic partner, if the plan administrator reasonably concludes that under federal law the plan will become disqualified for tax purposes, will be void under Oregon law. Nor does domestic partnership status apply to any benefit under ERISA.

17. It is also important to know that the Oregon laws applicable to wills, trusts, and estates are applied to the domestic partners just as they would apply to a spouse. Therefore, the rules regarding spousal elective share, intestacy, spousal support and other rules apply equally in domestic partnerships.
   a. With respect to tax issues, it appears that Oregon domestic partners will be entitled to the following rights:
      i. With respect to Oregon estate taxes, it appears a domestic partner will fully qualify for the OSMP deduction and the Oregon QTIP election at the death of the first partner. This mean gifts or bequests to domestic partners also qualify for the standard marital deduction.
         (A) This means that A/B estate planning methods should be employed for domestic partners who
choose to leave the lion’s share of their estate to their domestic partners.

(B) Care should be taken to ensure that federal estate taxes and Oregon estate taxes are charged against the “bypass” share.

(C) This could wipe out the Oregon bypass share, forcing Oregon tax at the first death, which would cut further into the OSMP share.

(D) This puts the computation of the marital deduction and any resulting Oregon estate tax into a simultaneous equation.

(E) Does a non-citizen partner who is an Oregon resident qualify for the OSMP deduction? In other words, would a qualified domestic trust be necessary, or is a QTIP sufficient?

(F) The law seems to provide that if individuals become Oregon domestic partners, and are relatives more remote than first cousins (or are first cousins by adoption only), leaving an estate to the person could exempt the estate from Oregon estate tax.

(G) It appears that this could create a plethora of “death bed domestic partnerships.”

(H) Domestic partners are entitled to inherit under the intestate laws, reducing Oregon estate tax.

(I) Joint tenancies and tenancies by the entirety created between domestic partners now qualify for the marital deduction.

(J) Direct bequests to a domestic partner appear to qualify for the marital deduction.

b. A conveyance of land to domestic partners will create a tenancy in common with rights of survivorship.

c. Upon the death of domestic partner, the surviving partner must consent to an autopsy and can direct disposition of remains. The surviving partner also has a vested right in interment in the burial plot of a deceased partner.

d. A partner can make an anatomical gift of the body parts of a deceased partner.

e. A child born during a domestic partnership is presumed to be a child of the mother’s partner.

i. This creates all kinds of interesting questions, because the child is also presumed to be the child of the biological father.

ii. This does not apply in the case of artificial insemination.
f. A domestic partner is an “heir” for purposes of intestate succession, and is entitled to either one-half or all of the intestate estate, depending upon whether the deceased partner has children from a prior relationship.

g. Entering into a domestic partnership agreement revokes the wills of both partners.

h. Termination of a domestic partnership revokes all provision in favor of the former partner.

i. A surviving domestic partner has preference to be named as personal representative.

j. A domestic partner is entitled to the spousal elective share under Oregon law.

k. Gifts to domestic partners are now subject to the marital deduction under IRC §2523 for Oregon tax purposes.

l. Domestic partners now have insurable interests in life insurance policyholders.

XIV. **Other Recent Changes.**


1. Last Four Digits: Amends provisions of Oregon Uniform Trust Code to require only the last four digits of a settlor’s social security number or a trust’s tax identification number which include:

   a. Petition to Determine Claims of Creditors of Settlor (ORS 130,355)

   b. Notice to Creditors and Dept. of Human Services (ORS 130.370)

   c. Certification of Trust (ORS 130.860)

   d. Applies to petitions, notices, and certifications after the effective date.

2. Purpose: Reduce possibility of identity theft.


1. Trust Modifications - Nonjudicial Settlement Agreements.

   a. **Unintended Modification:** Sections 6, 10 and 11 of the bill amend current law to correct an unintended change to Oregon law of trust modification. Prior to the OUTC, an irrevocable trust could be modified by the unanimous written agreement of the trustee and all the beneficiaries, even if the settlor had died.

   b. **Agreement Without Court Approval:** Under the new law, even though the settlor is deceased, a nonjudicial settlement agreement can be entered into by the beneficiaries and the trustee provided the agreement does not violate a material purpose of the trust.

      i. A Notice of Filing of Settlement Agreement or Memorandum may be filed with the circuit court and then served within five days after filing to all interested parties.
ii. If all interested parties waive the notice, the agreement is binding upon filing.

iii. Interested parties have 120 days to object to settlement.

iv. If no objections within 120 days, the agreement is binding.

v. If objections are filed, then the court will collect a hearing fee and schedule a hearing.

c. **Extending or Reducing Term of the Trust:** A provision was added to include the extension or reduction of the period of the trust as one of the matters that could be resolved by a nonjudicial settlement agreement if it does not modify the material purpose of the trust. (§ 6) (ORS 130.045)

2. Irrevocable Trust Modifications.

a. **Settlor Living:** The settlor and all beneficiaries with the approval of the court can modify or terminate an irrevocable trust even if it is inconsistent with a material purpose of the trust. (§ 11) (ORS 130.200(1)).

b. **All Beneficiaries Consent:** Irrevocable trust can be modified or terminated with court approval only if it is not inconsistent with a material purpose of the trust. (§ 11) (ORS 130.200(2)).

c. **Not All Beneficiaries Consent:** Irrevocable trust can be modified or terminated with court approval only if it is not inconsistent with a material purpose of the trust and the beneficiaries who do not consent are adequately protected. (§ 11) (ORS 130.200(5)).

d. **Binding Nonjudicial Settlement Agreement:** A binding nonjudicial settlement agreement relating to modification or termination of a trust may be entered into by all interested persons, as defined in ORS 130.045, without court approval. (§ 11) (ORS 130.200(6)).

e. **Material Purpose Modifications:** Court approval is necessary and can only occur while settlor is living. (§ 11) (ORS 130.200(1)).

3. **Notice Changes**

a. **Trust Terminations** (non-waivable notice requirement): Notice of termination of trust must be provided to qualified beneficiaries and designated persons, and it only applies to reports issued after the effective date of this bill (§§ 2 & 3) (ORS 130.020).

b. **Token Beneficiaries.**

i. If a beneficiary’s only interest in the trust is a specific property item or specific amount of money and the trustee has completed the distribution of those specific items within 6 months after the trust becomes irrevocable, then the trustee does not need to notify the “token” beneficiary of the trustee’s report of the trust identity, annual report or termination report.
ii. The trustee’s reporting obligation changes become effective when a trust becomes irrevocable after the effective date of this law.

iii. If a distribution is not made within 6 months, then the “token beneficiary” is entitled to the same reports as a qualified beneficiary. (§§ 18 & 19) (ORS 130.710)

c. Judicial Proceedings: must provide notice “in the manner required by statute for the approval of the final account in a decedent’s estate.” The more informal methods of ORS 130.035(1) through (3) are not allowed. (§ 4) (ORS 130.035)

4. Trust Advisor (§§ 20 & 21)—new provision—not a technical correction.

a. Current Situation: Frequently, a settlor would like to appoint an individual or a corporate fiduciary as a trustee, but would like another individual to have the responsibility for certain limited decisions, such as a trust protector, a financial advisor to invest trust assets or a distribution advisor to determine when and how discretionary trust distributions should be made. Under current law, the trustee is ultimately responsible for the advisor’s decisions, which can result in administrative delays and increased expense if the advisor and the trustee do not agree.

b. New Law: After the effective date, a settlor, in the trust agreement, may appoint a person to act as advisor for the purpose of directing a trustee or approving trust decisions. (§§ 20 & 21)

c. Fiduciary Capacity: Unless the trust instrument provides otherwise, the advisor shall exercise his or her duties in a fiduciary capacity.

d. Specific Statutory Reference Necessary: Such an appointment must be made by specific reference to this section in the trust instrument.

i. PRACTICE NOTE: Any trust agreement with advisor provisions must specifically reference this statute and is not effective until 1/1/2010.

ii. IRREVOCABLE TRUSTS: If the interested parties of an irrevocable trust currently in existence want to add advisor provisions or already have advisor provisions, the parties must seek a trust modification to add the specific statutory reference.

(A) Material Modification: Not sure.

e. Trustee Liability Limitation: An advisor can make the decisions outlined in the trust agreement and the trustee need not review those decisions and is not liable for the acts of the advisor (except in cases of “reckless indifference” on the part of the trustee).

i. Litigation Question: What constitutes “reckless indifference”?
f. **Trustee Decision Requires Advisor Approval:** If the trust agreement requires the trustee to obtain an advisor’s approval and the trustee does not receive a response within a reasonable period of time, the trustee is not liable for any direct or indirect loss resulting from that decision, unless the decision constitutes “reckless indifference.”

g. **Trustee - No Duty to Monitor Advisor:** Unless the trust agreement provides otherwise, the trustee has no duty to

i. Monitor the advisor;

ii. Advise the advisor;

iii. Consult with the advisor; or

iv. Give notice to any beneficiary or third party of any advisor decisions that the trustee would have decided differently.

h. **Trustee - Following Advisor Directions:** Absent clear and convincing evidence to the contrary, all actions by the trustee in carrying out the directions of the advisor are deemed presumed to be administrative. Administrative actions taken by the trustee to implement the directions of the advisor do not constitute monitoring the advisor or participating in decisions within the scope of the advisor’s authority.

5. **OUTC Technical Corrections**

a. Clarify the term “charitable trust” so that it is consistent throughout OUTC (§§ 1, 5, 9, 11 and 12).

b. Clarify that ORS sections 130.520 through 130.575 concerning a revocable trust continue to apply even though the trust cannot be revoked due to the incompetency or incapacity of the settler (§ 16).

c. Change the “marital deduction” tie-in date for section 2056 of the Internal Revenue Code from 1/1/06 to 1/1/08 (§ 14).

i. Remember, the Oregon estate tax tie-in date is now December 31, 2010.

d. Correct a typographical error in Oregon’s “cy pres” doctrine, the law dealing with a court’s power to amend a charitable trust due to changed circumstances (§ 13).

e. Clarify that the circuit court has jurisdiction over all trust matters except the summary determination of a claim, which must be commenced in probate court (§§ 7 and 15).

C. **Uniform Principal and Income Act 2011 SB 287.**

1. **Amend ORS 129.355:**

a. This amendment allows IRA and retirement distributions to a marital deduction trust to qualify for QTIP treatment under the IRS safe harbor provisions. Existing trust law, the ‘Revised Uniform Principal and Income Act’, requires a trust to be administered, as specified in the instrument or local state law, if silent, with due regard to the respective interests of defined income and remainder
beneficiaries. Prior to this amendment, ORS 129.355(1)(a) “payment” was defined to mean a payment that a trustee “may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments . . . including a private or commercial annuity, an individual retirement account and a pension, profit sharing, stock bonus or stock-ownership plan.”

b. This revision requires a trustee to separately account for a private or commercial annuity, an individual retirement account and a pension, profit sharing, stock bonus or stock-ownership plan. The revised definition for “payment” also includes any payment from a “separate fund”, as described, and further requires the trustee to allocate the internal income from any separate fund to income, thus protecting the estate tax marital deduction for the trust, in accordance with prescribed federal requirements.

c. Also, this amendment revises the requirements for determining the amount of a payment that is required to be allocated to income for purposes of qualifying for a marital tax deduction under federal law, as specified, and for calculating the amount of tax required to be paid by a trustee based on income, as determined by receipts allocated to income for the year.

d. For purposes of the marital tax deduction, the amendment requires the trustee to determine, if the separate fund payer provides documentation reflecting the internal income of the separate fund to the trustee, that the internal income of each separate fund be allocated for the accounting period as if the separate fund were a trust subject to the proposed revision, except as provided.

e. The amendment requires the trustee to allocate the balance of the payment to principal. Naming the marital trust as the IRA or plan beneficiary ensures that any principal not distributed to the surviving spouse is accumulated and is available to pass to the designated remainder beneficiaries upon the death of that spouse.

2. Amend ORS 129.420.

a. The amendment no longer places the trustee in the difficult position of how to pay the trust’s tax liabilities when a cash distribution received from an entity is not sufficient, as well as how to satisfy the required income distribution amount to the income beneficiary. This amendment makes it clear that a trustee of a mandatory income trust may in fact pay some or all of the tax liability on the trust’s share of the entity’s taxable income from income or principal receipts from the pass-through entity. It further clarifies that the trustee is required to increase current year income distributions to the income beneficiary to the extent that the trust’s
income tax liability is reduced by distributing the corresponding income receipts to the beneficiary.

b. This amendment contains an algebraic formula that should be used because the trust’s tax liability and amounts distributed to the beneficiary are interrelated. The formula, when properly implemented, supports the trustee’s actions that after deducting the proper income distributions paid to the beneficiary, the remaining cash is sufficient to satisfy the trust’s tax liability on its share of the entity’s taxable income as reduced by the tax deduction of the income distribution(s).

c. For income tax purposes, the amount of income required to be distributed by a trustee is based upon the current year’s trust income as determined by fiduciary accounting income, generally following statutory state law provisions. This amendment provide greater clarity and consistency for trusts administered under Oregon law.

D. Safe Deposit Box Bill 2011 SB 414.
Provides that upon delivery of small estate affidavit to person that controls access to personal property belonging to estate of decedent, including financial institution with safe deposit box, access must be provided to property.
1. If it is known that a Decedent was the last/only lessee on a safe deposit box, prior to filing a Small Estate Affidavit, Affiant must first request an inventory of the box and must include the value of the inventory in the box on the affidavit.
2. If it is discovered after an Affidavit is filed that the Decedent was the last/only lessee on a safe deposit box, then Affiant must request an inventory of the box and depending on value, either amend affidavit or move to full probate.
3. If a person transfer property belonging to Decedent to Affiant after being presented the Affidavit at least 10 days after it was filed with the court, is released from liability.
4. A person named as Trustee of Decedent’s Trust may petition as Affiant.

E. Health Care Decision Bill 2011 SB 579B.
Allows hospital to appoint health care provider and ethics committee to make health care decisions on behalf of patient incapable of making and communicating health care decisions.

F. Uniform Real Property Transfer on Death Act 2011 SB 815.
Authorizes owner of real property to use transfer on death deed to pass real property outside of probate at owner's death.

This new law provides that Oregon will no longer tax intangible property held by the estates of nonresident decedents. That is, for non-resident decedent estates, only the value of real property and personal property located in Oregon will be subject to Oregon’s estate tax. Resident decedents will continue to be taxed on
their intangible property (wherever it is located), unless it is subject to a death tax in another state or country. The reasons for no longer taxing intangibles of nonresident decedents include the following:

1. It is tremendously complex and impractical to try to define what types of intangibles Oregon would tax because by definition intangibles do not have a readily ascertainable location;
2. Taxes from intangible property provide little revenue to the state;
3. Such a tax is nearly impossible to enforce due to the often complex ownership interests involved;
4. No other western state taxes the intangibles of nonresident decedents’ estates;
5. There is a potential state business investment disadvantage with trying to tax such intangibles; and
6. It is easily susceptible to double taxation and litigation because unlike real property and personal property, the location of an intangible is often difficult to determine.

To complete this policy change, the new law repeals the confusing reciprocal exemption of intangible personal property provision in ORS 118.010(4)(b) and deletes the phrase “and intangible personal property located in Oregon” in present ORS 118.010(4)(a). The administrative rule, OAR 150-118.010(4)(b), will also need to be repealed. The reciprocal provision had long lost its meaning and become the subject of confusion because more and more states have no effective estate tax due because of the repeal of the state death tax credit but still have an estate tax in their law. Lastly, the new law deletes confusing “within the jurisdiction of the state” language in ORS 118.010(1) and instead the new law focuses on domicile of the decedent and location of the property of the decedent to determine what property is subject to Oregon’s estate tax.

H. Income Tax issues.

1. Federal Tax Increases. In 2013, ordinary income rates increased to a maximum 39.6% from 35%, Long Term Capital Gains increased to 20% and Qualified Dividends increased to 39.6%. In addition a new Surcharge Tax for Medicare, the net investment income tax, was implemented at 3.8% for certain investment income on high income tax payers. The increase in income and capital gains rates, combined with the higher federal estate tax threshold, dramatically alters the conversation when a client is considering giving an asset away during his or her lifetime versus passing the asset on at death. Many practitioners spent decades working with clients to move assets out of the taxable estate, as their clients feared the harsh federal estate tax. Today, the federal exclusion amount is almost eight times as high as it was in 2001 and the top federal estate tax rate has dropped by 15%. As a result, in many cases, the client is better served holding the asset until death so that family members can receive the step-up in basis at the client’s death.
2. **2015 Federal Income Tax Rates:**

**Single Filing Status**
- 10% on taxable income from $0 to $9,075, plus
- 15% on taxable income over $9,075 to $36,900, plus
- 25% on taxable income over $36,900 to $89,350, plus
- 28% on taxable income over $89,350 to $186,350, plus
- 33% on taxable income over $186,350 to $405,100, plus
- 35% on taxable income over $405,100 to $406,750, plus
- 39.6% on taxable income over $406,750.

**Married Filing Jointly or Qualifying Widow(er)**
- 10% on taxable income from $0 to $18,150, plus
- 15% on taxable income over $18,150 to $73,800, plus
- 25% on taxable income over $73,800 to $148,850, plus
- 28% on taxable income over $148,850 to $226,850, plus
- 33% on taxable income over $226,850 to $405,100, plus
- 35% on taxable income over $405,100 to $457,600, plus
- 39.6% on taxable income over $457,600.

**Married Filing Separately**
- 10% on taxable income from $0 to $9,075, plus
- 15% on taxable income over $9,075 to $36,900, plus
- 25% on taxable income over $36,900 to $74,425, plus
- 28% on taxable income over $74,425 to $113,425, plus
- 33% on taxable income over $113,425 to $202,550, plus
- 35% on taxable income over $202,550 to $228,800, plus
- 39.6% on taxable income over $228,800.

**Head of Household Filing**
- 10% on taxable income from $0 to $12,950, plus
- 15% on taxable income over $12,950 to $49,400, plus
- 25% on taxable income over $49,400 to $127,550, plus
- 28% on taxable income over $127,550 to $206,600, plus
- 33% on taxable income over $206,600 to $405,100, plus
- 35% on taxable income over $405,100 to $432,200, plus
- 39.6% on taxable income over $432,200.

**Long-term gains and qualified dividends taxed at**
- 0% if taxable income falls in the 10% or 15% marginal tax brackets
- 15% if taxable income falls in the 25%, 28%, 33%, or 35% marginal tax brackets
- 20% if taxable income falls in the 39.6% marginal tax bracket
- 25% on Depreciation Recapture
• 28% on Collectibles
• 28% on qualified small business stock after exclusion

Net Investment Income
3.8% on the lower of net investment income or modified adjusted gross income over the following thresholds:
• Married Filing Jointly or Qualifying Widow(er): $250,000
• Single or Head of Household: $200,000
• Married Filing Separately: $125,000

Taxation of Trusts:
• 15% on taxable income from $0 to $2,500, plus
• 25% on taxable income over $2,500 to $5,800, plus
• 28% on taxable income over $5,800 to $8,900, plus
• 33% on taxable income over $8,900 to $12,150, plus
• 39.6% on taxable income over $12,150.
Chapter 4

Probate Modernization Update

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ORS CHAPTER 111

SECTION 1. ORS 111.005, as amended by section 1, chapter 42, Oregon Laws 2016, is amended to read:

111.005. As used in ORS chapters 111, 112, 113, 114, 115, 116 and 117, unless the context requires otherwise:

(1) “Abate” means to reduce a devise on account of the insufficiency of the estate to pay all claims, expenses and devises in full.

(2) “Action” includes suits and legal proceedings.

(3) “Administration” means any proceeding relating to the estate of a decedent, whether the decedent died testate, intestate or partially intestate.

(4) “Advancement” means a gift by a decedent to an heir or devisee with the intent that the gift satisfy in whole or in part the heir's share of an intestate estate or the devisee’s share of a testate estate.

(5) “Assets” includes real, personal and intangible property.

(6) “Claim” includes liabilities of a decedent, whether arising in contract, in tort or otherwise.

(7) “Court” or “probate court” means the court in which jurisdiction of probate matters, causes and proceedings is vested as provided in ORS 111.075.

(8) “Decedent” means a person who has died.

(9)(a) “Descendant” means a person who is descended from a specific ancestor and includes an adopted child and the adopted child’s descendants.

(b) When used to refer to persons who take by intestate succession, “descendant” does not include a person who is the descendant of a living descendant.

(10) “Deive,” when used as a noun, means property disposed of by a will.

(11) “Deive,” when used as a verb, means to dispose of property by a will.

(12) “Dveisee” means a person designated in a will to receive a devise.
(13) “Distributee” means a person entitled to any property of a decedent under the will of the decedent or under intestate succession.

(14) “Domicile” means the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return.

(15) (a) “Estate” means the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment, substitutions or otherwise, augmented by any accretions or additions or diminished by any decreases or distributions.

(b) “Estate” includes tangible and intangible personal property of a decedent domiciled in Oregon, wherever the property is situated.

(16) “Funeral” includes the burial or other disposition of the remains of a decedent, any plot or tomb and other necessary incidents to the disposition of the remains, any memorial ceremony or other observance and related expenses.

(17) “General devise” means a devise chargeable generally on the estate of a testator so that the devise is not distinguishable from other parts of the estate and does not constitute a specific devise.

(18) “Heir” means any person who is or would be entitled under intestate succession to property of a person upon that person’s death.

(19) “Interested person” includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent that may be affected by the proceeding. “Interested person” also includes fiduciaries representing interested persons.

(20) “Intestate” means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will, effectively disposing of all the estate.

(21) “Intestate succession” means succession to property of a decedent who dies intestate or partially intestate.

(22) “Issue” means a descendant or descendants.

(23) “Net estate” means the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

(24) “Net intestate estate” means any part of the net estate of a decedent not effectively disposed of by the will.

(25) “Personal property” includes all property other than real property.

(26) “Personal representative” includes executor, administrator, administrator with will annexed and administrator de bonis non, but does not include special administrator.

(27) “Property” includes both real and personal property.

(28) “Real property” includes all legal and equitable interests in land, in fee and for life.

(29) “Settlement” includes, as to the estate of a decedent, the full process of administration, distribution and closing.

(30) “Specific devise” means a devise of a specific thing or specified part of the estate of a testator that is so described as to be capable of identification. A specific devise is a gift of a part of the estate identified and differentiated from all other parts.

(31) “Will” includes codicil and also includes a testamentary instrument that merely appoints [an executor] a personal representative or that merely revokes or revives another will.

SECTION 2. ORS 111.085 is amended to read:
111.085. (1) The jurisdiction of the probate court includes, but is not limited to:
[(1)] (a) Appointment and qualification of personal representatives.
[(2)] (b) Probate and contest of wills.
[(3)] (c) Determination of heirship.
[(4)] (d) Determination of title to and rights in property claimed by or against personal representatives, guardians and conservators.
[(5)] (e) Administration, settlement and distribution of estates of decedents.
[(6)] (f) Construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding.
Guardianships and conservatorships, including the appointment and qualification of guardians and conservators and the administration, settlement and closing of guardianships and conservatorships.

Supervision and disciplining of personal representatives, guardians and conservators.

Appointment of a successor testamentary trustee where the vacancy occurs prior to, or during the pendency of, the probate proceeding.

(2) The distributees of an estate administered in Oregon are subject to the jurisdiction of the courts of Oregon regarding any matter involving the distributees’ interests in the estate. By accepting a distribution from an estate, the distributee submits personally to the jurisdiction of the courts of this state regarding any matter involving the estate.

(3) This section does not preclude other methods of obtaining jurisdiction over a person to whom assets are distributed from an estate.

SECTION 3. ORS 111.215 is amended to read:

111.215. (1) Except as otherwise specifically provided in ORS chapters 111, 112, 113, 114, 115, 116 and 117, whenever notice is required to be given of a hearing on any petition or other matter upon which an order or judgment is sought, the petitioner or other person filing the matter shall cause notice of the date, time and place of the hearing to be given to each person interested in the subject of the hearing or to the attorney of the person, if the person has appeared by attorney or requested that notice be sent to the attorney of the person, in any one or more of the following ways and within the following times:

(a) By mailing a copy of the notice addressed to the person or the attorney of the person at least 14 days before the date set for the hearing.

(b) By delivering a copy of the notice to the person personally or to the attorney of the person at least five days before the date set for the hearing.

(c) If the address of any person is not known or cannot be ascertained with reasonable diligence, by publishing a copy of the notice once in each of three consecutive weeks in a newspaper of general circulation in the county where the hearing is to be held, the last publication of which shall be at least 10 days before the date set for the hearing.

(2) Upon good cause shown the court may change the requirements as to the method or time of giving notice for any hearing. The court may authorize notice by electronic means under this subsection.

(3) Proof of the giving of notice must be made at or before the hearing and filed in the proceeding.

(4) The Department of Human Services and the Oregon Health Authority may adopt rules allowing for the department or authority to accept electronic notice in lieu of the notice required under subsection (1) of this section.

ORS CHAPTER 113

SECTION 4. ORS 113.005, as amended by section 20, chapter 42, Oregon Laws 2016, is amended to read:

113.005. (1) If, prior to appointment and qualification of a personal representative, property of a decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject.

[2] The special administrator shall qualify by filing a bond in the amount set by the court, conditioned upon the special administrator faithfully performing the duties of the trust.]

(2)(a) Except as provided in section 6 of this 2017 Act, the special administrator may not act, and letters may not be issued to the special administrator, until the special administrator provides a bond to the clerk of the court. The bond must be for the security and
benefit of all interested persons and must be conditioned upon the special administrator faithfully performing the duties of the position. The bond must be executed by a surety qualified under ORCP 82 D to G.

(b) The amount of the bond set by the court under this subsection must be adequate to protect interested persons. In setting the amount of the bond, the court shall consider:
   (A) The nature, liquidity and apparent value of the property subject to administration.
   (B) The anticipated income during administration.
   (C) The probable indebtedness and taxes.

3. The court may authorize the special administrator [may] to:
   (a) Arrange for and incur expenses for the funeral of the decedent [in a manner suitable to the condition in life of the decedent];
   (b) Incur expenses for the protection of [the] property of the estate; and
   (c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(c) Administer property of the estate.

4. The special administrator [shall] may not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in danger of loss, injury or deterioration pending the appointment of a personal representative.

5. Upon the appointment and qualification of a personal representative the powers of the special administrator [shall] cease. Within 30 days after the issuance of letters testamentary or letters of administration to a personal representative, the special administrator shall make and file an account and deliver to the personal representative the assets of the estate in the possession of the special administrator. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account.

6. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by the special administrator, including a reasonable fee of the attorney of the special administrator, shall be paid as expenses of administration.

SECTION 5. Section 6 of this 2017 Act is added to and made a part of ORS chapter 113.

SECTION 6. (1) A special administrator is not required to provide a bond to the court under ORS 113.005 (2) if a will provides that no bond is required of the person appointed as special administrator, but the court may, for good cause, require a bond notwithstanding any provision in a will that no bond is required.

(2) Upon a request by the special administrator, the court may waive the requirement of a bond if:
   (a) The request states the reasons why the waiver is requested; and
   (b) The request describes the known creditors of the estate, if the special administrator will administer property of the estate.

(3) Upon a request by the special administrator, the court may waive or reduce the requirement of a bond if the court orders the special administrator to provide written confirmation from a financial institution that property of the estate is held by the financial institution subject to withdrawal only on order of the court.

SECTION 7. ORS 113.035 is amended to read:

113.035. Any interested person or [executor] the person nominated as personal representative named in the will may petition for the appointment of a personal representative and for the probate of a will. The petition [shall] must include the following information, so far as known:

1. The name, age, domicile, post-office address[,] and date and place of death[, and Social Security account number or taxpayer identification number] of the decedent.

2. Whether the decedent died testate or intestate.

3. The facts relied upon to establish venue.

4. The name and post-office address of the person nominated as personal representative and the facts that show the person is qualified to act.
(5) The names, relationship to the decedent and post-office addresses of persons who are or would be the heirs of the decedent upon the death of the decedent intestate, and the ages of any who are minors.

(6) A statement that reasonable efforts have been made to identify and locate all heirs of the decedent. If the petitioner knows of any actual or possible omissions from the list of heirs, the petition must include a statement indicating that there are omissions from the information relating to heirs.

(7) If the decedent died testate, the names and post-office addresses of the devisees, and the ages of any who are minors. If the will devises property to a person who did not survive the decedent or who is otherwise not entitled to receive the devise, the petition must include a statement explaining why the devise failed. If the petitioner knows of any actual or possible omissions from the list of devisees, the petition must include a statement indicating that there are omissions from the information relating to devisees.

(8) The name and post-office address of any person asserting an interest in the estate, or on whose behalf an interest has been asserted, based on a contention that:
   (a) The will alleged in the petition to be the will of the decedent is ineffective in whole or part;
   (b) There exists a will that has not been alleged in the petition to be the will of the decedent;
   or
   (c) The decedent agreed, promised or represented that the decedent would make or revoke a will or devise, or not revoke a will or devise, or die intestate.

(9) The name and post-office address of any person asserting an interest in the estate, or on whose behalf an interest has been asserted, based on a contention that a parent of the decedent willfully deserted the decedent or neglected without just and sufficient cause to provide proper care and maintenance for the decedent, as provided by ORS 112.047.

(10) Whether the original of the last will of the decedent is in the possession of the court or accompanies the petition. If the original will is not in the possession of the court or accompanying the petition and an authenticated copy of the will probated in another jurisdiction does not accompany the petition, the petition shall also state the contents of the will and indicate that it is lost, destroyed or otherwise unavailable and that it was not revoked.

(11) A statement of the extent and nature of assets of the estate, to enable the court to set the amount of bond of the personal representative.

SECTION 8. Section 9 of this 2017 Act is added to and made a part of ORS chapter 113.

SECTION 9. (1) A petition for the appointment of a personal representative under ORS 113.035 may include a request for the compensation of the personal representative to be determined by a different method than as provided in ORS 116.173 (3). The petition must set forth specific facts showing that the compensation calculated under ORS 116.173 (3) would be inadequate to compensate the personal representative for the reasonable value of the personal representative’s services. The court may grant the request if the court finds that compensation as provided in ORS 116.173 (3) would be inadequate.

(2) If the petition includes a request for a different method of compensation under this section:
   (a) The petitioner shall give notice and a copy of the petition to the distributees of the estate, the Department of Human Services and the Oregon Health Authority. The notice shall allow 20 days for filing objections to the petition unless the court allows a different time.
   (b) A judgment appointing a personal representative under ORS 113.035 may not be entered until the court has held a hearing on the petition including the request or the time for filing objections to the petition has expired without an objection being filed.

(3) If the court allows the petitioner’s request for a different method of compensation under this section, the personal representative may, at any time prior to or at the time of the filing of the final account or the statement in lieu of the final account under ORS 116.083, elect to be compensated as provided in ORS 116.173 (3).
(4) Failure by the department, the authority or a distributee to object to a request for a different method of compensation under this section does not preclude the department, the authority or a distributee from objecting to the amount of the personal representative's compensation set forth in the final account filed under ORS 116.083 on the basis that the compensation exceeds the reasonable value of the services actually provided by the personal representative.

SECTION 10. ORS 113.045 is amended to read:
ORS 113.045. (1) Upon appointment, a personal representative shall deliver or mail to [an estate administrator of] the Department of State Lands [appointed under ORS 113.235] a copy of the petition filed under ORS 113.035, and a copy of any last will of the decedent, if the personal representative has not identified and found all heirs and devisees of the decedent. The personal representative shall file proof of the delivery or mailing with the court.

(2) If at any time after the appointment of a personal representative it appears that any heir or devisee of the decedent cannot be identified and found, the personal representative shall promptly deliver or mail to [an estate administrator of] the Department of State Lands [appointed under ORS 113.235] a notice indicating that an heir or devisee cannot be identified and found. The personal representative shall file proof of the delivery or mailing with the court.

(3) This section does not affect the requirements of ORS 113.085 [(2)] (3).

SECTION 11. ORS 113.055 is amended to read:
ORS 113.055. (1) Upon [an ex parte hearing] the ex parte review of a petition for the probate of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching the affidavit to the will or to a photographic or other facsimile copy of the will[,] and may identify the signature of the testator and witnesses to the will by use of the will or the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at or after the time of execution of the will [or at any time thereafter].

(2) However, upon motion of any person interested in the estate filed within 30 days [after the order admitting the will to probate is made] from the date the personal representative first delivers or mails information under ORS 113.145 (1), the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken.

(3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will or of probate [thereof] of the will in solemn form, proof of any facts shall be made in the same manner as in an action tried without a jury.

SECTION 12. ORS 113.075 is amended to read:
ORS 113.075. (1) Any interested person may contest the probate of the will or the validity of the will or assert an interest in the estate for the reason that:
(a) The will alleged in the petition for probate to be the will of the decedent is ineffective in whole or part;
(b) There exists a will that has not been alleged in the petition to be the will of the decedent; or
(c) The decedent agreed, promised or represented that the decedent would make or revoke a will or devise, or not revoke a will or devise, or die intestate.

(2) An action described in subsection (1) of this section [shall] must be commenced by the filing of a petition in the probate proceedings, except that an action described in subsection (1)(c) of this section may be commenced by the filing of a separate action in any court of competent jurisdiction.

(3) An action described in subsection (1) of this section [shall] must be commenced before the later of:
(a) Four months after the date of delivery or mailing of the information described in ORS 113.145 if that information was required to be delivered or mailed to the person on whose behalf the [petition] action under subsection (1) of this section is filed; or

(b) Four months after the first publication of notice to interested persons if the person on whose behalf the [petition] action under subsection (1) of this section is filed was not required to be named in the petition for probate as an interested person.

(4)(a) A person who commences an action under subsection (1) of this section shall give notice of the action to heirs and devisees identified in the petition for probate or amended petition for probate, and to the Department of State Lands if the personal representative has delivered or mailed information to the department under ORS 113.045.

(b) If any devisee under the contested will is a charitable trust as described in ORS 130.170, a public benefit corporation as defined in ORS 65.001 or a religious organization, a person who commences an action under subsection (1) of this section shall give notice to the Attorney General of the action.

[(4)] (5) A cause of action described in subsection (1)(c) of this section shall may not be presented as a claim under ORS chapter 115.

SECTION 13. ORS 113.085 is amended to read:

113.085. (1) Except as provided in subsection [(2)] (3) of this section, upon the filing of the petition under ORS 113.035, if there is no will or if there is a will and it has been proved, the court shall appoint a qualified person [it] the court finds suitable as personal representative, giving preference in the following order:

(a) The personal representative named in the will.

(b) If the surviving spouse of the decedent is a distributee of the estate, the surviving spouse of the decedent or the nominee of the surviving spouse of the decedent.

[(c) The nearest of kin of the decedent or the nominee of the nearest of kin of the decedent.] (c) If the person is a distributee of the estate, a person who would be entitled to property of the decedent under intestate succession.

(d) Any other distributee of the estate.

[(d)] (e) The Director of Human Services or the Director of the Oregon Health Authority, or an attorney approved under ORS 113.086, if the decedent received public assistance as defined in ORS 411.010, received medical assistance as defined in ORS 414.025 or received care at an institution described in ORS 179.321 (1) and it appears that the assistance or the cost of care may be recovered from the estate of the decedent.

[(e)] (f) The Department of Veterans’ Affairs, if the decedent was a protected person under ORS 406.050 (10), and the department has joined in the petition for such appointment.

[(f)] (g) Any other person.

(2) Before the court appoints a personal representative under subsection (1)(b) to (g) of this section, the court may require the petitioner to make a reasonable attempt to notify persons of higher priority than the proposed personal representative under subsection (1)(b) to (g) of this section.

[(2)] (3) Except as provided in subsection [(3)] (4) of this section, the court shall appoint the Department of State Lands as personal representative if it appears that the decedent died wholly intestate and without known heirs. The Attorney General shall represent the Department of State Lands in the administration of the estate. Any funds received by the Department of State Lands in the capacity of personal representative may be deposited in accounts, separate and distinct from the General Fund, established [with] in the State [Treasurer] Treasury. Interest earned by such account shall be credited to that account.

[(3)] (4) The court may appoint a person other than the Department of State Lands to administer the estate of a decedent who died wholly intestate and without known heirs if the person filing a petition under ORS 113.035 attaches written authorization from [an estate administrator of] the Department of State Lands [appointed under ORS 113.235] approving the filing of the petition by the person. Except as provided by rule adopted by the Director of the Department of State Lands, [an
estate administrator] the department may consent to the appointment of another person to act as personal representative only if it appears after investigation that the estate is insolvent.

SECTION 14. ORS 113.095 is amended to read:

113.095. A person is not qualified to act as personal representative if the person is:

(1) An incompetent.
(2) A minor.
(3) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.
(4) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against the person, until the person is reinstated.
(5) A licensed funeral service practitioner unless the decedent was:
(a) A relative of the licensed funeral service practitioner; or
(b) A licensed funeral service practitioner who was a partner, employee or employer in the practice of the licensed funeral service practitioner who is petitioning for appointment as personal representative.

SECTION 15. ORS 113.105 is amended to read:

113.105. (1) Unless a testator provides in a will that no bond shall be required of the executor of the estate, or unless the personal representative is the sole heir or devisee or is the Department of State Lands, the Department of Veterans’ Affairs, the Director of Human Services, the Director of the Oregon Health Authority or an attorney approved under ORS 113.086, the personal representative may not act nor shall letters be issued to the personal representative until the personal representative files with the clerk of the court a bond. The bond shall be executed by a surety company authorized to transact surety business in this state, or by one or more sufficient personal sureties approved by the court. A personal surety must be a resident of this state. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required. The bond shall be for the security and benefit of all interested persons and shall be conditioned upon the personal representative faithfully performing the duties of the trust.

(1)(a) Except as provided in subsections (2) to (4) of this section, the personal representative may not act, and letters may not be issued to the personal representative, until the personal representative provides a bond to the clerk of the court. The bond must be for the security and benefit of all interested persons and must be conditioned upon the personal representative faithfully performing the duties of the position. The bond must be executed by a surety qualified under ORCP 82 D to G.

(2) (b) The amount of the bond set by the court [shall] under this subsection must be adequate to protect interested persons,[ but in no event shall it be less than $1,000]. In setting the amount of the bond, the court shall consider:

(a) (A) The nature, liquidity and apparent value of the assets of the estate.
(b) (B) The anticipated income during administration.
(c) (C) The probable indebtedness and taxes.

(3) Nothing in this section affects the provisions of ORS 709.240, relating to a trust company acting as personal representative.

(4) Notwithstanding any other provisions of this section, a court may, in its discretion, waive the requirement of a bond if all devisees and heirs known to the court agree in writing that the requirement be waived and the signed agreement is filed with the court at the time of filing of the petition for the appointment of a personal representative.

(2) Subsection (1) of this section does not apply if:
(a) The will provides that no bond is required, but the court may, for good cause, require a bond notwithstanding any provision in a will that no bond is required;
(b) The personal representative is the sole heir or devisee, but the court may, for good cause, require a bond notwithstanding the fact that the personal representative is the sole heir or devisee; or

(c) The personal representative is the Department of State Lands, the Department of Veterans’ Affairs, the Director of Human Services, the Director of the Oregon Health Authority or an attorney approved under ORS 113.086.

3) Upon a request by the personal representative, the court may waive the requirement of a bond if:
   (a) The request states the reasons why the waiver is requested; and
   (b) The request describes the known creditors of the estate.

4) The court may waive or reduce the requirement of a bond to the extent that:
   (a) The personal representative provides written confirmation from a financial institution that property of the estate is held by the financial institution subject to withdrawal only on order of the court; or
   (b) The court restricts the sale, encumbrance or other disposition of property of the estate without prior court approval.

5) Nothing in this section affects the provisions of ORS 709.240, relating to a trust company acting as personal representative.

SECTION 16. ORS 113.125 is amended to read:

113.125. (1) The court shall issue letters testamentary or letters of administration to the personal representative appointed by the court upon the filing with the clerk of the court the bond, if any, required by the court.

(2) Letters testamentary may be in the following form:

LETTERS TESTAMENTARY

No. __________________

THIS CERTIFIES that the will of ________________, deceased, has been proved and ________________ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting ________________ ([Executor(s) or Administrator(s)] Personal Representative(s) with the Will Annexed) of the will and estate of the decedent.

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of ________________, in which proceedings for administration upon the estate are pending, [do hereby] subscribe my name and affix the seal of the court this _____ day of ________, 2____

__________________________ Clerk of the Court

By __________________________ Deputy

(Seal)

(3) Letters of administration may be in the following form:

LETTERS OF ADMINISTRATION

No. __________________

THIS CERTIFIES that _______ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting [administrator(s)] personal representative(s) of the estate of_______, deceased, and that no will of the decedent has been proved in this court.
IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of ________, in which proceedings for administration upon the estate are pending, [do hereby] subscribe my name and affix the seal of the court this ____ day of ________, 20____

__________________________ Clerk of the Court

By __________________________ Deputy

(Seal)

SECTION 17. ORS 113.165 is amended to read:

113.165. Within [60] 90 days after the date of appointment, unless a longer time is granted by the court, a personal representative shall file in the estate proceeding an inventory of all [the] property of the estate that has come into the possession or knowledge of the personal representative. The inventory shall show the estimates by the personal representative of the respective true cash fair market values as of the date of the death of the decedent of the properties described in the inventory.

SECTION 18. ORS 113.185 is amended to read:

113.185. (1) The personal representative may employ a qualified and disinterested appraiser to assist the personal representative in the appraisal of any property of the estate the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of property.

(2) The court in its discretion may direct that all or any part of the property of the estate be appraised by one or more appraisers appointed by the court.

(3) Property for which appraisement is required shall be appraised at its true cash value as of the date of the death of the decedent. Each appraisement shall be in writing and must be signed by the appraiser making it.

(4) Each appraiser is entitled to be paid a reasonable fee from the estate for services and to be reimbursed from the estate for necessary expenses.

SECTION 19. ORS 113.195 is amended to read:

113.195. (1) When a personal representative ceases to be qualified as provided in ORS 113.095, or becomes incapable of discharging duties, the court shall remove the personal representative.

(2) When a personal representative has been unfaithful to or neglectful of the trust, the court may remove the personal representative.

(3) When a personal representative has failed to comply with ORS 113.092, the court may remove the personal representative.

(4) For other good cause shown, the court may remove the personal representative.

(5) When grounds for removal of a personal representative appear to exist, the court, on its own motion or on the petition of any interested person, shall order the personal representative to appear and show cause why the personal representative should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon the surety of the personal representative as provided in ORS 111.215.

SECTION 20. ORS 113.205 is amended to read:

113.205. (1) Every power exercisable by copersonal representatives may be exercised by the survivors or survivor of them when the appointment of one is terminated, unless the will provides otherwise.

(2) Where one of two or more persons named as copersonal representatives is not appointed, those appointed may exercise all the powers incident to the office, unless the will provides otherwise.

SECTION 21. ORS 113.215 is amended to read:

Enrolled House Bill 2986 (HB 2986-A)
113.215. (1) When a personal representative dies, is removed by the court, or resigns and the resignation is accepted by the court, the court may appoint, and, if the personal representative was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in place of the personal representative.

(2) If, after a will has been proven and letters testamentary or letters of administration [with the will annexed] have been issued, the will is set aside, declared void or inoperative, the letters testamentary or letters of administration [with the will annexed] shall be revoked and letters of administration issued.

(3) If, after administration has been granted, a will of the decedent is found and proven, the letters of administration shall be revoked and letters testamentary or letters of administration [with the will annexed] shall be issued.

(4) When a successor personal representative is appointed, the successor has all the rights and powers of the predecessor or of the [executor] personal representative named in the will, except that the successor [shall] may not exercise powers given in the will [which] that by its terms are personal to the personal representative named [therein] in the will.

SECTION 22. ORS 113.225 is amended to read:

113.225. (1) If the personal representative dies, is removed by the court or resigns after the notice to interested persons required by ORS 113.155 has been published but before the expiration of four months from the date of first publication, the successor personal representative shall cause notice to interested persons to be published as if the successor were the original personal representative. The republished notice shall state:

(a) That the original personal representative died, was removed by the court or resigned,

(b) The date of death, removal or resignation and the date of appointment of the new personal representative. [It also shall state]

(c) That all persons having claims against the estate shall present [them,] the claims to the new personal representative as provided in ORS 115.005 within four months after the date of the first publication of the republished notice[, to the new personal representative, at the address designated in the republished notice for the presentation of claims], or [they] the claims may be barred.

(2) [No] Notice by the successor personal representative [shall be] is not required under subsection (1) of this section if the original personal representative dies, is removed by the court, or resigns after the expiration of four months from the date of the first publication of the notice to interested persons.

SECTION 23. ORS 113.238 is amended to read:

113.238. (1) A person who has knowledge that a decedent died wholly intestate, that the decedent owned property subject to probate in Oregon and that the decedent died without a known heir shall give notice of the death within 48 hours after acquiring that knowledge to [an estate administrator of] the Department of State Lands [appointed under ORS 113.235].

(2) Except as provided by ORS 708A.430 and 723.466, a person may not dispose of or diminish any assets of the estate of a decedent who has died wholly intestate, who owned property subject to probate in Oregon and who died without a known heir unless the person has prior written approval of [an estate administrator of] the Department of State Lands [appointed under ORS 113.235]. The prohibition of this subsection:

(a) Applies to a guardian or conservator for the decedent; and

(b) Does not apply to a personal representative appointed under ORS 113.085 [(3)] (4) or to an affiant authorized under ORS 114.520 to file an affidavit under ORS 114.515.

(3) For purposes of this section, a known heir is an heir who has been identified and found.

ORS CHAPTER 114

SECTION 24. ORS 114.005 is amended to read:

114.005. (1) Except as provided in subsection (3) of this section, the spouse and dependent children of a decedent occupying the principal dwelling of the decedent at the time of the
decedent's death, or any of them, may continue to occupy the [principal place of abode of the decedent] dwelling until:

(a) One year after the death of the decedent; or,

(b) If the [estate therein is an estate of leasehold or an estate for the lifetime of another] decedent's interest in the dwelling is a leasehold or otherwise less than a fee interest, until one year after the death of the decedent or the earlier termination of the [estate] interest.

(2) During [that] an occupancy under subsection (1) of this section:

[(1)] (a) The occupants [shall] may not commit or permit waste to the [abode] dwelling, or cause or permit [mechanic's or materialman's] construction liens or other liens to attach [thereto] to the dwelling.

[(2)] (b) The occupants shall pay the cost to keep the [abode] dwelling insured, to the extent of the fair market value of the improvements, against fire and other hazards within the extended coverage provided by fire insurance policies, with loss payable to the estate. [In the event of loss or damage from those hazards, to the extent of the proceeds of the insurance, they shall restore the abode to its former condition.]

[(3)] (c) The occupants shall pay taxes and improvement liens on the [abode as payment thereof] dwelling as payment of the liens becomes due.

[(4)] (d) The [abode] dwelling is exempt from execution to the extent that [it] the dwelling was exempt when the decedent was living.

(e) The dwelling is subject to the rights of persons having a security interest in the dwelling.

(3) For good cause shown, the court may waive or alter the provisions of subsection (1) of this section.

SECTION 25. ORS 114.325 is amended to read:

114.325. (1) Except as provided in subsection (2) of this section, and subject to ORS 113.105, a personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.

(2) Exercise of the power of sale by the personal representative is improper, except after notice, hearing and order of the court, if:

(a) The sale is in contravention of the provisions of the will; or

(b) The property is specifically devised and the will does not authorize its sale.; or

[(c) A bond of the personal representative has been required and filed, the sale price of the property to be sold exceeds $5,000 and the bond of the personal representative has not been increased by the amount of cash to be realized on the sale, unless the court has directed otherwise.]

SECTION 26. ORS 114.630 is amended to read:

114.630. (1) Except as otherwise provided in ORS 114.600 to 114.725, the augmented estate consists of all of the following property, whether real or personal, movable or immovable, or tangible or intangible, wherever situated:

(a) The decedent's probate estate as described in ORS 114.650.

(b) The decedent's nonprobate estate as described in ORS 114.660 and 114.665.

(c) The surviving spouse's estate, as described in ORS 114.675.

(2) The value attributable to any property included in the augmented estate under ORS 114.600 to 114.725 must be reduced by the amount of all enforceable claims against the property and all encumbrances on the property. Any exemption or deduction that is allowed for the purpose of determining estate [or inheritance] taxes on the augmented estate and that is attributable to the marriage of the decedent and the surviving spouse inures to the benefit of the surviving spouse as provided in ORS 116.343 (2).

(3) The value attributable to any property included in the augmented estate includes the present value of any present or future interest and the present value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security Act.
(4) The value attributable to property included in the augmented estate is equal to the value that would be used for purposes of federal estate and gift tax laws if the property had passed without consideration to an unrelated person on the date that the value of the property is determined for the purposes of ORS 114.600 to 114.725.

(5) In no event may the value of property be included in the augmented estate more than once.

ORS CHAPTER 115

SECTION 27. ORS 115.005 is amended to read:

115.005. (1)(a) Claims against the estate of a decedent, other than claims of the personal representative as a creditor of the decedent, shall be presented to the personal representative. Filing a claim with the court does not constitute presentation to the personal representative. Except as provided in paragraph (b) of this subsection, a claim is presented to the personal representative when the claim is mailed or personally delivered to the personal representative at:

(A) The address for the personal representative included in the petition for appointment of the personal representative under ORS 113.035;

(B) The address provided for presentation of claims under ORS 115.003; or

(C) The address provided for presentation of claims in the published notice under ORS 113.155 or 113.225.

(b) In addition to the addresses for the presentation of claims under paragraph (a) of this subsection, the personal representative may authorize creditors to present claims by electronic mail or facsimile communication to a designated electronic mail address or facsimile number. If the personal representative authorizes alternative methods of presentation under this subsection, a claim is presented to the personal representative when it is sent to the electronic mail address or the facsimile number designated by the personal representative for the presentation of claims, unless the sender receives a notice that the electronic mail was not delivered or the facsimile communication was not successful. If the personal representative denies receiving the electronic mail or facsimile communication, the burden of proof is on the creditor to demonstrate that the electronic mail was properly addressed and sent or that the facsimile communication was properly addressed and successfully delivered or transmitted.

(2) Except as provided in subsection (3) of this section, a claim is barred from payment from the estate if not presented within the statute of limitations applicable to the claim and before the later of:

(a) Four months after the date of first publication of notice to interested persons; or

(b) If the claim was one with respect to which the personal representative was required to deliver or mail a notice under ORS 115.003 (2), [30] 45 days after a notice meeting the requirements of ORS 115.003 (3) is delivered or mailed to the last-known address of the person asserting the claim.

(3) A claim against the estate presented after claims are barred under subsection (2) of this section shall be paid from the estate if the claim:

(a) Is presented before the expiration of the statute of limitations applicable to the claim and before the personal representative files the final account;

(b) Is presented by a person who did not receive a notice under ORS 115.003 mailed or delivered more than 30 days prior to the date on which the claim is presented and who is not an assignee of a person who received such notice; and

(c) Would be allowable but for the time at which the claim is presented.

(4) A claim against an estate may be paid under subsection (3) of this section only after payment of all expenses having priority over claims under ORS 115.125 and payment of all previously presented claims.

(5) This section does not affect or prevent:

(a) Any proceeding to enforce a mortgage, pledge or other lien upon property of the estate, or to quiet title or reform any instrument with respect to title to property; or...
(b) To the limits of the insurance protection only, any proceeding to establish liability of the
decedent or the personal representative for which the decedent or personal representative is pro-
tected by liability insurance at the time the proceeding is commenced.

SECTION 28. ORS 115.065 is amended to read:

115.065. (1) A claim on a debt due for which the creditor holds security may be presented as a
claim on an unsecured debt due, or the creditor may elect to rely entirely on the security without
presentation of the claim. A creditor who presents a claim under this subsection does not waive
the creditor's security interest and may recover a deficiency as provided in subsection (5)
of this section.

(2) If the claim is presented, [it] the claim shall describe the security generally. If the security
is an encumbrance that is recorded, it is sufficient to describe the encumbrance by reference to the
[book, page,] book and page or document number, date and place of recording or filing.

(3) If the claim is presented and allowed, allowance shall be in the amount of the debt remaining
unpaid on the date of allowance.

(4) If the creditor surrenders the security, payment shall be on the basis of the amount allowed.

(5) If the creditor does not surrender the security, payment shall be on the basis of:

(a) If the creditor exhausts the security before receiving payment, unless precluded by other law,
the amount allowed, less the amount realized on exhausting the security; or

(b) If the creditor does not exhaust the security before receiving payment or does not have the
right to exhaust the security, the amount allowed, less the value of the security determined by
agreement or as the court may order.

(6) The personal representative may convey the secured property to the creditor in consider-
ation of the satisfaction or partial satisfaction of the claim.

SECTION 29. ORS 115.070 is amended to read:

115.070. If a judgment was entered on a claim prior to the death of the decedent but was not
a lien against property of the estate on the date of the decedent's death, the claim shall be
presented in the same manner as if no judgment had been entered, and a copy of the judgment shall
be attached to the claim. [Such a claim] A claim for which a judgment was entered prior to the
death of the decedent may be disallowed only if the judgment was void or voidable, or if the
judgment could have been set aside on the date of the decedent's death, or if the claim is not pres-
tented within the time required by ORS 115.005. If the judgment was a lien against [the] property
of the estate on the date of the decedent's death it shall be treated as a claim on a debt due for
which the creditor holds security under ORS 115.065. In all other respects a claim [which] that has
been reduced to judgment shall have the same priority under ORS 115.125 as [it] the claim would
have had were it not reduced to judgment.

SECTION 30. ORS 115.125, as amended by section 23, chapter 42, Oregon Laws 2016, is
amended to read:

115.125. (1) If the applicable assets of the estate are insufficient to pay all expenses and claims
in full, the personal representative shall make payment in the following order:

(a) Support of spouse and children, subject to the limitations imposed by ORS 114.065.

(b) Expenses of administration of the estate, and subject to preferences established under
federal law, expenses of administration of any protective proceeding in which the decedent
was the protected person authorized by the court in the protective proceeding.

(c) Expenses of a plain and decent funeral.

(d) Debts and taxes with preference under federal law.

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent,
including compensation of persons attending the decedent to which the persons are otherwise
entitled by law.

(f) Taxes with preference under the laws of this state that are due and payable while possession
of the estate of the decedent is retained by the personal representative.

(g) Debts owed employees of the decedent for labor performed within 90 days immediately pre-
ceding the date of death of the decedent.
(h) Child support arrearages.

(i) The claim of the Department of Veterans’ Affairs under ORS 406.100, including a claim the waiver of which was retracted by the Director of Veterans’ Affairs under ORS 406.110.

(j) The claim of the Department of Human Services or the Oregon Health Authority for the amount of the state’s monthly contribution to the federal government to defray the costs of outpatient prescription drug coverage provided to a person who is eligible for Medicare Part D prescription drug coverage and who receives benefits under the state medical assistance program or Title XIX of the Social Security Act.

(k) The claim of the Department of Human Services or the Oregon Health Authority for the net amount of assistance properly or improperly paid to or for the decedent, in the following order:

(A) Public assistance, as defined in ORS 411.010, and medical assistance, as defined in ORS 414.025, funded entirely by moneys from the General Fund; and

(B) Public assistance, as defined in ORS 411.010, and medical assistance, as defined in ORS 414.025, [that may be recovered from an estate under ORS 416.350], funded by a combination of state and federal funds.

(L) The claim of the Department of Human Services or the Oregon Health Authority for the care and maintenance of the decedent at a state institution, as provided in ORS 179.610 to 179.770.

(m) The claim of the Department of Corrections for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(n) All other claims against the estate.

(2) If the applicable assets of the estate are insufficient to pay in full all expenses or claims of any one class specified in subsection (1) of this section, each expense or claim of that class shall be paid only in proportion to the amount thereof.

SECTION 31. ORS 115.135 is amended to read:

115.135. (1) A claim presented to the personal representative shall be considered allowed as presented unless within 60 days after the date of presentation of the claim as provided in ORS 115.005 the personal representative mails or delivers a notice of disallowance of the claim in whole or in part to the claimant and, if any, the attorney of the claimant. The personal representative shall file in the estate proceeding the claim as presented and a copy of the notice of disallowance.

(2) A notice of disallowance of a claim shall state the reason for the disallowance and inform the claimant that the claim has been disallowed in whole or in part and, to the extent disallowed, will be barred unless the claimant proceeds as provided in ORS 115.145. Statement of a reason for disallowance under this subsection is not an admission by the personal representative and does not preclude the assertion of other defenses to the claim.

(3) The personal representative may rescind the previous allowance of an unpaid claim, if the claim was allowed because of error, misinformation or excusable neglect. Not less than 30 days before the date of the filing of the final account the personal representative shall give notice of rescission of previous allowance of a claim to the claimant and, if any, the attorney of the claimant in the same manner and containing the same information as a notice of disallowance.

(4) If allowed, the claim shall be paid only to the extent of the assets of the estate available for the payment of the claim pursuant to the priorities established in ORS 115.115 and 115.125.

SECTION 32. ORS 115.145 is amended to read:

115.145. (1) If the personal representative disallows a claim in whole or in part, the claimant, within 30 days after the date of mailing or delivery of the notice of disallowance, may either:

(a) File with the court in the estate proceeding a request for summary determination of the claim by the probate court, with proof of service of a copy of the request upon the personal representative or the attorney of the personal representative; or

(b) Commence a separate action against the personal representative on the claim in any court of competent jurisdiction. The action shall proceed and be tried as any other action.
(2) If the claimant fails to either request a summary determination or commence a separate action as provided in subsection (1) of this section, the claim, to the extent disallowed by the personal representative, is barred.

(3) In a proceeding for summary determination of a claim or in a separate action on a claim the claim shall be allowed or judgment entered on the claim in the full amount of the liability, if any, of the decedent to the claimant. However, the claim shall be paid only to the extent of the assets of the estate allocable to the payment of the claim pursuant to ORS 115.115 and 115.125.

ORS CHAPTER 116

SECTION 33. ORS 116.083 is amended to read:

116.083. (1) A personal representative shall make and file in the estate proceeding an account of the personal representative’s administration:

(a) Unless the court orders otherwise, annually within 60 days after the anniversary date of the personal representative’s appointment.

(b) Within 30 days after the date of the personal representative's removal or resignation or the revocation of the personal representative’s letters.

(c) When the estate is ready for final settlement and distribution.

(d) At such other times as the court may order.

(2) Each account must include the following information:

(a) The period of time covered by the account.

(b) The total value of the property with which the personal representative is chargeable according to the inventory, or, if there was a prior account, the amount of the balance of the prior account.

(c) All money and property received during the period covered by the account.

(d) All disbursements made during the period covered by the account. Evidence of disbursements must accompany the account, unless otherwise provided by order or rule of the court, or unless the personal representative is a trust company that has complied with ORS 709.030, but that personal representative shall:

(A) Maintain the evidence of disbursement for a period of not less than one year following the date on which the order approving the final account is entered;

(B) Permit interested persons to inspect the evidence of disbursement and receive copies thereof of the evidence at their own expense at the place of business of the personal representative during the personal representative’s normal business hours at any time prior to the end of the one-year period following the date on which the order approving the final account is entered; and

(C) Include in each annual account and in the final account a statement that the evidence is not filed with the account but is maintained by the personal representative and may be inspected and copied as provided in subparagraph (B) of this paragraph.

(e) The money and property of the estate on hand.

(f) [Such] Any other information that the personal representative considers necessary to show the condition of the affairs of the estate or as the court may require.

(g) A declaration under penalty of perjury in the form required by ORCP 1 E, or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States.

(3) When the estate is ready for final settlement and distribution, the account must also include:

(a) A statement that any required estate tax return has been filed.

(1) A statement that all Oregon income taxes, [inheritance or] estate taxes and personal property taxes that are due, if any, have been paid, or if not paid, that payment of those taxes has been secured by bond, deposit or otherwise, and that all [required] tax returns currently due have been filed.
(c) Any request to retain a reserve for the determination and payment of any additional taxes, interest and penalties, and of all related reasonable expenses.

(d) A statement describing the determination of the compensation of the personal representative under the will or under section 9 of this 2017 Act or ORS 116.173 (3) and (4).

[(b)] (e) A petition for a judgment authorizing the personal representative to distribute the estate to the persons and in the portions specified [therein] in the judgment.

[(4) If the distributees consent thereto in writing and all creditors of the estate have been paid in full other than creditors owed administrative expenses that require court approval, the personal representative, in lieu of the final account otherwise required by this section, may file a statement that includes the following:] (4) The personal representative may file a statement under this subsection in lieu of the final account otherwise required by this section if:

(A) The distributees, other than distributees whose only distribution is a cash or specific bequest that will be paid or satisfied in full, consent in writing; and

(B) All creditors of the estate, other than creditors owed administrative expenses that require court approval, have been paid in full.

(b) A statement under this subsection must include:

(a) The period of time covered by the statement.

(b) A statement that all creditors [have been paid in full] of the estate, other than creditors owed administrative expenses that require court approval, have been paid in full.

(c) The statement and petition and any request for a reserve under [referred to in] subsection (3) of this section.

(d) A declaration under penalty of perjury in the form required by ORCP 1 E, or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States.

(5) Notice of time for filing objections to the statement described in subsection (4) of this section is not required.

(6) The Chief Justice of the Supreme Court may by rule specify the form and contents of accounts that must be filed by a personal representative.

SECTION 34. ORS 116.093 is amended to read:

116.093. (1) Upon filing the final account and petition for a judgment of distribution, the personal representative shall [fix] set a time for filing objections [thereto in a notice thereof] to the account and petition. Not less than 20 days before the time [fixed in the notice] set, the personal representative shall [cause a copy of the notice to be mailed] mail a copy of the final account and petition for judgment and notice of the time set for objections to:

(a) Each [heir] distributee at the last-known address of the distributee [heir, if the decedent died intestate].

(b) Each devisee at the last-known address of the devisee, if the decedent died testate.

(c) Each creditor who has not received payment in full and whose claim has not otherwise been barred.

(d) Any other person known to the personal representative to have or to claim an interest in the estate being distributed.

(2) If a charitable trust as described in ORS 130.170, a public benefit corporation as defined in ORS 65.001 or a religious organization is a residuary beneficiary of the estate, or if a charitable trust, a public benefit corporation or a religious organization will receive less under the judgment than the amount of a specific devise to the trust, corporation or organization, the personal representative shall mail the notice under subsection (1) of this section to the Attorney General.

(3) The notice need not be mailed to the personal representative.

(4) Proof of the mailing to those persons entitled to notice shall be filed in the estate proceeding at or before approval of the final account.
[(4)] (5) If the Department of Human Services has presented a claim under ORS chapter 411 or ORS 416.310 to 416.340, 416.350 or 417.010 to 417.080, or the Oregon Health Authority has presented a claim under ORS chapter 414 or ORS 416.310 to 416.340, 416.350 or 416.510 to 416.990, or the Department of Corrections has presented a claim under ORS 179.620 (3), and the claim has not been settled or paid in full, the personal representative shall mail to the appropriate agency a copy of the final account at the same time, and shall make proof of the mailing in the same manner, as the notice provided for in this section.

[(5)] (6) The Oregon Health Authority may adopt rules designating the Department of Human Services as the appropriate department to receive the final account for claims presented by the authority under subsection [(4)] (5) of this section.

SECTION 35. ORS 116.113 is amended to read:

116.113. (1) If no objections to the final account and petition for distribution are filed, or if objections are filed, upon the hearing or upon the filing of a statement in lieu of the final account under ORS 116.083 (4), the court shall enter a general judgment of final distribution. In the judgment the court shall designate the persons in whom title to the estate available for distribution is vested and the portion of the estate or property to which each is entitled under the will, by agreement approved by the court or pursuant to intestate succession. The judgment shall also contain any findings of the court in respect to:

(a) Advancements.
(b) Election against will by the surviving spouse.
(c) Renunciation.
(d) Lapse.
(e) Adjudicated controversies.
(f) Partial distribution, which shall be confirmed or modified.
(g) Retainer.
(h) Claims for which a special fund is set aside, and the amount set aside.
(i) Contingent claims that have been allowed and are still unpaid.
(j) Any reserve requested under ORS 116.083.
(k) Attorney fees.

[(j)] (l) Approval of the final account or the statement filed in lieu of the final account under ORS 116.083 (4) in whole or in part.

[(2) The personal representative is not entitled to approval of the final account until Oregon income and personal property taxes, if any, have been paid and appropriate receipts and clearances therefor have been filed, or until payment of those taxes has been secured by bond, deposit or otherwise, provided, however, that no such receipts or clearances shall be required with regard to damages accepted upon settlement of a claim or recovered on a judgment in an action for wrongful death as provided in ORS 30.010 to 30.100.]

[(3)] (2) If, by agreement approved by the court, property is distributed to persons in whom title is vested by the judgment of final distribution otherwise than as provided by the will or pursuant to intestate succession, the judgment operates as a transfer of the property between those persons.

[(4)] (3) The judgment of final distribution is a conclusive determination of the persons who are the successors in interest to the estate and of the extent and character of their interest therein, subject only to the right of appeal and the power of the court to vacate the judgment.

SECTION 36. ORS 116.173 is amended to read:

116.173. (1) As used in this section, “property subject to the jurisdiction of the court” means:

(a) All property owned by the decedent at the time of death that is subject to administration;
(b) All income received during the course of the administration of the estate;
(c) All gains realized on the sale or disposition of assets during the course of the administration of the estate, to the extent that the gain realized on each asset sold or disposed of exceeds the value of the asset as provided in subsection (2) of this section; and
(d) All unrealized gains on assets acquired during the course of administration of the estate.

(2) For purposes of this section, each asset shall be valued at its highest value as reported in the inventory, any amended or supplemental inventory, any interim account or the final account or statement in lieu of the final account filed under ORS 116.083, which may be based upon revaluation of the asset to reflect its then current fair market value.

[(1)] (3) Unless the court has granted a request for a different determination of the compensation of the personal representative under section 9 of this 2017 Act, upon application to the court a personal representative is entitled to receive compensation for services as provided in this section. If there is more than one personal representative acting concurrently or consecutively, the compensation [shall] may not be increased, but may be divided among [them] the personal representatives as they agree or as the court may order. The compensation is a commission upon the whole estate, as follows:

(a) Upon the property subject to the jurisdiction of the court, including income and realized gains:

(A) Seven percent of any sum not exceeding $1,000.
(B) Four percent of all above $1,000 and not exceeding $10,000.
(C) Three percent of all above $10,000 and not exceeding $50,000.
(D) Two percent of all above $50,000.

(b) One percent of the property, exclusive of life insurance proceeds, not subject to the jurisdiction of the court but reportable for Oregon [inheritance or] estate tax or federal estate tax purposes.

[(2)] (4) In all cases, further compensation as is just and reasonable may be allowed by the court for any extraordinary and unusual services, including services not ordinarily required of a personal representative in the performance of duties as a personal representative.

[(3)] (5) When a decedent by will has made special provision for the compensation of a personal representative,:

(a) The personal representative is not entitled to any other compensation for services unless prior to appointment the personal representative signs and files with the clerk of the court a written renunciation of the compensation provided by the will.

(b) If the assets of the estate are insufficient to pay in full all expenses or claims of the estate, the compensation of the personal representative may not exceed the compensation provided by subsections (3) and (4) of this section.

SECTION 37. ORS 116.183 is amended to read:

116.183. (1) A personal representative shall be allowed in the settlement of the final account all necessary expenses incurred in the care, management and settlement of the estate, including reasonable fees of appraisers, attorneys and other qualified persons employed by the personal representative. A partial award of such expenses, including fees, may be allowed prior to settlement of the final account upon petition, showing that the final account reasonably cannot be filed at that time, and upon notice as directed by the court.

(2)(a) An award of reasonable attorney fees under this section shall be made after consideration of the customary fees in the community for similar services, the time spent by counsel, counsel’s experience in such matters, the skill displayed by counsel, [the excellence of] the result obtained, any agreement as to fees [which may exist] between the personal representative and the counsel of the personal representative, the amount of responsibility assumed by counsel considering the total value of the estate, and [such] other factors as may be relevant. No single factor [shall be] is controlling.

(b) Before the court awards attorney fees in an amount less than the amount requested by the personal representative, the court must allow the attorney an opportunity to submit additional materials supporting the requested amount.

(c) ORCP 68 does not apply to requests for attorney fees under this section.
A personal representative who defends or prosecutes any proceeding in good faith and with just cause, whether successful or not, is entitled to receive from the estate necessary expenses and disbursements, including reasonable attorney fees, in the proceeding.

**SECTION 38.** ORS 116.223 is amended to read:

116.223. The personal representative shall cause to be recorded in the deed records of any county in which real property belonging to the estate is situated, a **personal representative’s deed** executed in the manner required by ORS chapter 93. The execution of the **personal representative’s deed** does not place the personal representative in the chain of title to the property so conveyed unless the personal representative is also an heir, devisee or claiming successor to the property conveyed.

**SECTION 39.** ORS 116.263 is amended to read:

116.263. (1) Three months or more after the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession of personal property or an instrument evidencing a debt, obligation, stock or **chose in action** right to sue belonging to the estate of the nonresident decedent may make payment of the indebtedness, in whole or in part, or deliver the personal property or the instrument evidencing the debt, obligation, stock or **chose in action** right to sue to the foreign personal representative of the nonresident decedent, upon an affidavit made by or on behalf of the foreign personal representative, accompanied by proof of the foreign personal representative’s authority, stating:

(a) The date of the death of the nonresident decedent;
(b) That no local administration or application therefor is pending in this state; and
(c) That the foreign personal representative is entitled to payment or delivery.

(2) Payment or delivery made in good faith on the basis of the affidavit is a discharge of the debtor or person having possession of the personal property.

(3) Payment or delivery may not be made under this section if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the foreign personal representative.

**SECTION 40.** ORS 116.343 is amended to read:

116.343. (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purpose of the gift inures to the benefit of the person bearing that relationship or receiving the gift, except that when an interest is subject to a prior present interest that is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or estate taxes of a foreign country paid by the decedent or the estate of the decedent inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for **inheritance, succession or** estate taxes **or taxes in the nature thereof** in respect to property or interests includable in the estate inures to the benefit of the persons or interests chargeable with the payment **thereof** the tax to the extent that, or in proportion as, the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an **inheritance** estate tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in ORS 116.313, and to that extent no apportionment shall be made against the property. This subsection does not apply to any case in which the result will be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code (26 U.S.C. 2053(d)) relating to deduction for state estate taxes on transfers for public, charitable or religious uses.
IRREVOCABLE LETTERS OF CREDIT

SECTION 41. ORS 22.020 is amended to read:

22.020. (1) In any cause, action, proceeding or matter before any court, board or commission in this state or upon appeal from any action of any such court, board or commission, where bond or security deposit of any character is required or permitted for any purpose, it is lawful for the party required or permitted to furnish such security or bond to deposit, in lieu thereof, in the manner provided in ORS 22.020 to 22.070, money, an irrevocable letter of credit issued by an insured institution, as defined in ORS 706.008, a certified check or checks on any state or national bank within this country payable to the officer with whom such check is filed, satisfactory municipal bonds negotiable by delivery, or obligations of the United States Government negotiable by delivery, equal in amount to the amount of the bond or security deposit so required or permitted.

(2) Notwithstanding subsection (1) of this section, an irrevocable letter of credit may not be furnished to a court in lieu of other security or bond to be deposited in any criminal offense, action, proceeding or matter before any court under ORS 105.395, 111.185, 113.005, 113.035, 113.105, 113.115, 114.325 and 125.715. In any other type of civil cause, action, proceeding or matter before any court, an irrevocable letter of credit may be furnished pursuant to subsection (1) of this section subject to approval of its terms by the parties and to its being in the form and amount prescribed by statute, rule or order of the court.

STAYS OF EXECUTION

SECTION 42. ORS 18.312 is amended to read:

18.312. (1) Except as provided in subsection (2) of this section, execution may not be issued against the property of a deceased party. Except as provided in subsection (2) of this section, a judgment against a deceased party may be collected only by making a claim against the estate of the deceased party in the manner prescribed by ORS chapter 115 or ORS 114.505 to 114.560.

(2) This section does not prevent the issuance of execution and sale of property pursuant to a judgment of foreclosure and sale of property of the decedent. If the amount realized from the sale of property is not sufficient to satisfy the judgment and collection of the deficiency is otherwise allowed by law, the amount of the deficiency may be collected by making a claim against the estate in the manner prescribed by ORS chapter 115 or ORS 114.505 to 114.560.

(3) The stay imposed by subsection (1) of this section:

(a) Expires when the property ceases to be property of the estate, including but not limited to upon conveyance of the property by the personal representative to a third party or upon distribution by the personal representative; and

(b) Does not diminish the lien effect of a judgment or bar execution based on a lien when execution commences after the property ceases to be property of the estate.

CONFORMING AMENDMENTS AND MODERNIZATION

SECTION 43. ORS 86.809 is amended to read:

86.809. The charge of a trustee for the performance of powers and duties of foreclosure by advertisement and sale imposed under ORS 86.705 to 86.815 shall not exceed 50 percent of the compensation allowable to [an executor or administrator] a personal representative under ORS 116.173 or a minimum charge of $100. Such compensation shall be based upon the amount due on the obligation, both principal and interest, at the time of the trustee’s sale.

SECTION 44. ORS 111.025 is amended to read:

111.025. For purposes of ORS chapters 111 to 116, the Oregon Tax Court is not a court having probate jurisdiction and is limited to the trial of appeals on [inheritance or] estate tax matters.

SECTION 45. ORS 111.205 is amended to read:
111.205. No particular pleadings or forms of pleadings are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of an action not triable by right to a jury except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts in proceedings before a probate court must include a declaration under penalty of perjury in the form required by ORCP 1 E, or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States, made by at least one of the persons making the petitions, reports and accounts or by the attorney for the person, or in case of a corporation by its agent. The court exercises its powers by means of:

(1) A petition of a party in interest.
(2) A notice to a party.
(3) A subpoena to a witness.
(4) Orders and judgments.
(5) An execution or warrant to enforce its orders and judgments.

SECTION 46. ORS 111.245 is amended to read:

111.245. (1) Proof of documents pursuant to ORS chapters 111, 112, 113, 114, 115, 116 and 117 may be made as follows:

(a) Of a will, by a certified copy of the will.
(b) That a will has been probated or established in a foreign jurisdiction, by a certified copy of the order admitting the will to probate or evidencing its establishment.
(c) Of letters testamentary or letters of administration, by a certified copy of the letters. The certification may include a statement that the letters have not been revoked.

(2) A document or order filed or entered in a foreign jurisdiction may be proved by a copy of the document or order, certified by a clerk of the court in which the document or order was filed or entered or by any other official having legal custody of the original document or order.

SECTION 47. ORS 111.255 is amended to read:

111.255. If a document or part of a document is not in the English language, a translation certified by the translator to be accurate may be attached to the document and shall be regarded as sufficient evidence of the contents of the document, unless objection is made thereto. In the absence of objection, if any person relies in good faith on the accuracy of the translation the person shall not be prejudiced because of its inaccuracy.

SECTION 48. ORS 112.315 is amended to read:

112.315. Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former spouse of the testator and any provision in the will naming the former spouse as executor personal representative, and the effect of the will is the same as though the former spouse did not survive the testator.

SECTION 49. ORS 113.065 is amended to read:

113.065. (1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon property in this state, may be admitted to probate upon petition, by filing a certified copy of the will and a certified copy of the order admitting the will to probate or evidencing its establishment in the jurisdiction where the testator died domiciled.
(2) A will offered for probate under this section may be contested for a cause that would be grounds for rejection of a will of a testator who died domiciled in this state.

SECTION 50. ORS 113.145 is amended to read:

113.145. (1) Upon appointment a personal representative shall deliver or mail to the devisees, heirs and the persons described in ORS 113.035 (8) and (9) who were required to be named in the petition for appointment of a personal representative, at the addresses shown in the petition, information that shall include:

(a) The title of the court in which the estate proceeding is pending and the clerk's file number;
(b) The name of the decedent and the place and date of the death of the decedent;
(c) Whether or not a will of the decedent has been admitted to probate;
(d) The name and address of the personal representative and the attorney of the personal representative;
(e) The date of the appointment of the personal representative;
(f) A statement advising the devisee, heir or other interested person that the rights of the devisee, heir or other interested person may be affected by the proceeding and that additional information may be obtained from the records of the court, the personal representative or the attorney for the personal representative;
(g) If information under this section is required to be delivered or mailed to a person described in ORS 113.035 (8), a statement that the rights of the person in the estate may be barred unless the person proceeds as provided in ORS 113.075 within four months of the delivery or mailing of the information; and
(h) If information under this section is required to be delivered or mailed to a person described in ORS 113.035 (9), a statement that the rights of the person in the estate may be barred unless the person proceeds as provided in ORS 112.049 within four months of the delivery or mailing of the information.

(2) If the personal representative is a devisee, heir or other interested person named in the petition the personal representative is not required to deliver or mail the information under this section to the personal representative.

(3) The failure of the personal representative to give information under this section is a breach of duty to the persons concerned, but does not affect the validity of the personal representative’s appointment, duties or powers or the exercise of duties or powers.

(4) Within 30 days after the date of appointment a personal representative shall cause to be filed in the estate proceeding proof of the delivery or mailing required by this section or a waiver of notice as provided under ORS 111.225. The proof must include a copy of the information delivered or mailed and the names of the persons to whom it was delivered or mailed.

(5) If before the filing of the final account the personal representative has actual knowledge that the petition did not include the name and address of any person described in ORS 113.035 (4), (5), (7), (8) or (9), the personal representative shall:
   a) Make reasonable efforts under the circumstances to ascertain each of those names and addresses;
   b) Promptly deliver or mail information as described specified in subsection (1) of this section to each of those persons located after the filing of the petition and before the filing of the final account; and
   c) File in the estate proceeding, on or before filing the final account under ORS 116.083, proof of compliance with this subsection or a waiver of notice as provided under ORS 111.225.

(6) Within 30 days after the appointment of a personal representative, the personal representative must mail or deliver the information specified in subsection (1) of this section and a copy of the death record of the decedent to the Department of Human Services and the Oregon Health Authority or as otherwise provided by rule adopted by the department and the authority.

SECTION 51. ORS 113.242, as amended by section 21, chapter 42, Oregon Laws 2016, is amended to read:

113.242. (1) An estate administrator of the Department of State Lands appointed under ORS 113.235 may take custody of the property of a decedent who died owning property subject to probate in Oregon upon the department receiving notice that:
   a) The decedent died wholly intestate and without a known heir as described in ORS 113.238 (3); or
   b) The decedent left a valid will, but no devisee has been identified and found.

(2) For any estate described in subsection (1) of this section, an estate administrator of the Department of State Lands appointed under ORS 113.235 may:
   a) Incur expenses for the funeral of the decedent in a manner suitable to the condition in life of the decedent;
(b) Incur expenses for the protection of the property of the estate;
(c) Incur expenses searching for a will or for heirs or devisees of the decedent;
(d) Have access to the property and records of the decedent other than records that are made confidential or privileged by statute;
(e) With proof of the death of the decedent, have access to all financial records of accounts or safe deposit boxes of the decedent at banks or other financial institutions; and
(f) Sell perishable property of the estate.

The reasonable funeral and administrative expenses of the Department of State Lands incurred under this section, including a reasonable attorney fee, shall be paid from the assets of the estate with the same priority as funeral and administration expenses under ORS 115.125.

SECTION 52. ORS 114.385 is amended to read:
114.385. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising the power of the personal representative is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising the power of the personal representative, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge of the provision or order. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection expressed in this section extends to a person dealing with or assisting a personal representative appointed under ORS 113.085 without actual knowledge that the personal representative was not qualified as provided in ORS 113.095 or that the appointment of the personal representative involved procedural irregularity.

SECTION 53. ORS 114.525 is amended to read:
114.525. An affidavit filed under ORS 114.515 must:
(1) State the name, age, domicile, post-office address and Social Security number of the decedent;
(2) State the date and place of the decedent’s death. A certified copy of the death record must be attached to the affidavit;
(3) Describe and state the fair market value of all property in the estate, including a legal description of any real property;
(4) State that no application or petition for the appointment of a personal representative has been granted in Oregon;
(5) State whether the decedent died testate or intestate, and if the decedent died testate, the will must be attached to the affidavit;
(6) List the heirs of the decedent and the last address of each heir as known to the affiant, and state that a copy of the affidavit showing the date of filing and a copy of the will, if the decedent died testate, will be delivered to each heir or mailed to the heir at the last-known address;
(7) If the decedent died testate, list the devisees of the decedent and the last address of each devisee as known to the affiant and state that a copy of the will and a copy of the affidavit showing the date of filing will be delivered to each devisee mailed to the devisee at the last-known address;
(8) State the interest in the property described in the affidavit to which each heir or devisee is entitled and the interest, if any, that will escheat;
(9) State that reasonable efforts have been made to ascertain creditors of the estate;
(10) List the expenses of and claims against the estate remaining unpaid or on account of which the affiant or any other person is entitled to reimbursement from the estate, including the known or estimated amounts of the expenses and claims and the names and addresses of the creditors as known to the affiant, and state that a copy of the affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last-known address;
Separately list the name and address of each person known to the affiant to assert a claim against the estate that the affiant disputes and the known or estimated amount [thereof] of the claim and state that a copy of the affidavit showing the date of filing will be delivered to each such person or mailed to the person at the last-known address;

State that a copy of the affidavit showing the date of filing will be mailed or delivered to the Department of Human Services or to the Oregon Health Authority, as prescribed by rule by the department or authority;

State that claims against the estate not listed in the affidavit or in amounts larger than those listed in the affidavit may be barred unless:

(a) A claim is presented to the affiant within four months of the filing of the affidavit at the address stated in the affidavit for presentment of claims; or

(b) A personal representative of the estate is appointed within the time allowed under ORS 114.555; and

If the affidavit lists one or more claims that the affiant disputes, state that any such claim may be barred unless:

(a) A petition for summary determination is filed within four months of the filing of the affidavit; or

(b) A personal representative of the estate is appointed within the time allowed under ORS 114.555.

SECTION 54. ORS 115.003 is amended to read:

115.003. (1) During the three months following appointment, unless a longer time is allowed by the court, the personal representative shall make reasonably diligent efforts to investigate the financial records and affairs of the decedent and shall take such further actions as may be reasonably necessary to ascertain the identity and address of each person who has or asserts a claim against the estate. The personal representative shall request and the court shall allow a longer time for ascertaining claims if the personal representative cannot complete reasonably diligent efforts to identify persons with claims during the time required by this section or by a previous order of the court.

(2) Not later than 30 days after expiration of the period, including any extensions, described in subsection (1) of this section, the personal representative shall cause to be delivered or mailed to each person known by the personal representative during such period to have or assert a claim against the estate a notice containing the information required in subsection (3) of this section, except that it shall not be necessary to give notice on account of a claim that has already been presented, accepted or paid in full or on account of a claim that is merely conjectural. The personal representative may also cause such a notice to be delivered or mailed to any person discovered by the personal representative after expiration of the period described in subsection (1) of this section to have or assert a claim against the estate.

(3) The notice shall include:

(a) The title of the court in which the estate proceeding is pending;

(b) The name of the decedent;

(c) The name of the personal representative and the address at which claims are to be presented;

(d) A statement that claims against the estate not presented to the personal representative within [30] 45 days of the date of the notice may be barred; and

(e) The date of the notice, which shall be the date on which it is delivered or mailed.

(4) Not later than 60 days after expiration of the period, including any extensions, described in subsection (1) of this section, the personal representative shall cause to be filed in the estate proceeding proof of compliance with subsections (1) and (2) of this section. The proof shall include a copy of the form of any notice delivered or mailed, the date on which each notice was delivered or mailed and the name and address of the person to whom each notice was delivered or mailed.

(5) The failure of the personal representative to make reasonably diligent efforts to ascertain claims as required by subsection (1) of this section or to cause a notice to be delivered or mailed
as required by subsection (2) of this section is a breach of duty to the persons concerned, but does not affect the validity of appointment, duties or powers or the exercise of duties or powers.

**SECTION 55.** ORS 115.025 is amended to read:

115.025. Each claim presented shall:

(1) Be in writing.

(2) Describe the nature and the amount [thereof] of the claim, if ascertainable.

(3) State the names and addresses of the claimant and, if any, the attorney of the claimant.

**SECTION 56.** ORS 115.105 is amended to read:

115.105. A claim of a personal representative shall be filed with the clerk of the court within the time required by law for [presentation] presentation of claims. Upon application by the personal representative or by any interested person the claim may be considered by the court on the hearing of the final account of the personal representative or prior to the hearing of the final account upon notice to interested persons.

**SECTION 57.** ORS 116.043 is amended to read:

116.043. If, after the distribution of property under ORS 116.013, it appears that all or any part of the property distributed is required for the payment of claims and expenses of administration, including determined and undetermined state and federal tax liability, the personal representative shall petition the court to order the return of the property. Notice of the hearing on the petition shall be given as provided in ORS 111.215. Upon the hearing the court may order the distributee to return all or part of the property distributed [or any part thereof], or to pay [its] the value of the property as of the time of distribution, and may specify the time within which the return or payment must be made. If the property is not returned or the payment is not made within the time ordered, the person failing to return the property or pay [the] its value may be adjudged in contempt of court and judgment may be entered against the person and the sureties of the person, if any.

**SECTION 58.** ORS 116.243 is amended to read:

116.243. A court clerk of any county in which the county court has judicial functions, the clerk of any county court that has jurisdiction over probate matters under ORS 111.075 or a court administrator, upon request, shall furnish to [an estate administrator of] the Department of State Lands [appointed under ORS 113.235] the titles of estates of decedents that have remained open for more than three years and in which no heirs, or only persons whose right to inherit the proceeds thereof is being contested, have appeared to claim the estate.

**SECTION 59.** ORS 125.525 is amended to read:

125.525. An order terminating [a] the conservatorship of a living person shall direct the conservator to deliver the assets in the possession of the conservator to the protected person:

(1) Immediately, to the extent that the assets are not required for payment of expenses of administration and debts incurred by the conservator for the account of the estate of the protected person; and

(2) Upon entry of an order approving the final accounting or surcharging the conservator, to the extent of any balance remaining.

**SECTION 60.** ORS 316.387 is amended to read:

316.387. (1) In the case of any tax for which a return is required under this chapter from a decedent or a decedent’s estate during the period of administration, the Department of Revenue may give notice of deficiency as described in ORS 305.265 within 18 months after a written election for a final tax determination is made by the personal representative, administrator, trustee or other fiduciary representing the estate of the decedent. This election must be filed after the return is made and filed in the form and manner as may be prescribed by the department by rule.

(2) Notwithstanding the provisions of subsection (1) of this section, if the department finds that gross income equal to 25 percent or more of the gross income reported has been omitted from the taxpayer’s return, notice of the deficiency may be given at any time within five years after the return was filed.

(3) The limitations to the giving of a notice of deficiency provided in this section shall not apply to a deficiency resulting from false or fraudulent returns, or in cases where no return has been filed.
If the Commissioner of Internal Revenue or other authorized official of the federal government makes a correction resulting in a change of the decedent’s or the estate of the decedent’s tax for state income tax purposes, then notice of a deficiency under any law imposing tax upon or measured by income for the corresponding tax year may be mailed within one year after the department is notified by the fiduciary or the commissioner of such federal correction, or within the applicable 18-month or five-year period prescribed in subsections (1) and (2) of this section, respectively, whichever period later expires.

(4) After filing the decedent’s return, the personal representative, administrator, trustee or other fiduciary may apply in writing for discharge from personal liability for tax on the decedent’s income. After paying any tax for which the personal representative, administrator, trustee or other fiduciary is subsequently notified, or after expiration of nine months since receipt of the application and during which no notification of tax liability is made, the discharge becomes effective. A discharge under this subsection does not discharge the personal representative, administrator, trustee or other fiduciary from liability to the extent that assets of the decedent’s estate are still in the possession or control of the personal representative, administrator, trustee or other fiduciary. The failure of a personal representative to make application and otherwise proceed under this subsection shall not affect the protection available to the personal representative under ORS \[116.113 (2),\] 116.123 and 116.213.

(5) For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the department, on behalf of the state, may agree upon the amount of taxes at any time due or to become due from such fiduciaries under this chapter or transferees of an estate as provided in ORS 314.310 with respect to a tax return or returns of or for a decedent individual or an estate or trust, and payment in accordance with such agreement shall be in full satisfaction of the taxes to which the agreement relates.

SECTION 61. ORS 406.100 is amended to read:

406.100. If the Department of Veterans’ Affairs is appointed as a conservator under ORS 406.050, a personal representative under ORS 113.085, a fiduciary by the United States Department of Veterans Affairs or a representative payee by the United States Social Security Administration, the Department of Veterans’ Affairs shall have a claim against the estate of the protected person, the decedent, the veteran or the veteran’s beneficiaries for purposes of ORS 406.050 (8) or (9), for all of the following:

(1) Reasonable expenses incurred by the department in the execution or administration of the estate.

(2) After the appointment of the department as conservator, reasonable compensation for ordinary and unusual services, as set forth by rule by the department.

(3) After the appointment of the department as personal representative, compensation as provided in ORS 116.173 (3) and (4) or section 9 of this 2017 Act.

(4) With prior approval by the court having probate jurisdiction over the estate, fees charged to the department by the Attorney General for advice or assistance in the performance of the department’s duties as conservator or personal representative of the estate.

(5) After the appointment of the department as a fiduciary by the United States Department of Veterans Affairs, compensation as determined by the United States Department of Veterans Affairs.

(6) After the appointment of the department as representative payee by the United States Social Security Administration, compensation as determined by the administration.

APPLICATION

SECTION 62. Section 6 of this 2017 Act and the amendments to ORS 113.005 by section 4 of this 2017 Act apply to special administrators appointed on or after the effective date of this 2017 Act.
SECTION 63. Section 9 of this 2017 Act and the amendments to ORS 113.035 by section 7 of this 2017 Act apply to petitions for appointment of a personal representative filed on or after the effective date of this 2017 Act.

SECTION 64. The amendments to ORS 113.055 by section 11 of this 2017 Act apply to motions filed under ORS 113.055 on or after the effective date of this 2017 Act.

SECTION 65. The amendments to ORS 113.075 by section 12 of this 2017 Act apply to actions commenced under ORS 113.075 on or after the effective date of this 2017 Act.

SECTION 66. The amendments to ORS 113.085 and 113.095 by sections 13 and 14 of this 2017 Act apply to petitions filed under ORS 113.035 on or after the effective date of this 2017 Act.

SECTION 67. The amendments to ORS 113.105 by section 15 of this 2017 Act apply to personal representatives appointed on or after the effective date of this 2017 Act.

SECTION 68. The amendments to ORS 113.165 by section 17 of this 2017 Act apply to inventories filed on or after the effective date of this 2017 Act.

SECTION 69. The amendments to ORS 113.195 by section 19 of this 2017 Act apply to personal representatives appointed before, on or after the effective date of this 2017 Act.

SECTION 70. The amendments to ORS 114.005 by section 24 of this 2017 Act apply to all persons occupying a dwelling of a decedent, whether the decedent died before, on or after the effective date of this 2017 Act.

SECTION 71. The amendments to ORS 113.225 and 115.005 by sections 22 and 27 of this 2017 Act apply to claims mailed, delivered or sent on or after the effective date of this 2017 Act.

SECTION 72. The amendments to ORS 116.083 by section 33 of this 2017 Act apply to accounts and statements filed on or after the effective date of this 2017 Act.

SECTION 73. The amendments to ORS 116.093 by section 34 of this 2017 Act apply to notices required to be mailed on or after the effective date of this 2017 Act.

SECTION 74. The amendments to ORS 116.113 by section 35 of this 2017 Act apply to judgments entered on or after the effective date of this 2017 Act.

SECTION 75. The amendments to ORS 116.173 by section 36 of this 2017 Act apply to applications for compensation of the personal representative made on or after the effective date of this 2017 Act.

SECTION 76. The amendments to ORS 116.183 by section 37 of this 2017 Act apply to awards of attorney fees made on or after the effective date of this 2017 Act.

SECTION 77. The amendments to ORS 18.312 by section 42 of this 2017 Act apply to stays imposed before, on or after the effective date of this 2017 Act.

CAPTIONS

SECTION 78. The unit captions used in this 2017 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 2017 Act.
Chapter 4—Probate Modernization Update

OREGON LAW COMMISSION

Oregon Probate Code

Report of the
Probate Modernization
Work Group
on
HB 2986A (2017)

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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
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.
Enrolled

House Bill 4102

Sponsored by Representative BARTON (at the request of Oregon Law Commission) (Presession filed.)

CHAPTER .................................................

AN ACT

Relating to estates; creating new provisions; amending ORS 111.005, 111.015, 111.095, 111.115, 111.175, 111.185, 111.275, 112.025, 112.035, 112.045, 112.058, 112.065, 112.135, 112.145, 112.155, 112.175, 112.238, 113.005, 113.242, 114.305, 115.125 and 179.610; repealing ORS 112.390; and declaring an emergency.

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

SECTION 1. ORS 111.005 is amended to read:

111.005. As used in ORS chapters 111, 112, 113, 114, 115, 116 and 117, unless the context requires otherwise:

(1) “Abate” means to reduce a devise on account of the insufficiency of the estate to pay all claims, expenses and devises in full.

(2) “Action” includes suits and legal proceedings.

(3) “Administration” means any proceeding relating to the estate of a decedent, whether the decedent died testate, intestate or partially intestate.

(4) “Advancement” means a gift by a decedent to an heir [to enable the donee to anticipate the inheritance to the extent of the gift] or devisee with the intent that the gift satisfy in whole or in part the heir's share of an intestate estate or the devisee's share of a testate estate.

(5) “All purposes of intestate succession” means succession by, through or from a person, both lineal and collateral.

(6) “Assets” includes real, personal and intangible property.

(7) “Claim” includes liabilities of a decedent, whether arising in contract, in tort or otherwise.

(8) “Court” or “probate court” means the court in which jurisdiction of probate matters, causes and proceedings is vested as provided in ORS 111.075.

(9) “Decedent” means a person who has died [leaving property that is subject to administration].

(a) “Descendant” means a person who is descended from a specific ancestor and includes an adopted child and the adopted child's descendants.

(b) When used to refer to persons who take by intestate succession, “descendant” does not include a person who is the descendant of a living descendant.

(10) “Devise,” when used as a noun, means property disposed of by a will[. and includes "legacy" and "bequest."]

(11) “Devise,” when used as a verb, means to dispose of property by a will[, and includes "bequeath."].
(12) “Devisee” [includes “legatee” and “beneficiary.”] means a person designated in a will to receive a devise.

(13) “Distributee” means a person entitled to any property of a decedent under the will of the decedent or under intestate succession.

(14) “Domicile” means the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return.

(15) “Estate” means the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment, substitutions or otherwise, [and] augmented by any accretions or additions [thereof and substitutions therefor] or diminished by any decreases [and] or distributions [therefrom].

(16) “Funeral” includes the burial or other disposition of the remains of a decedent, [including the] any plot or tomb and other necessary incidents to the disposition of the remains, any memorial ceremony or other observance and related expenses.

(17) “General devise” means a devise chargeable generally on the estate of a testator [and] so that the devise is not distinguishable from other parts [thereof or not so given as to amount to] of the estate and does not constitute a specific devise.

[(18) “Generation” means a group of human beings, living or deceased, that constitute a single step in the line of descent from an ancestor.]

[(19) “Heir” means any person, including the surviving spouse, who is or would be entitled under intestate succession to [the property of a decedent who died wholly or partially intestate] property of a person upon that person’s death.

[(20) “Interested person” includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent that may be affected by the proceeding. [It] “Interested person” also includes fiduciaries representing interested persons.

(21) “Intestate” means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will, effectively disposing of all the estate.

(22) “Intestate succession” means succession to property of a decedent who dies intestate or partially intestate.

(23) “Issue” [includes adopted children and their issue and, when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants] means a descendant or descendants.

[(24) “Net estate” means the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

(25) “Net intestate estate” means any part of the net estate of a decedent not effectively disposed of by the will.

(26) “Personal property” includes all property other than real property.

(27) “Personal representative” includes executor, administrator, administrator with will annexed and administrator de bonis non, but does not include special administrator.

(28) “Property” includes both real and personal property.

(29) “Real property” includes all legal and equitable interests in land, in fee and for life.

(30) “Settlement” includes, as to the estate of a decedent, the full process of administration, distribution and closing.

[(31) “Specific devise” means a devise of a specific thing or specified part of the estate of a testator that is so described as to be capable of identification. [It] A specific devise is a gift of a part of the estate identified and differentiated from all other parts.

(32) “Will” includes codicil; [it] and includes a testamentary instrument that merely appoints an executor or that merely revokes or revives another will.

SECTION 2. ORS 112.025 is amended to read:

112.025. If the decedent leaves a surviving spouse and [issue] one or more descendants, the intestate share of the surviving spouse is:
(1) If there are [surviving issue] one or more surviving descendants of the decedent all of whom are [issue] descendants of the surviving spouse also, the entire net intestate estate.

(2) If there are [surviving issue] one or more surviving descendants of the decedent one or more of whom are not [issue] descendants of the surviving spouse, one-half of the net intestate estate.

SECTION 3. ORS 112.035 is amended to read:

112.035. If the decedent leaves a surviving spouse and no [issue, the surviving spouse shall have all of the net intestate estate] descendant, the intestate share of the surviving spouse is the entire net intestate estate.

SECTION 4. ORS 112.045 is amended to read:

112.045. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent. Issue of different generations in relation to the decedent take by representation as defined in ORS 112.065.

(2) If there is no surviving issue [or spouse], to the surviving parents of the decedent.

(3) If there is no surviving issue, spouse or parent, to the brothers and sisters of the decedent and the issue of any deceased brother or sister of the decedent by representation as defined in ORS 112.065. If there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as defined in ORS 112.065.

(4)(a) If there is no surviving issue, [spouse,] parent or issue of a parent, equally to the grandparents of the decedent and the issue of any deceased grandparent of the decedent by representation as defined in ORS 112.065 who left issue surviving at the time of the decedent’s death. If one or more grandparents of the decedent do not survive the decedent, the issue of the grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as defined in ORS 112.065.

(b) If there is no surviving grandparent, the issue of grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as defined in ORS 112.065.

(5) If, at the time of taking, surviving parents or grandparents of the decedent are married to each other, they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

SECTION 4a. ORS 112.045, as amended by section 4 of this 2016 Act, is amended to read:

112.045. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the [issue] descendants of the decedent by representation as described in ORS 112.065. [Issue of different generations in relation to the decedent take by representation as defined in ORS 112.065.]

(2) If there is no surviving [issue] descendant, to the surviving parents of the decedent.

(3) If there is no surviving [issue] descendant or parent, equally to the brothers and sisters of the decedent and [the issue] by representation as described in ORS 112.065 to the descendants of any deceased brother or sister of the decedent [by representation as defined in ORS 112.065]. If there is no surviving brother or sister, the [issue] descendants of brothers and sisters take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as [defined] described in ORS 112.065.

(4)(a) If there is no surviving [issue, parent or issue] descendant, parent or descendant of a parent, equally to the grandparents of the decedent and [the issue] by representation as described in ORS 112.065 to the descendants of any deceased grandparent of the decedent [by representation as defined in ORS 112.065] who left [issue] descendants surviving at the time of the decedent’s death. If one or more grandparents of the decedent do not survive the decedent, the [issue of the] descendants of each of the deceased grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as [defined] described in ORS 112.065.
(b) If there is no surviving grandparent, the [issue] descendants of grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as [defined] described in ORS 112.065.

(5) If, at the time of taking, surviving parents or grandparents of the decedent are married to each other, they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

SECTION 5. ORS 112.058 is amended to read:
112.058. (1) In any proceeding to determine the escheat share of the estate of a decedent whose estate is wholly or partially subject to probate in this state:
   (a) No preference shall be given to any person over escheat; and
   (b) After diligent search and inquiry appropriate to the circumstances, the following presumptions apply in a proceeding to determine whether a missing person has died:
     (A) A missing person whose death cannot be proved by other means lives to 100 years of age.
     (B) A missing person who was exposed to a specific peril at the time the person became missing has died if it is reasonable to expect from the nature of the peril that proof of death would be impractical.
     (C) A missing person whose absence is unexplained has died if the character and habits of the person are inconsistent with a voluntary absence for the time that the person has been missing.
     (D) A missing person known to have been alive who has not been seen or heard from for seven years has died if the person has been absent from the person's usual residence, the absence is unexplained, there are other persons who would have been likely to have heard from the missing person during that period were the missing person alive, and those other persons have not heard from the missing person.
   (2) In any proceeding described by subsection (1) of this section, a missing person who is presumed to be dead is also presumed to have had two children in addition to any known [issue] descendants of the person unless the presumption of death arises by reason of the application of subsection (1)(b)(B) or (C) of this section.

SECTION 6. ORS 112.065 is amended to read:
112.065. “Representation” means the method of determining the passing of the net intestate estate when the distributees are of different generations in relation to the decedent. Representation is accomplished as follows: [The estate shall be divided into as many shares as there are surviving heirs of the generation closest in relation to the decedent and deceased persons of the same generation who left issue who survive the decedent, each surviving heir of the nearest generation in relation to the decedent receiving one share and the share of each deceased person of the same generation being divided among the issue of the deceased person in the same manner.]

(1) If a distributive share of a wholly or partially intestate estate passes by representation to a person's descendants, the share is divided into as many equal shares as there are:
   (a) Surviving descendants in the generation nearest to the person that contains one or more surviving descendants; and
   (b) Deceased descendants, in the generation nearest to the person that contains one or more surviving descendants, who left surviving descendants, if any.

(2) Each share created for a surviving descendant in the nearest generation is distributed to that descendant. Each share created for a deceased descendant is distributed to the descendants of the deceased descendant by representation as described in this section.

SECTION 7. ORS 112.390 is repealed.

SECTION 8. ORS 112.135 is amended to read:
112.135. (a) If a person dies intestate as to all or part of the estate of the person, property [which] that the person [gave in] gives during the lifetime of the person to an heir [shall be] is treated as an advancement against the heir's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement.

(b) [For that purpose] For purposes of applying the gift against the heir's share of the intestate estate, the property advanced [shall] must be valued as of the time the heir came into
possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first, unless otherwise directed in the decedent’s writing.

(2)(a) Except as provided in ORS 112.385, property that a testator gives during the testator's lifetime to a devisee is treated as an advancement of the devisee's share in whole or in part if:

(A) The will provides for deduction of the gift;
(B) The testator declared in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise; or
(C) The devisee acknowledges in writing, before or after the testator's death, that the gift was made in satisfaction of the devise or that its value was to be deducted from the value of the devise.

(b) For purposes of applying the gift against the devisee's share of the testate estate, the property advanced must be valued as of the time the devisee came into possession or enjoyment of the property or as of the time of the testator's death, whichever occurs first, unless otherwise directed in the testator's will or a writing described in paragraph (a)(B) of this subsection.

(3)(a) Property not subject to probate administration, the transfer of which is intended by the decedent to take effect on death, is treated as an advancement against the heir's or devisee's share of the estate or the devisee's devise under the will if declared in writing by the decedent, or acknowledged in writing by the heir or devisee, to be an advancement. Examples of transfers under this subsection include but are not limited to beneficiary designation, right of survivorship and transfer on death deed or transfer on death designation.

(b) The property transferred under this subsection must be valued as of the time of the decedent's death, unless otherwise directed in the testator's will or in a writing by the decedent.

SECTION 9. ORS 112.145 is amended to read:
112.145. (1) If the value of [the] an advancement exceeds the heir's or devisee's share of the estate, the heir or devisee shall be excluded from any further share of the estate, but the heir or devisee shall not be required to refund any part of the advancement. If the value of [the] an advancement is less than the heir's or devisee's share, the heir or devisee shall be entitled upon distribution of the estate to such additional amount as will give the heir or devisee the heir's or devisee's share of the estate.

(2) The property advanced is not a part of the estate, but for the purpose of determining the shares of the heirs or devisees the advancement shall be added to the value of the estate, the sum then divided among the heirs or devisees according to the laws of intestate succession or the testator's will and the advancement then deducted from the share of the heir or devisee to whom the advancement was made.

SECTION 10. ORS 112.155 is amended to read:
112.155. If the recipient of the property advanced fails to survive the decedent, the amount of the advancement shall be taken into account in computing the share of the [issue] descendants of the recipient, whether or not the [issue] descendants take by representation.

SECTION 11. ORS 112.175 is amended to read:
112.175. (1) An adopted person, the [issue] descendants and kindred of the adopted person shall take by intestate succession from the adoptive parents, their [issue] descendants and kindred, and the adoptive parents, their [issue] descendants and kindred shall take by intestate succession from the adopted person, the [issue] descendants and kindred of the adopted person, as though the adopted person were the biological child of the adoptive parents.

(2) An adopted person shall cease to be treated as the child of any person other than the adopted person’s adoptive parents for all purposes of intestate succession except in the following circumstances:

(a) If a person is adopted by a stepparent or a domestic partner of a parent in a domestic partnership registered under ORS 106.300 to 106.340 or under a similar law in another state, the
adopted person shall continue also to be treated, for all purposes of intestate succession, as the child
of the parent who is the spouse of, or other domestic partner in the domestic partnership with, the
adoptive parent.

(b) If a parent of a person dies, and the other parent of the person marries or enters into a
domestic partnership registered under ORS 106.300 to 106.340 or under a similar law in another
state, and the person is adopted by a stepparent or the other domestic partner, the adopted person
shall continue also to be treated, for all purposes of intestate succession, as the child of the de-
ceased parent.

(3) ORS chapters 111, 112, 113, 114, 115, 116 and 117 apply to adopted persons who were adopted
in this state or elsewhere.

SECTION 12. ORS 111.015 is amended to read:

ORS 111.015. Except as specifically provided otherwise in chapter 591, Oregon Laws 1969, on July
1, 1970:

(1) chapter 591, Oregon Laws 1969, applies to wills of decedents dying [thereon or] thereafter,
and a will executed before July 1, 1970, shall be considered lawfully executed if the application of
ORS 112.255 would make it so, but the construction of a will executed before July 1, 1970, shall be
governed by the law in effect on the date of execution unless a contrary intent is established by the
will.

(2) The procedure prescribed by chapter 591, Oregon Laws 1969, applies to any proceedings com-
menced thereon or thereafter regardless of the time of the death of a decedent, and also as to any fur-
ther procedure in proceedings then pending except to the extent that in the opinion of the court the
former procedure should be made applicable in a particular case in the interest of justice or because
of infeasibility of application of the procedure prescribed by chapter 591, Oregon Laws 1969.

(3) A personal representative, guardian or conservator holding an appointment on that date shall
continue to hold the appointment, but shall have only the powers conferred and be subject to the duties
imposed by chapter 591, Oregon Laws 1969, with respect to any act occurring or done thereon or
thereafter, other than acts pursuant to powers or duties validly conferred or imposed by a will executed
before July 1, 1970.

(4) An act done before July 1, 1970, in any proceeding and any accrued right shall not be impaired
by chapter 591, Oregon Laws 1969. When a right is acquired, extinguished or barred upon the expi-
ration of a prescribed period of time which has commenced to run by the provisions of any statute be-
fore July 1, 1970, those provisions shall remain in force with respect to that right.

SECTION 13. ORS 111.095 is amended to read:

ORS 111.095. (1) The general legal and equitable powers of a circuit court [are applicable to effectuate
the jurisdiction of] apply to a probate court,[, punish contempts and carry out its determinations, or-
ders and judgments as a court of record with general jurisdiction, and]

(2) The same validity, finality and presumption of regularity shall be accorded to [its] the de-
determinations, orders and judgments of a probate court, including determinations of its own juris-
diction, as to those of a [court of record with general jurisdiction] circuit court.

(3) A probate court has full, legal and equitable powers to make declaratory judgments, as
provided in ORS 28.010 to 28.160, in all matters involved in the administration of an estate, including
those matters pertaining to the title of real property and ownership of personal property, the
determination of heirship and the distribution of the estate.

SECTION 14. ORS 111.115 is amended to read:

ORS 111.115. (1) An estate proceeding[,] including all probate matters, causes and proceedings pertaining
thereto[,] may be transferred at any time from a county court [sitting in probate] to the circuit
court for the county by order of the county court.

(2) An estate proceeding[,] including all probate matters, causes and proceedings pertaining
thereto[,] commenced in a county court [sitting in probate] and in which the county judge is a party
or directly interested [shall] must be transferred from the county court to the circuit court for the
county by order of the county court.
(3) Upon transfer of an estate proceeding from a county court to the circuit court for the county under this section:

(a) The county clerk shall certify and cause to be filed in the records of the circuit court all original papers and proceedings pertaining to the estate proceeding, and thereafter jurisdiction of all probate matters, causes and proceedings pertaining to the estate proceeding is vested in the circuit court as if that jurisdiction had been originally and exclusively vested in the circuit court; and

(b) Jurisdiction over the estate proceeding vests in the circuit court as if the jurisdiction had been originally and exclusively vested in the circuit court.

SECTION 15. ORS 111.175 is amended to read:

111.175. [The court may appoint the clerk of the probate court or some other suitable person at the county seat to act as probate commissioner within the county. If the clerk of the probate court is appointed probate commissioner, the deputy of the clerk has the power to perform any act as probate commissioner that the clerk has, and the clerk is responsible for conduct of the deputy so acting.] The presiding judge of a circuit court or the county judge of a county court may appoint a probate commissioner and one or more deputy probate commissioners and, if such appointments are made, shall prescribe, by rule or order, the duties and responsibilities of the probate commissioner and deputy probate commissioners, subject to ORS 111.185.

SECTION 16. ORS 111.185 is amended to read:

111.185. (1) To the extent prescribed or otherwise authorized by rule or order made under ORS 111.175, a probate commissioner or deputy probate commissioner may:

(a) Act upon uncontested petitions for appointment of special administrators, for probate of wills and for appointment of personal representatives, guardians and conservators, to the extent authorized by rule of the court. Pursuant thereto the probate commissioner may;

(b) Make and enter orders and judgments on behalf of the court admitting wills to probate and appointing and setting the amount of the bonds of special administrators, personal representatives, guardians and conservators, subject to the orders of the probate commissioner being set aside or modified by the judge of the court within 30 days after the date an order is entered; and

(c) Appoint court visitors.

(2) Any matter presented to the probate commissioner or deputy probate commissioner may be referred by the probate commissioner to the judge of the court.

(3) Any order or judgment made by a probate commissioner or deputy probate commissioner is subject to being set aside or modified by the judge of the court within 30 days after the date of the order or judgment.

(4) Any interested person may object to an order or judgment of a probate commissioner or deputy probate commissioner within 30 days after the date of the order or judgment, and the judge of the court may set aside or modify the order or judgment.

(3) (5) Unless set aside or modified by the judge of the court, the orders and judgments of the probate commissioner or deputy probate commissioner have the same effect as if made by the judge of the court.

SECTION 17. ORS 112.238 is amended to read:

112.238. (1) Although a writing was not executed in compliance with ORS 112.235, the writing may be treated as if it had been executed in compliance with ORS 112.235 if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the writing to constitute:

(a) The decedent’s will;

(b) A partial or complete revocation of the decedent’s will; or

(c) An addition to or an alteration of the decedent’s will.

(2) The proponent of the writing must file a petition with the court to establish the decedent’s intention with respect to the writing. The proponent shall provide notice of the petition to heirs, devisees under prior wills and persons interested in the estate of the decedent that would be required to be identified and set forth in a petition for the appointment of a personal representative under ORS 113.035. Persons receiving notice and other interested persons shall have 20 days after service of the
notice under this subsection to file written objections to the petition. The court may make a determination regarding the decedent’s intent after a hearing or on the basis of affidavits.]

(2) A writing described in subsection (1) of this section may be filed with the court for administration as the decedent’s will pursuant to ORS 113.035. The proponent of the writing shall give notice of the filing of the petition to those persons identified in ORS 113.035 (5), (7), (8) and (9). Persons receiving notice under this subsection shall have 20 days after the notice was given to file written objections to the petition. The court may make a determination regarding the decedent’s intent after a hearing or on the basis of affidavits.

(3) If the court determines that clear and convincing evidence exists showing that the writing was intended by the decedent to accomplish one of the purposes set forth in subsection (1) of this section, the court shall:

[a) Prepare written findings of fact in support of the determination; and]
[b) Enter a limited judgment that admits the writing for probate or otherwise acknowledges the validity and intent of the writing.]

(3) The proponent of a writing described in subsection (1) of this section may file a petition with the court to establish the decedent’s intent that the writing was to be a partial or complete revocation of the decedent’s will, or an addition to or an alteration of the decedent’s will. The proponent shall give notice of the filing to any personal representative appointed by the court, the devisees named in any will admitted to probate and those persons identified in ORS 113.035 (5). Persons receiving notice under this subsection shall have 20 days after the notice was given to file written objections to the petition. The court may make a determination regarding the decedent’s intent after a hearing or on the basis of affidavits.

(4) A petition filed under this section must be filed within four months after the date on which the notice required by subsection (2) of this section was provided.

(4)(a) If the court determines that clear and convincing evidence exists showing that a writing described in subsection (1) of this section was intended by the decedent to accomplish one of the purposes set forth in subsection (1) of this section, the court shall:

[A) Prepare written findings of fact in support of the determination; and
B) Enter a limited judgment that admits the writing for probate as the decedent’s will or otherwise acknowledges the validity and intent of the writing.]

(b) A determination under this subsection does not preclude the filing of a will contest under ORS 113.075, except that the will may not be contested on the grounds that the will was not executed in compliance with ORS 112.235.

(5) The fee imposed and collected by the court for the filing of a petition under this section shall be in accordance with ORS 21.135.

SECTION 18. ORS 111.275 is amended to read:
111.275. (1) The court in a probate proceeding under ORS chapters 111, 112, 113, 114, 115, 116 and 117 may enter a limited judgment only for the following decisions of the court:
(a) A decision on a petition for appointment or removal of a personal representative.
(b) A decision in a will contest filed in the probate proceeding.
(c) A decision on an objection to an accounting.
(d) A decision on a request made in the proceeding for a declaratory judgment under ORS 111.095.
(e) A decision on a request for an award of expenses under ORS 116.183.
(f) A decision on a petition filed under ORS 112.238 admitting a writing for probate or otherwise acknowledging the validity and intent of the writing.

[(f)(g) Such decisions of the court as may be specified by rules or orders of the Chief Justice of the Supreme Court under ORS 18.028.

(2) A court may enter a limited judgment under this section only if the court determines that there is no just reason for delay. The judgment document need not reflect the court’s determination that there is no just reason for delay.

SECTION 19. ORS 179.610 is amended to read:
179.610. As used in ORS 179.610 to 179.770, unless the context requires otherwise:

(1) “Authorized representative” means an individual or entity appointed under authority of ORS chapter 125, as guardian or conservator of a person, who has the ability to control the person's finances, and any other individual or entity holding funds or receiving benefits or income on behalf of any person.

(2) “Care” means all services rendered to a patient by the state institutions as described in ORS 179.321 or by the Eastern Oregon Training Center. These services include, but are not limited to, such items as medical care, room, board, administrative costs and other costs not otherwise excluded by law.

(3) “Decedent’s estate” has the meaning given “estate” in ORS 111.005 [(/15)].

(4) “Person,” “person in a state institution” or “person at a state institution,” or any similar phrase, means an individual who is or has been at a state institution described in ORS 179.321 or in the Eastern Oregon Training Center.

(5) “Personal estate” means all income and benefits as well as all assets, including all personal and real property of a living person, and includes assets held by the person's authorized representative and all other assets held by any other individual or entity holding funds or receiving benefits or income on behalf of any person.

SECTION 20. ORS 113.005 is amended to read:

113.005. (1) If, prior to appointment and qualification of a personal representative, property of a decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject.

(2) The special administrator shall qualify by filing a bond in the amount set by the court, conditioned upon the special administrator faithfully performing the duties of the trust.

(3) The special administrator may:
   (a) Incur expenses for the funeral, burial or other disposition of the remains of the decedent in a manner suitable to the condition in life of the decedent;
   (b) Incur expenses for the protection of the property of the estate; and
   (c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(4) The special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in danger of loss, injury or deterioration pending the appointment of a personal representative.

(5) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease. Within 30 days after the issuance of letters testamentary to a personal representative, the special administrator shall make and file an account and deliver to the personal representative the assets of the estate in the possession of the special administrator. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account.

(6) To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by the special administrator, including a reasonable fee of the attorney of the special administrator, shall be paid as expenses of administration.

SECTION 21. ORS 113.242 is amended to read:

113.242. (1) An estate administrator of the Department of State Lands appointed under ORS 113.235 may take custody of the property of a decedent who died owning property subject to probate in Oregon upon the estate administrator receiving notice that:
   (a) The decedent died wholly intestate and without a known heir as described in ORS 113.238 (3); or
   (b) The decedent left a valid will, but no devisee has been identified and found.

(2) For any estate described in subsection (1) of this section, an estate administrator of the Department of State Lands appointed under ORS 113.235 may:
(a) Incur expenses for the funeral, burial or other disposition of the remains of the decedent in a manner suitable to the condition in life of the decedent;
(b) Incur expenses for the protection of the property of the estate;
(c) Incur expenses searching for a will or for heirs or devisees of the decedent;
(d) Have access to the property and records of the decedent other than records that are made confidential or privileged by statute;
(e) With proof of the death of the decedent, have access to all financial records of accounts or safe deposit boxes of the decedent at banks or other financial institutions; and
(f) Sell perishable property of the estate.
(3) The reasonable funeral and administrative expenses of the Department of State Lands incurred under this section, including a reasonable attorney fee, shall be paid from the assets of the estate with the same priority as funeral and administration expenses under ORS 115.125.

SECTION 22. ORS 114.305 is amended to read:
114.305. Subject to the provisions of ORS 97.130 (2) and (10) and except as restricted or otherwise provided by the will of the decedent, a document of anatomical gift under ORS 97.965 or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:
(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to the condition in life of the decedent. Only those funeral expenses necessary for a plain and decent funeral and disposition of the remains of the decedent may be paid from the estate if the assets are insufficient to pay the claims of the Department of Human Services and the Oregon Health Authority for the net amount of public assistance, as defined in ORS 411.010, or medical assistance, as defined in ORS 414.025, paid to or for the decedent and for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.
(2) Retain assets owned by the decedent pending distribution or liquidation.
(3) Receive assets from fiduciaries or other sources.
(4) Complete, compromise or refuse performance of contracts of the decedent that continue as obligations of the estate, as the personal representative may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease real property, the personal representative, among other courses of action, may:
(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid or upon receipt of the note of the purchaser adequately secured; or
(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.
(5) Satisfy written pledges of the decedent for contributions, whether or not the pledges constituted binding obligations of the decedent or were properly presented as claims.
(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or savings and loan association accounts, or invest the funds in bank or savings and loan association certificates of deposit, or federally regulated money-market funds and short-term investment funds suitable for investment by trustees under ORS 130.750 to 130.775, or short-term United States Government obligations.
(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.
(8) Vote stocks or other securities in person or by general or limited proxy.
(9) Pay calls, assessments and other sums chargeable or accruing against or on account of securities.
(10) Sell or exercise stock subscription or conversion rights.
(11) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise.
(12) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held.

(13) Insure the assets of the estate against damage and loss, and insure the personal representative against liability to third persons.

(14) Advance or borrow money with or without security.

(15) Compromise, extend, renew or otherwise modify an obligation owing to the estate. A personal representative who holds a mortgage, pledge, lien or other security interest may accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(16) Accept other real property in part payment of the purchase price of real property sold by the personal representative.

(17) Pay taxes, assessments and expenses incident to the administration of the estate.

(18) Employ qualified persons, including attorneys, accountants and investment advisers, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

(19) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties as personal representative.

(20) Prosecute claims of the decedent including those for personal injury or wrongful death.

(21) Continue any business or venture in which the decedent was engaged at the time of death to preserve the value of the business or venture.

(22) Incorporate or otherwise change the business form of any business or venture in which the decedent was engaged at the time of death.

(23) Discontinue and wind up any business or venture in which the decedent was engaged at the time of death.

(24) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(25) Satisfy and settle claims and distribute the estate as provided in ORS chapters 111, 112, 113, 114, 115, 116 and 117.

(26) Perform all other acts required or permitted by law or by the will of the decedent.

SECTION 23. ORS 115.125 is amended to read:

115.125. (1) If the applicable assets of the estate are insufficient to pay all expenses and claims in full, the personal representative shall make payment in the following order:

(a) Support of spouse and children, subject to the limitations imposed by ORS 114.065.

(b) Expenses of administration.

(c) Expenses of a plain and decent funeral [and disposition of the remains of the decedent].

(d) Debts and taxes with preference under federal law.

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent.

(f) Taxes with preference under the laws of this state that are due and payable while possession of the estate of the decedent is retained by the personal representative.

(g) Debts owed employees of the decedent for labor performed within 90 days immediately preceding the date of death of the decedent.

(h) Child support arrearages.

(i) The claim of the Department of Veterans’ Affairs under ORS 406.100, including a claim the waiver of which was retracted by the Director of Veterans’ Affairs under ORS 406.110.

(j) The claim of the Department of Human Services or the Oregon Health Authority for the amount of the state’s monthly contribution to the federal government to defray the costs of outpatient prescription drug coverage provided to a person who is eligible for Medicare Part D prescription drug coverage and who receives benefits under the state medical assistance program or Title XIX of the Social Security Act.
(k) The claim of the Department of Human Services or the Oregon Health Authority for the net amount of assistance paid to or for the decedent, in the following order:

(A) Public assistance, as defined in ORS 411.010, and medical assistance, as defined in ORS 414.025, funded entirely by moneys from the General Fund; and

(B) Public assistance, as defined in ORS 411.010, and medical assistance, as defined in ORS 414.025, that may be recovered from an estate under ORS 416.350, funded by a combination of state and federal funds.

(L) The claim of the Department of Human Services or the Oregon Health Authority for the care and maintenance of the decedent at a state institution, as provided in ORS 179.610 to 179.770.

(m) The claim of the Department of Corrections for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(n) All other claims against the estate.

(2) If the applicable assets of the estate are insufficient to pay in full all expenses or claims of any one class specified in subsection (1) of this section, each expense or claim of that class shall be paid only in proportion to the amount thereof.

SECTION 24. The amendments to ORS 111.005, 111.015, 111.095, 111.115, 111.175, 111.185, 111.275, 112.025, 112.035, 112.045, 112.058, 112.065, 112.135, 112.145, 112.155, 112.175, 113.005, 113.242, 114.305, 115.125 and 179.610 by sections 1 to 3, 4a, 5, 6, 8 to 16 and 18 to 23 of this 2016 Act and the repeal of ORS 112.390 by section 7 of this 2016 Act become operative on January 1, 2017.

SECTION 25. (1) The amendments to ORS 111.005, 111.015, 111.095, 111.115, 111.175, 111.185, 111.275, 112.025, 112.035, 112.045, 112.058, 112.065, 112.135, 112.145, 112.155, 112.175, 113.005, 113.242, 114.305, 115.125 and 179.610 by sections 1 to 3, 4a, 5, 6, 8 to 16 and 18 to 23 of this 2016 Act and the repeal of ORS 112.390 by section 7 of this 2016 Act apply to estates of decedents dying after the operative date specified in section 24 of this 2016 Act.

(2) The amendments to ORS 112.045 and 112.238 by sections 4 and 17 of this 2016 Act apply to estates of decedents dying after the effective date of this 2016 Act.

SECTION 26. This 2016 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect on its passage.
Amendments to the Oregon Probate Code

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

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&
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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.
Enrolled

Senate Bill 379

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary)

CHAPTER ..................................................

AN ACT


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

REVISION OF ORS CHAPTER 112

SECTION 1. ORS 112.075, 112.325, 112.335, 112.435, 112.485 and 112.695 are repealed.

SECTION 2. ORS 112.015 is amended to read:

112.015. (1) Any part of the net estate of a decedent not effectively disposed of by the will of the decedent shall pass as provided in ORS 112.025 to 112.055.

(2) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed that individual's or member's intestate share.

SECTION 3. ORS 112.045 is amended to read:

112.045. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent. [If the issue are all of the same degree of kinship to the decedent, they shall take equally, but if of unequal degree, then those of more remote degrees take by representation] Issue of different generations in relation to the decedent take by representation as defined in ORS 112.065.

(2) If there is no surviving issue or spouse, to the surviving parents of the decedent.

(3) If there is no surviving issue, spouse or parent, to the brothers and sisters of the decedent and the issue of any deceased brother or sister of the decedent by representation as defined in ORS 112.065. If there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same [degree of kinship] generation in relation to the decedent, but if of [unequal degree] different generations, then those of [more remote degrees] later generations take by representation as defined in ORS 112.065.

(4)(a) If there is no surviving issue, spouse, parent or issue of a parent, equally to the grandparents of the decedent and the issue of any deceased grandparent of the decedent by repre-
sentation as defined in ORS 112.065. If one or more grandparents of the decedent do not survive the decedent, the issue of the grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as defined in ORS 112.065.

(b) If there is no surviving grandparent, the issue of grandparents take equally if they are all of the same [degree of kinship] generation in relation to the decedent, but if of [unequal degree] different generations, then those of [more remote degrees] later generations take by representation as defined in ORS 112.065.

(5) If, at the time of taking, surviving parents or grandparents of the decedent are married to each other, they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

SECTION 4. ORS 112.047 is amended to read:

112.047. (1) Property that would pass by intestate succession under ORS 112.045 from the estate of a decedent to a parent of the decedent shall pass and be vested as if the parent had predeceased the decedent if:

(a) The parental rights of the parent with respect to the decedent were terminated and the parent-child relationship between the parent and the decedent was not judicially reestablished.

(b) The decedent was an adult when the decedent died and:

[(a)] (A) The parent of the decedent willfully deserted the decedent for the 10-year period immediately preceding the date on which the decedent became an adult; or

[(b)] (B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the 10-year period immediately preceding the date on which the decedent became an adult.

[(2)] (c) Property that would pass by intestate succession under ORS 112.045 from the estate of a decedent to a parent of the decedent shall pass and be vested as if the parent had predeceased the decedent if

[(a)] (A) The parent of the decedent willfully deserted the decedent for the life of the decedent or for the 10-year period immediately preceding the date on which the decedent died; or

[(b)] (B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the life of the decedent or for the 10-year period immediately preceding the date on which the decedent died.

[(3)] (2) For the purposes of [subsections (1) and (2)] subsection (1) of this section, the court may disregard incidental visitations, communications and contributions in determining whether a parent willfully deserted the decedent or neglected without just and sufficient cause to provide proper care and maintenance for the decedent.

[(4)] (3) For the purposes of [subsections (1) and (2)] subsection (1) of this section, in determining whether the parent willfully deserted the decedent or neglected without just and sufficient cause to provide proper care and maintenance for the decedent, the court may consider whether a custodial parent or other custodian attempted, without good cause, to prevent or to impede contact between the decedent and the parent whose intestate share would be forfeited under this section.

[(5)] (4) The intestate share of a parent of a decedent may be forfeited under this section only pursuant to an order of the court entered after the filing of a petition under ORS 112.049. A petition filed under ORS 113.035 may not request the forfeiture of the intestate share of a parent of a decedent under this section.

SECTION 5. ORS 112.055 is amended to read:

112.055. (1) If, after diligent search and inquiry that is appropriate to the circumstances, taking into account the value of the decedent’s estate, no person takes under ORS 112.025 to 112.045, the net intestate estate escheats to the State of Oregon.

(2) If a devisee or a person entitled to take under ORS 112.025 to 112.045 is not identified or found, the share of that person escheats to the State of Oregon.
(3) If a devisee or a person entitled to take under ORS 112.025 to 112.045 is not identified or found:
   (a) The Department of State Lands has the same preference as the missing devisee or person for the purpose of appointment as personal representative under ORS 113.085;
   (b) Title to property of the decedent that would vest in the missing devisee or person under ORS 114.215 vests in the Department of State Lands; and
   (c) The Department of State Lands has all of the rights of the missing devisee or person for the purposes of ORS chapters 111, 112, 113, 114, 115, 116 and 117, including but not limited to the following:
      (A) The right to contest any will of the decedent under ORS 113.075; and
      (B) The right to information under ORS 113.145.

SECTION 6. ORS 112.065 is amended to read:
112.065. “Representation” means the method of determining the passing of the net intestate estate when the distributees are of [unequal degrees of kinship] different generations in relation to the decedent. [It] Representation is accomplished as follows: The estate shall be divided into as many shares as there are surviving heirs of the [nearest degree of kinship] generation closest in relation to the decedent and deceased persons of the same [degree] generation who left issue who survive the decedent, each surviving heir of the nearest [degree] generation in relation to the decedent receiving one share and the share of each deceased person of the same [degree] generation being divided among the issue of the deceased person in the same manner.

SECTION 7. ORS 112.105 is amended to read:
112.105. (1) For all purposes of intestate succession, full effect shall be given to all relationships as described in ORS 109.060, except as otherwise provided by law in case of adoption.
   (2) For all purposes of intestate succession and for those purposes only, before the relationship of father and child and other relationships dependent upon the establishment of paternity shall be given effect under subsection (1) of this section:
      [a] the paternity of the child shall have been established under ORS 109.070 during the lifetime of the child;
      [b] The father shall have acknowledged himself to be the father in writing signed by him during the lifetime of the child.

SECTION 8. ORS 112.175 is amended to read:
112.175. (1) An adopted person, the issue and kindred of the adopted person shall take by intestate succession from the adoptive parents, their issue and kindred, and the adoptive parents, their issue and kindred shall take by intestate succession from the adopted person, the issue and kindred of the adopted person, as though the adopted person were the [natural] biological child of the adoptive parents.
   (2) An adopted person shall cease to be treated as the child of [the person’s natural parents] any person other than the adopted person’s adoptive parents for all purposes of intestate succession [by the adopted person, the issue and kindred of the adopted person and the natural parents, their issue and kindred,] except in the following circumstances:
      (a) [If a natural parent of a person marries or remarries and the] If a person is adopted by [the] a stepparent or a domestic partner of a parent in a domestic partnership registered under ORS 106.300 to 106.340 or under a similar law in another state, the adopted person shall continue also to be treated, for all purposes of intestate succession, as the child of the [natural] parent who is the spouse of, or other domestic partner in the domestic partnership with, the adoptive parent.
      (b) If a [natural] parent of a person dies, [the other natural parent remarries] and the other parent of the person marries or enters into a domestic partnership registered under ORS 106.300 to 106.340 or under a similar law in another state, and the person is adopted by [the] a stepparent or the other domestic partner, the adopted person shall continue also to be treated, for all purposes of intestate succession [by any person through the deceased natural parent], as the child of the deceased [natural] parent.
(3) ORS chapters 111, 112, 113, 114, 115, 116 and 117 apply to adopted persons who were adopted in this state or elsewhere.

**SECTION 9.** ORS 112.185 is amended to read:

112.185. For all purposes of intestate succession, a person who has been adopted more than once shall be treated as the child of the parents who have most recently adopted the person and, except as otherwise provided in this section, shall cease to be treated as the child of the previous adoptive parents. The person shall continue also to be treated as the child of a [natural parent or previous adoptive parent] previous parent or previous adoptive parent other than the most recent adoptive parents only to the extent provided in ORS 112.175 (2), and for the purpose of applying that subsection with reference to a previous adoptive parent, “natural” parent” in that subsection means the previous adoptive parent.

**SECTION 10.** ORS 112.225 is amended to read:

112.225. Any person who is 18 years of age or older or who has been lawfully married or who has been emancipated in accordance with ORS 419B.550 to 419B.558, and who is of sound mind, may make a will.

**SECTION 11.** ORS 112.235 is amended to read:

112.235. (1) Except as provided in section 29 of this 2015 Act, a will shall be in writing and shall be executed in accordance with the following formalities:

[(1)] (a) The testator, in the presence of each of the witnesses, shall:

[(a)] (A) Sign the will; [or]

[(b)] (B) Direct one of the witnesses or some other person to sign thereon the name of the testator and the signer’s own name on the will; or

[(c)] (C) Acknowledge the signature previously made on the will by the testator or at the testator’s direction.

[(2)] Any person who signs the name of the testator as provided in subsection (1)(b) of this section shall sign the signer’s own name on the will and write on the will that the signer signed the name of the testator at the direction of the testator.

[(3)] (b) At least two witnesses shall each:

[(a)] (i) See the testator sign the will; [or]

[(b)] (ii) Hear the testator acknowledge the signature on the will; [and] or

(iii) Hear or observe the testator direct some other person to sign the name of the testator; and

[(c)] (B) Attest the will by signing the witness’ name to [it] the will within a reasonable time before the testator’s death.

(2) The signature by a witness on an affidavit executed contemporaneously with execution of a will is considered a signature by the witness on the will in compliance with subsection (1)(b)(A)(iii) of this section if necessary to prove the will was duly executed in compliance with this section.

[(4)] (3) A will executed in compliance with the Uniform International Wills Act shall be deemed to have complied with the formalities of this section.

(4) As used in this section, “writing” does not include an electronic record, document or image.

**SECTION 12.** ORS 112.255 is amended to read:

112.255. (1) A will is lawfully executed if it is in writing, signed by or at the direction of the testator and otherwise executed in accordance with the law of:

(a) This state at the time of execution or at the time of death of the testator; [or]

(b) The domicile of the testator at the time of execution or at the time of the testator’s death; or

(c) The place of execution at the time of execution.

(2) A will is lawfully executed if it complies with the Uniform International Wills Act.
(3) A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

(4) A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

SECTION 13. ORS 112.272 is amended to read:

112.272. (1) Except as provided in this section, an interrorem clause in a will is valid and enforceable. If a devisee contests a will that contains an in terrorem clause that applies to the devisee, the court shall enforce the clause against the devisee even though the devisee establishes that there was probable cause for the contest.

(2) The court shall not enforce an in terrorem clause:

(a) If the devisee contesting the will establishes that:

(A) The devisee has probable cause to believe that the will is a forgery; [or that]

(B) The will has been revoked; or

(C) The will is invalid in whole or in part.

(b) If the devisee is only making objections to the acts of the personal representative in the administration of the decedent's estate.

(3) The court shall not enforce an in terrorem clause if the contest is brought by a fiduciary acting on behalf of a protected person under the provisions of ORS chapter 125, a guardian ad litem appointed for a minor, or a guardian ad litem appointed for an incapacitated or financially incapable person.

(4) For the purposes of this section, “in terrorem clause” means a provision in a will that reduces or eliminates a devise to a devisee if the devisee contests the will in whole or in part.

(5) This section is not intended as a complete codification of the law governing enforcement of an in terrorem clause. The common law governs enforcement of an in terrorem clause to the extent the common law is not inconsistent with the provisions of this section.

SECTION 14. ORS 112.275 is amended to read:

112.275. A will may be revoked or altered only as provided in ORS 112.285 to 112.315 or section 29 or 30 of this 2015 Act.

SECTION 15. ORS 112.285 is amended to read:

112.285. (1) A will may be revoked or altered by another will.

(2) A will may be revoked by one or more physical acts by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator, or by another person at the direction of the testator and in the presence of the testator. The injury or destruction of the will by a person other than the testator at the direction and in the presence of the testator shall be proved by at least two witnesses.

(3) A partial revocation of a provision in a will by one or more physical acts as described in subsection (2) of this section is not a valid revocation. One or more physical acts that affect one or more provisions of a will but not the entirety of the will are not effective to revoke those provisions, but clear and convincing evidence may show that the testator intended by the physical act or acts to revoke the entirety of the will.

SECTION 16. ORS 112.305 is amended to read:

112.305. A will is revoked by the subsequent marriage of the testator if the testator is survived by a spouse, unless:

(1) The will evidences an intent that it not be revoked by the subsequent marriage or was drafted under circumstances establishing that it was in contemplation of the marriage; [or]

(2) The testator and spouse entered into a written contract before the marriage that either makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator; or

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(3) The testator executed the will after entering into a registered domestic partnership under ORS 106.300 to 106.340 or a similar law in another state and the testator subsequently marries the domestic partner.

SECTION 17. ORS 112.345 is amended to read:

112.345. A devise of property to any person for the term of the life of the person, and after the death of the person to the [children or] heirs of the person, vests an estate or interest for life only in the devisee and remainder in the [children or] heirs.

SECTION 18. ORS 112.355 is amended to read:

112.355. A devise of property passes all of the interest of the testator [therein] in the property at the time of the death of the testator, unless the will evidences the intent of the testator to devise a lesser interest.

SECTION 19. ORS 112.365 is amended to read:

112.365. Any property acquired by the testator after the making of a will passes [thereby, and in like manner] pursuant to the will as if title [thereto] to the property were vested in the testator at the time of making the will, unless the intent expressed in the will is clear and explicit to the contrary.

SECTION 20. ORS 112.385 is amended to read:

112.385. (1) In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the encumbrance, destruction, damage, sale, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the devise fail under the particular circumstances appears in the will or if the testator during the lifetime of the testator gives property to the specific devisee with the intent of satisfying the specific devise.

(2) Whenever the subject of a specific devise is property only part of which is encumbered, destroyed, damaged, sold or condemned, the specific devise of any remaining interest in the property owned by the testator at the time of death is not affected by this section; but this section applies to the part which would have been adeemed under the common law by the destruction, damage, sale or condemnation.

(3) If insured property that is the subject of a specific devise is destroyed or damaged, the specific devisee has the right to receive, reduced by any amount expended or incurred by the testator in restoration or repair of the property:

(a) Any insurance proceeds paid to the personal representative after the death of the testator, with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to any insurance proceeds paid to the testator within six months before the death of the testator.

(4) If property that is the subject of a specific devise is sold by the testator, the specific devisee has the right to receive:

(a) Any balance of the purchase price unpaid at the time of the death of the testator, including any security interest in the property and interest accruing before the death, if part of the estate, with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to the amount of the purchase price paid to the testator within six months before the death of the testator. Acceptance of a promissory note of the purchaser or a third party is not considered payment, but payment on the note is payment on the purchase price. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on the death of the testator, is a sale by the testator for purposes of this section.

(5) If property that is the subject of a specific devise is taken by condemnation before the death of the testator, the specific devisee has the right to receive:

(a) Any amount of the condemnation award unpaid at the time of the death, with the incidents of the specific devise; and
(b) A general pecuniary legacy equivalent to the amount of an award paid to the testator within six months before the death of the testator. In the event of an appeal in a condemnation proceeding, the award, for purposes of this section, is limited to the amount established on the appeal.

(6) If property that is the subject of a specific devise is sold by a conservator of the testator, or insurance proceeds or a condemnation award are paid to a conservator of the testator, the specific devisee has the right to receive a general pecuniary legacy equivalent to the proceeds of the sale, the insurance proceeds or the condemnation award, reduced by any amount expended or incurred in restoration or repair of the property. This subsection does not apply if the testator, after the sale, receipt of insurance proceeds or award, is adjudicated competent and survives such adjudication by six months.

(7) If securities are specifically devised, and after the execution of the will other securities in the same or another entity are distributed to the testator by reason of ownership of the specifically devised securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange or any other similar transaction, and if the other securities are part of the estate of the testator at death, the specific devise is considered to include the additional or substituted securities. Distributions prior to death with respect to a specifically devised security not provided for in this subsection are not part of the specific devise. As used in this subsection, “securities” means the same as defined in ORS 59.015.

(8) The amount a specific devisee receives as provided in this section is reduced by any expenses of the sale or of collection of proceeds of insurance, sale or condemnation award and by any amount by which the income tax of the decedent or the estate of the decedent is increased by reason of items provided for in this section. Expenses include legal fees paid or incurred.

SECTION 21. ORS 112.405 is amended to read:

112.405. (1) As used in this section, “pretermitted child” means a child of a testator who is born, [or] adopted, or conceived as described in section 27 (3) or (4) of this 2015 Act, after the execution of the will of the testator, who is neither provided for in the will nor in any way mentioned in the will and who survives the testator.

(2) If a testator has one or more children living when the testator executes a will and no provision is made in the will for [any such living child] one or more of the living children, a pretermitted child shall not take a share of the estate of the testator disposed of by the will.

(3) If a testator has one or more children living when the testator executes a will and provision is made in the will for one or more of [such] the living children, a pretermitted child is entitled to share in the estate of the testator disposed of by the will as follows:

(a) The pretermitted child may share only in the portion of the estate devised to the living children by the will.

(b) The share of each pretermitted child shall be the total value of the portion of the estate devised to the living children by the will divided by the number of pretermitted children plus the number of living children for whom provision, other than nominal provision, is made in the will.

(c) To the extent feasible, the interest of a pretermitted child in the estate [shall be] is of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(4) If a testator has no child living when the testator executes a will, a pretermitted child shall take a share of the estate as though the testator had died intestate, unless the will devised all or substantially all of the estate to the other parent of the pretermitted child and that other parent survives the testator and is entitled to take under the will.  

(5) A pretermitted child may recover the share of the estate to which the child is entitled, as provided in this section, either from the other children under subsection (3) of this section or from the testamentary beneficiaries under subsection (4) of this section, ratably, out of the portions of the estate passing to those persons under the will. In abating the interests of those beneficiaries, the character of the testamentary plan adopted by the testator [shall] must be preserved so far as possible.

SECTION 22. ORS 112.465 is amended to read:
112.465. (1) Property that would have passed by reason of the death of a decedent to a person who was a slayer or an abuser of the decedent, whether by intestate succession, by will, by transfer on death deed, or by trust, or otherwise, passes on death and vests as if the slayer or abuser had predeceased the decedent.

(2) Property that would have passed by reason of the death of an heir or devisee of a decedent to a person who was the slayer or abuser of the decedent, whether by intestate succession, by will, by transfer on death deed or by trust, passes and vests as if the slayer or abuser had predeceased the decedent unless the heir or devisee specifically provides otherwise in a will or other instrument executed after the death of the decedent.

SECTION 23. ORS 112.475 is amended to read:

112.475. (1) If a slayer of a decedent and the decedent, or an abuser of a decedent and the decedent, owned property as tenants by the entirety or with a right of survivorship, upon the death of the decedent [an undivided one-half interest remains in the slayer or abuser for the lifetime of the slayer or abuser and subject to that interest the property passes to and is vested in the heirs or devisees of the decedent other than the slayer or abuser], there exist two undivided equal interests in the property. One share passes to and is vested in the heirs or devisees of the decedent, and the other share passes to and is vested in the slayer or abuser.

(2) If a slayer of a decedent, the decedent and one or more other persons owned property with a right of survivorship, or if an abuser of a decedent, the decedent and one or more other persons owned property with a right of survivorship, upon the death of the decedent, the interest of the slayer or abuser remains as an undivided interest in the slayer or abuser for the lifetime of the slayer or abuser and subject to that interest, the property passes to and is vested in the other surviving owner or owners.

SECTION 24. ORS 112.535 is amended to read:

112.535. Any insurance company making payment according to the terms of its policy, or any financial institution, trustee or other person performing an obligation to a slayer of a decedent or an abuser of a decedent is not subject to [additional] liability because of ORS 112.455 to 112.555 if the payment or performance is made without written notice by a claimant of a claim arising under those sections. Upon receipt of written notice the person to whom it is directed may withhold any disposition of the property pending determination of the duties of the person.

SECTION 25. ORS 112.555 is amended to read:

112.555. After any right to appeal has been exhausted, a final judgment of conviction of felonious and intentional killing is conclusive for purposes of ORS 112.455 to 112.555. In the absence of a conviction of felonious and intentional killing the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of ORS 112.455 to 112.555.

SECTION 26. Sections 27 to 30 of this 2015 Act are added to and made a part of ORS chapter 112.

SECTION 27. (1) For purposes of this section, an embryo that exists outside a person’s body is not considered to be conceived until the embryo is implanted into a person’s body.

(2) Except as provided in subsections (3) and (4) of this section, the relationships existing at the time of the death of a decedent govern the passing of the decedent’s estate.

(3) A person conceived before the death of the decedent and born alive thereafter inherits as though the person was a child of the decedent and alive at the time of the death of the decedent.

(4) A child conceived from the genetic material of a decedent who died before the transfer of the decedent’s genetic material into a person’s body is not entitled to an interest in the decedent’s estate unless:

(a) The decedent’s will or trust provided for posthumously conceived children; and
(b) The following conditions are satisfied:

(A) The decedent, in a writing signed by the decedent and dated, specified that the decedent’s genetic material may be used for the posthumous conception of a child of the decedent, and the person designated by the decedent to control use of the decedent’s genetic
material gives written notice to the personal representative of the decedent's estate, within
four months of the date of the appointment of the personal representative, that the
decedent's genetic material is available for the purpose of posthumous conception; and

(B) The child using the decedent's genetic material is in utero within two years after the
date of the decedent's death.

SECTION 28. (1) Except as provided in ORS 112.385, property that a testator gives during
the testator's lifetime to a devisee of the testator's will is treated as a satisfaction of the
device in whole or in part only if:

(a) The will provides for deduction of the gift;
(b) The testator declared in a writing that the gift is in satisfaction of the devise or that
its value is to be deducted from the value of the devise; or
(c) The devisee acknowledges in writing that the gift was made in satisfaction of the de-
vice or that its value was to be deducted from the value of the devise.

(2) For purposes of applying the gift against the devisee's share of the estate, the prop-
erty must be valued as of the time the devisee came into possession or enjoyment of the
property or as of the time of the testator's death, whichever occurs first.

SECTION 29. (1) Although a writing was not executed in compliance with ORS 112.235,
the writing may be treated as if it had been executed in compliance with ORS 112.235 if the
proponent of the writing establishes by clear and convincing evidence that the decedent in-
tended the writing to constitute:

(a) The decedent's will;
(b) A partial or complete revocation of the decedent's will; or
(c) An addition to or an alteration of the decedent's will.

(2) The proponent of the writing must file a petition with the court to establish the
decedent's intention with respect to the writing. The proponent shall provide notice of the
petition to heirs, devisees under prior wills and persons interested in the estate of the
decedent that would be required to be identified and set forth in a petition for the appoint-
ment of a personal representative under ORS 113.035. Persons receiving notice and other
interested persons shall have 20 days after service of the notice under this subsection to file
written objections to the petition. The court may make a determination regarding the
decedent's intent after a hearing or on the basis of affidavits.

(3) If the court determines that clear and convincing evidence exists showing that the
writing was intended by the decedent to accomplish one of the purposes set forth in sub-
section (1) of this section, the court shall:

(a) Prepare written findings of fact in support of the determination; and
(b) Enter a limited judgment that admits the writing for probate or otherwise acknowl-
edges the validity and intent of the writing.

(4) A petition filed under this section must be filed within four months after the date on
which the notice required by subsection (2) of this section was provided.

(5) The fee imposed and collected by the court for the filing of a petition under this sec-
tion shall be in accordance with ORS 21.135.

SECTION 30. (1) Except as otherwise provided in a valid will, a will may refer to a writing
that contains a statement or list disposing of household items, furniture, furnishings and
personal effects. Money, property used in trade or business and items evidenced by docu-
ments or certificates of title may not be disposed of under this section.

(2) To be admissible under this section as evidence of the intended disposition, the writ-
ing must:

(a) Be referred to in the testator's will;
(b) Be signed by the testator; and
(c) Describe the household items, furniture, furnishings, personal effects and the
devicees with reasonable certainty.
(3) A writing under this section may be referred to as a writing that is or will be in existence at the time of the testator's death and may be prepared before or after the execution of the testator's will.

(4) A writing under this section may be altered by the testator one or more times after the initial creation of the writing and may be a writing that has no significance apart from the writing's effect on the dispositions made by the will.

(5) As used in this section, “writing” includes an electronic record, document or image.

AMENDMENTS TO LAWS IN CHAPTERS OTHER THAN ORS CHAPTER 112

SECTION 31. ORS 111.005 is amended to read:

111.005. As used in ORS chapters 111, 112, 113, 114, 115, 116 and 117, unless the context requires otherwise:

1. “Abate” means to reduce a devise on account of the insufficiency of the estate to pay all claims, expenses and devises in full.

2. “Action” includes suits and legal proceedings.

3. “Administration” means any proceeding relating to the estate of a decedent, whether the decedent died testate, intestate or partially intestate.

4. “Advancement” means a gift by a decedent to an heir to enable the donee to anticipate the inheritance to the extent of the gift.

5. “All purposes of intestate succession” means succession by, through or from a person, both lineal and collateral.

6. “Assets” includes real, personal and intangible property.

7. “Claim” includes liabilities of a decedent, whether arising in contract, in tort or otherwise.

8. “Court” or “probate court” means the court in which jurisdiction of probate matters, causes and proceedings is vested as provided in ORS 111.075.

9. “Decedent” means a person who has died leaving property that is subject to administration.

10. “Devise,” when used as a noun, means property disposed of by a will, and includes “legacy” and “bequest.”

11. “Devise,” when used as a verb, means to dispose of property by a will, and includes “bequeath.”

12. “Devisee” includes “legatee” and “beneficiary.”

13. “Distributee” means a person entitled to any property of a decedent under the will of the decedent or under intestate succession.

14. “Domicile” means the place of abode of a person, where the person intends to remain and to which, if absent, the person intends to return.

15. “Estate” means the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distributions therefrom.

16. “Funeral” includes burial or other disposition of the remains of a decedent, including the plot or tomb and other necessary incidents to the disposition of the remains.

17. “General devise” means a devise chargeable generally on the estate of a testator and not distinguishable from other parts thereof or not so given as to amount to a specific devise.

18. “Generation” means a group of human beings, living or deceased, that constitute a single step in the line of descent from an ancestor.

[(18)] (19) “Heir” means any person, including the surviving spouse, who is entitled under intestate succession to the property of a decedent who died wholly or partially intestate.

[(19)] (20) “Interested person” includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent that may be affected by the proceeding. It also includes fiduciaries representing interested persons.
“Intestate” means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will, effectively disposing of all the estate.

“Intestate succession” means succession to property of a decedent who dies intestate or partially intestate.

“Issue” includes adopted children and their issue and, when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants.

“Net estate” means the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

“Net intestate estate” means any part of the net estate of a decedent not effectively disposed of by the will.

“Personal property” includes all property other than real property.

“Personal representative” includes executor, administrator, administrator with will annexed and administrator de bonis non, but does not include special administrator.

“Property” includes both real and personal property.

“Real property” includes all legal and equitable interests in land, in fee and for life.

“Settlement” includes, as to the estate of a decedent, the full process of administration, distribution and closing.

“Specific devise” means a devise of a specific thing or specified part of the estate of a testator that is so described as to be capable of identification. It is a gift of a part of the estate identified and differentiated from all other parts.

“Will” includes codicil; it also includes a testamentary instrument that merely appoints an executor or that merely revokes or revives another will.

SECTION 32. ORS 116.313 is amended to read:

116.313. Unless the will, or a revocable trust of which the decedent is settlor, otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose. In the event the decedent's will or revocable trust directs a method of apportionment of tax different from the method described in ORS 116.303 to 116.383, the method described in the will or revocable trust shall control. A mere testamentary direction to pay debts, charges, taxes or expenses of administration shall not be considered a direction against apportionment of estate taxes.

SECTION 33. ORS 419B.552 is amended to read:

419B.552. (1) A juvenile court, upon the written application of a minor who is domiciled within the jurisdiction of such court, is authorized to enter a judgment of emancipation in the manner provided in ORS 419B.558. A judgment of emancipation shall serve only to:
   (a) Recognize the minor as an adult for the purposes of contracting and conveying, establishing a residence, suing and being sued, and making a will, and recognize the minor as an adult for purposes of the criminal laws of this state.
   (b) Terminate as to the parent and child relationship the provisions of ORS 109.010 until the child reaches the age of majority.
   (c) Terminate as to the parent and child relationship the provisions of ORS 108.045, 109.100, 419B.373, 419B.400, 419B.402, 419B.404, 419B.406, 419B.408, 419C.550, 419C.590, 419C.592, 419C.595, 419C.597 and 419C.600.

   (2) A judgment of emancipation shall not affect any age qualification for purchasing alcoholic liquor, the requirements for obtaining a marriage license, nor the minor’s status under ORS 109.510.

SECTION 34. ORS 112.685 is amended to read:

112.685. Dower and curtesy, including inchoate dower and curtesy, are abolished, but any right to or estate of dower or curtesy of the surviving spouse of any person who died before July 1, 1970, shall continue and be governed by the law in effect immediately before that date].

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UNIT CAPTIONS

SECTION 35. The unit captions used in this 2015 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 2015 Act.

SECTION 36. Sections 27 to 30 of this 2015 Act, the amendments to ORS 111.005, 112.015, 112.045, 112.047, 112.055, 112.065, 112.105, 112.175, 112.185, 112.225, 112.235, 112.255, 112.272, 112.275, 112.285, 112.305, 112.345, 112.355, 112.365, 112.385, 112.405, 112.465, 112.475, 112.535, 112.555, 112.685, 116.313 and 419B.552 by sections 2 to 25 and 31 to 34 of this 2015 Act and the repeal of ORS 112.075, 112.325, 112.335, 112.435, 112.485 and 112.695 by section 1 of this 2015 Act apply to decedents dying and wills and writings executed after the effective date of this 2015 Act.
Amendments to the Oregon Probate Code

Work Group Report

SB 379-3

Prepared by:

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From the Office of the Executive Director
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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”) appointed a Work Group to review and recommend changes to the Oregon probate statutes. Lane Shetterly, Chair of the OLC, chairs the Probate Modernization Work Group, Wendy Johnson, Deputy Director and General Counsel of the OLC, staffed the Work Group until her recent departure from the OLC, Susan Gary serves as Reporter, and Bealisa Sydlik, Deputy Legislative Counsel, has drafted an initial bill based on the work of the Work Group. Members of the Work Group come 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 Oregon probate statutes are found in Chapters 111 – 118. Chapter 118, the Estate Tax, was thoroughly reviewed and amended in 2011, so the Work Group has not revisited that chapter. The Work Group has also skipped the elective share sections in Chapter 114, which were revised in 2009. The Work Group plans to review all other sections, but at this time is proposing amendments only to Chapter 112. The Work Group will resume meeting after this legislative session and will continue to review and discuss the other probate chapters.

The Work Group members are Lane Shetterley, Chair of the Work Group, OLC Commissioner and Attorney, Susan N. Gary, Reporter for the Work Group, OLC Commissioner and Professor at University of Oregon School of Law, Cleve Abbe, Lawyers Title of Oregon LLC, Kathy Belcher, Attorney, Susan Bower, Department of Justice Charitable Activities Section, Jeff Cheyne, Attorney, 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 Civil Recovery Section, Marsha Murray-Lusby, Attorney, Ken Sherman, Attorney, Jennifer Todd, Attorney, Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School, Judge Donald Hull, Samuel's Law.
III. Statement of the problem area and objectives of the proposal

Technological and social changes have affected the way people create families and the way they manage and dispose of their property. Chapter 112 provides legal rules for the disposition of property at death by intestacy or by will. The proposal amends Chapter 112 to address issues created by technological and societal changes, to make the rules governing intestacy and wills more likely to carry out the intent of decedents, and to clarify provisions where the language in the current statutes is unclear.

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 all sections of the Uniform Probate Code 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 and articles written about some of the developments in addressing the definition of parent and child for purposes of the intestacy statutes. Professor Gary and Ms. Johnson were able to provide information about ways in which other states handle many of the issues presented in Chapter 112.

V. The proposal

Section 1: This section repeals 112.075, 112.325, 112.335, 112.435, 112.485 and 112.695.

112.075 (Time of determining relationships; afterborn heirs) is replaced by a new section. See Section 27 of the bill.

112.325 (Contract of sale of property devised not a revocation) and 112.335 (Encumbrance or disposition of property after making will) are deleted because the substance is now covered by 112.385.

112.435 (Disposition of wills deposited with county clerk.). This provision directed the county clerk to deliver original wills placed with the court for safekeeping to the testators of the wills, and provided that after January 1, 2010, the court could destroy any remaining wills. Thus, this section is no longer applicable.

112.485 (Property jointly owned with others) is repealed because it is combined with ORS § 112.475 (Jointly owned property) as a new subsection (2) and does not change existing law (see Section 23 of this Report).
112.695 (Statute of limitations for recovery of dower and curtesy) is repealed because all rights to dower and curtesy expired in 1980.

**Section 2:** A new subsection added to ORS § 112.015 adopts the concept of a “negative will” from the UPC. Under current Oregon law, the only way to disinherit someone is to give property to someone else. If an unmarried testator wants all her property to go to her daughter, excluding her son from whom she is estranged, she can do that by will. If, however, the daughter predeceases the testator and leaves no descendants, the testator’s property will go by intestacy to her son. The testator should provide in the will for the disposition of her property if her daughter predeceases her, but if she does not do so, or if the substitute takers also predecease her, the son will inherit under intestacy. The new provision allows the testator to say that under no circumstances shall her son inherit.

**Section 3:** ORS § 112.045 provides for the intestate shares of issue of the decedent. The Work Group changed the manner in which shares are created (representation is defined in ORS § 112.065), and in conjunction with that change decided that using the word “generation” rather than “degree of kinship” would be better. In addition, a change to ORS § 112.045(4)(a) clarifies that if the estate will be distributed to collateral relatives descended from the decedent’s grandparents, if all relatives are of the same generation with respect to the decedent each will inherit the same size share, but if relatives are of different generations, then the process described in ORS § 112.065 for the division of shares will be followed.

**Section 4:** ORS § 112.047 provides that a parent will lose any right to an intestate share from a child who dies if the parent deserted the child or neglected to support the child. The proposal adds a subsection making clear that a parent whose parental rights have been terminated and not reinstated cannot inherit as a parent. In addition, minor changes are made for a better structure for the section. The new subsection is based on UPC § 2-114(a)(1).

**Section 5:** ORS § 112.055 provides for escheat to the state if no heirs can be found. Section 5 of the proposal adds guidance on the appropriate level of searching for heirs required before escheat happens. The search should be “diligent” and appropriate to the circumstances, taking the value of the estate into consideration. The new language clarifies that the estate should not be required to expend excessive amounts of money searching for missing heirs, determined based on the size of the estate and the difficulty of finding the missing persons.

**Section 6:** ORS § 112.065 defines “representation” for purposes of distributions to issue. This definition is used when an intestate estate is distributed to issue, and to interpret directions to distribute to issue or descendants in wills and trusts. The definition applies whenever one or more of a decedent’s children did not survive the decedent, if the child left descendants who survived. Shares go to issue in a direct line from the decedent, and subsequent generations take only when the parent in the generation closer to the decedent did not survive the decedent.
Under current law, the division into shares starts at the first generation below the
decedent with a living descendant. Shares are then created, one share for each
descendant at that generational level who is alive, and one share for each
descendant who is dead but left descendants who are alive. An example will help to
illustrate the effect of current law. Assume that a decedent had three children and
each of the children had children (the decedent’s grandchildren). Child One had one
child, Child Two had two children, and Child Three had five children. If all three
children predeceased the decedent, under current law a share would be created for
each grandchild who survived and one for each grandchild who did not survive but
who left children who survived the testator. If all grandchildren survived, eight
shares would be created, and each grandchild would receive an equal share.

While there are other methods that could be used for making distributions to
descendants, the Commission was concerned that changing the current statutory
provisions on distributions to descendants, which have been in effect since 1969,
could lead to confusion and litigation over the intent of testators. Consequently, the
Commission determined that Section 6 should be modified to modernize the terms
used, but that the provision should retain distribution to descendants as current law
provides.

It is important to remember that the intestacy statute is default law. Each person
can write a will and direct the distribution to descendants in whatever manner she
wants. Nonetheless, a goal of the intestacy statute is to make the rules match the
wishes of most decedents because many people fail to execute a will. In addition,
because people often execute trusts without an explanation of how a distribution to
"descendants" should be made, the intestacy rules are important for distributions
through trusts as well.

Note concerning intestacy: In some states the intestacy statute provides that if an
estate will otherwise escheat, stepchildren of the decedent will be considered heirs.
The Work Group discussed whether to include such a provision in the Oregon
statutes and decided not to do so.

Section 7: ORS § 112.105 defers to Chapter 109 for determinations of parentage.
The proposal deletes a subsection that became unnecessary after revisions to
Chapter 109. The Work Group does not intend a change in the law.

Although Chapter 109 does not address issues of maternity and most issues related
to children created through assisted reproductive technology, the Work Group
decided not to make changes to the definition of parent and child in Chapter 112.
The Work Group concluded that those changes belong in Chapter 109, due to
concern that changes in Chapter 112 might be used by courts in family law cases,
even if the statutes limited application to inheritance matters.
Sections 8 and 9: ORS §§ 112.175 and 112.185 provide rules related to the status of adopted persons. The changes to this section replace the term “natural parent” with “biological parent” as a more appropriate term and extend the provisions for children adopted by stepparents to children adopted by partners in a registered domestic partnership.

The Work Group discussed whether to treat as a parent someone who had retained contact with a child adopted by someone else, either through a post-adoption contract agreement or otherwise, and discussed a Pennsylvania statute’s provision for family members of adopted-out children who have maintained a family relationship with the children. The Work Group decided that keeping the statutes simple is an important policy goal, and therefore decided not to recommend changing the adoption provisions to include family members who maintain functional relationships after an adoption.

Section 10: ORS § 112.225 states who may make a will. The proposal adds language to provide that an emancipated minor may make a will. Under the intestacy rules, a person’s estate will go to his parents if the person is unmarried and has no issue. An emancipated minor will likely want his estate to go to someone other than his parents, and the Work Group decided that he should have the right to execute a will and direct where his property should go.

Section 11: ORS § 112.235 sets forth the formalities required for valid execution of a will. In connection with this section, the Work Group discussed the need to balance policy goals. On one side, the statutes should give effect to the intent of a decedent when the intent is clearly known and should not create unnecessary barriers for someone attempting to execute a will. On the other side, the statutes should facilitate quick disposition of estates, with limited use of court resources, and should protect testators from fraud and abuse. With these goals in mind, the Work Group discussed possible modifications to the execution requirements, looking at the UPC and statutes in other states.

The Work Group discussed whether to permit holographic wills (a will in the testator’s handwriting but with no witnesses), which are permitted in California, Washington, the UPC, and a majority of states. The Work Group expressed concern about the potential for fraud and elder abuse and concluded that rather than permitting holographic wills, the Work Group would recommend the adoption of the harmless error doctrine. This doctrine, included in the UPC and adopted in a number of states, provides that a document can be established as a will even if all the execution formalities are not met, if clear and convincing evidence establishes the decedent’s intent that the document be treated as her will. The goal is to reduce barriers to the creation of a valid will by someone attempting to create a will but making a mistake in execution. The Work Group concluded that the emphasis on intent and the requirement of a judicial determination based on clear and convincing evidence would provide protection against possible fraud or abuse.
Section 29 of the bill sets forth the harmless error provision and will be discussed later in this Report.

In addition to deciding to add the harmless error rule to the statutes, the Work Group made a few changes to the execution formalities. Most testators will execute their wills following these formalities, and making the will execution rules as clear and sensible as possible will aid efficient disposition of estates.

The requirements in connection with a will signed by someone else at the testator’s direction were modified so that the person signing the will must sign the testator’s name and the signor’s name, but need not add a statement on the will that the signor was signing at the testator’s direction. The Work Group deleted that requirement due to concern that the provision did not add protection for the testator and probably serves as a trap that could invalidate wills if the signor did not realize that she needed to add that statement on the face of the will.

Section 11 also adds to ORS § 112.235 a provision treating witnesses’ signatures on a self-proving affidavit as signatures on the will. This provision comes from Washington statute, RCW 11.12.020. Although harmless error could be used to admit a will executed in this manner, a situation in which the witnesses sign the affidavit instead of the will, by mistake, seems one that can be fixed by statute and not require an evidentiary hearing. Judicial resources will be saved, and the testator’s intent preserved without added risk of abuse.

After much discussion of whether the statute should permit electronic wills, the Work Group decided not to permit electronic wills and added a section making clear that an electronic document is not a “writing” for purposes of ORS § 112.235.

The Work Group added language clarifying that a witness can sign as a witness “within a reasonable time before the testator’s death.” The Work Group discussed whether the statute should permit a signature after the testator’s death but decided against doing so. If a witness saw the testator sign the will but did not sign as a witness until after the testator’s death, harmless error can be used to admit the document as a will. The Work Group thought that in such a situation judicial oversight would be appropriate. Oregon law currently permits a witness to sign within a reasonable time but not after the testator’s death. See Rogers v. Rogers, 71 Or. App. 133, 691 P. 2d 114 (1984).

The Work Group decided not to adopt a UPC provision that permits a will to be notarized rather than witnessed. Wills signed by testators and notarized may still be admitted to probate through application of the harmless error doctrine set out in Section 29.

**Section 12:** Section 12 amends ORS § 112.255 by adding two new subsections to codify common law doctrines. The UPC includes both. New subsection (3) adopts the doctrine of incorporation by reference, which allows a will to identify another
document and make its provisions a part of the will, as long as the other document is in existence when the will is executed. Changes to the other document made after the will is executed are not given effect through this doctrine. The doctrine already exists in the common law in Oregon, but the Work Group thought that codifying the doctrine would improve understanding. The language comes from UPC §2-510.

Similarly, subsection (4) adopts the doctrine of acts or events of independent significance. A will can refer to something outside the will, and as long as the other act or event has significance separate from the testamentary wishes of the testator, the other act or event can be used to convey information in the will. This doctrine is most easily understood by example. A testator might say in her will that she leaves “the car I own at my death” to her favorite nephew. She has not identified a particular car, but if she owns a car when she dies, her nephew will receive the car. Her decision to buy a car is independent from her testamentary wishes. That is, she is unlikely to buy and keep a car so that she can bequeath it to her nephew. If she gives “all the jewelry that I own at my death” to her niece, she may buy more jewelry between the time she executes her will and her death and the additional jewelry will go to her niece. She buys the jewelry for herself, and not merely to make a gift to her niece. Another testator might make a gift of $500 to “the person employed as my housekeeper when I die.” Again, the decision to hire a housekeeper has significance independent of the desire to make a gift under the will. Under this doctrine changes over time can be given effect without the execution of codicils to the will, but only if the changes occur for reasons other than testamentary reasons. The language for this subsection comes from the UPC § 2-512.

**Section 13:** The Work Group spent a great deal of time discussing ORS § 112.272, Oregon’s in terrorem clause provision. An in terrorem clause is a clause included in a will that states that if a beneficiary contests the will, the beneficiary loses the gift he would otherwise receive under the will. In Oregon an in terrorem clause will be given effect unless the person contesting the will can show probable cause to believe the will is a forgery or was revoked. In contrast, the majority of states will not enforce an in terrorem clause if probable cause existed for the will contest. The problem with that approach is that probable cause for a contest based on undue influence or lack of capacity, the typical grounds for a will contest, is fairly easy to establish.

In general the Work Group seemed satisfied with the current Oregon statute, based on the view that if a testator wants to use an in terrorem clause to avoid a public airing of dirty laundry, the testator should be able to do that without an easy work-around by a contestant. Work Group members raised three problems, which the amendments to ORS § 112.272 address.

First, the Work Group wanted to clarify that if a will contest is successful, the contest invalidates the in terrorem clause as well as the will or portion of the will that is declared invalid. This provision was thought necessary because some judges have invalidated a will or part of a will (for example, a codicil) but then applied an in
terrorem clause against the successful contestant. The in terrorem clause should not apply if a contest is successful.

Second, although the Work Group thought it best not to define in the statute the types of contests that would trigger the in terrorem clause, the Work Group thought it appropriate to clarify in the statute that an action challenging the acts of the personal representative should not trigger an in terrorem clause. For any other actions, the statute leaves to the court the issue of what is a “contest.” For example, a request for instructions, construction, or mediation may not be a “contest” and therefore may not trigger an in terrorem clause.

Third, the proposal adds a provision indicating that the common law on in terrorem clauses will continue to apply except to the extent it is inconsistent with the statute. A court may need to determine whether a clause is an in terrorem clause, and that determination will continue to be based on the common law. Further, it has been argued (successfully) that ORS § 112.272(4) is more narrow than the common law and that the common law enforced a no contest clause but the statute did not. The new subsection clarifies that the common law may still apply.

**Section 14:** The proposal adds two new ways to revoke a will, so the reference to ways in which a will may be revoked or altered is updated.

**Section 15:** This section adds some clarifying language to ORS § 112.274. The statute now states that in Oregon a revocation of a will by physical act must revoke the entire will. If a testator crosses out one provision in a will, or crosses out a person’s name in a will, the marking will not constitute revocation of that provision. The entire will, including the provision, will continue to be valid. However, even if the crossing out affects only one provision, a person can show that the testator intended to revoke the entire will, but must do so with clear and convincing evidence.

The Work Group discussed including language on revocation from UPC § 2-507(b)-(d) and concluded that the additional language did not add anything substantive and was confusing. No different meaning is intended.

**Section 16:** ORS § 112.305 provides that a testator’s marriage revokes her previously executed will except under circumstances specified in the statute. Section 16 adds as an exception the situation in which the testator marries the person with whom she had entered into a registered domestic partnership.

The Work Group discussed the situation in which an unmarried and unregistered couple executes wills leaving property to each other and then marries. ORS § 112.305 revokes their wills. The Work Group discussed whether to create another exception in the statute, but concluded that the statute as written, with the exception for the marriage of registered domestic partners, was the preferable
default rule. If an unmarried couple provides for each other in wills executed before marriage, they will need to re-execute the wills if they marry.

ORS § 112.315 revokes will provisions for a testator’s spouse if the testator and the spouse dissolve their marriage. The UPC also revokes will provisions for step-relatives of the testator, and the Work Group discussed whether to extend the revocation provisions in ORS § 112.315 to include step-relatives. The Work Group concluded that Oregon’s current statute provides the better default rule. The UPC also revokes provisions in will substitutes in addition to the will after a divorce. The Work Group concluded that a statute revoking designations in will substitutes would need to be placed in a different chapter in the ORS. The Work Group made no changes to ORS § 112.315.

**Section 17:** ORS § 112.345 was enacted to provide that the Rule in Shelley’s Case does not apply in Oregon. Because the Rule in Shelley’s Case applies to a situation in which a devise is made to a person for life, remainder to the person’s heirs, the statute is amended to match the Rule in Shelley’s case. The deletion of “children” is not intended to change current law. Because the Rule in Shelley’s case would not apply to a devise to a person for life with the remainder to the person’s children, that gift would vest a remainder interest in the children, without the need for a statute.

**Sections 18 and 19:** These Sections improve the language in ORS §§ 112.355, 112.365.

**Section 20:** This Section amends ORS § 112.385, Oregon’s nonademption statute, by adding “encumbrance” to the list of situations in which property owned by the testator will not be adeemed. ORS §§ 112.325 and 112.335 can be repealed because the need for those sections is now addressed in ORS § 112.385. If those sections are not repealed, they should be adjusted to cover the different ways an owner might carry back financing when a piece of real estate is sold. The carryback financing could occur through a land sale contract, a note and trust deed, or a note and mortgage.

The Work Group decided not to amend the anti-lapse statute, ORS § 112.395, to include step-children. The UPC covers step-children in its anti-lapse provision, UPC § 2-302(a)(1).

**Section 21:** ORS § 112.405 provides the rules for pretermitted children – children born after a parent executed his will. The amendment adds a reference to the new statute on posthumously conceived children, to say that a child conceived after a parent’s death and treated as a child of that parent under the new statute can be considered a pretermitted child under ORS § 112.405 if the circumstances in that statute apply.
ORS § 112.405 provides that if a parent executes her will when she has no children and then has a child, the child takes an intestate share of the estate. The proposal amends this subsection to provide that the child will not receive an intestate share if the testator’s will left substantially all of the testator’s estate to the other parent of the child. The change reflects the Work Group’s view that most testators would prefer to give the other parent of a child control over the property in the estate rather than have a conservatorship created for the child. This change mirrors the approach taken in the UPC § 2-302(a)(1).

Sections 22-25: These sections make changes to ORS §§ 112.465 – 112.555, the statutes that reduce or deny a share of a decedent’s estate to someone who is determined to be a “slayer” or “abuser” under the statute. As defined in ORS § 112.455, a slayer is someone who killed the decedent with felonious intent, and an abuser is someone who was convicted of a felony for physical or financial abuse of the decedent, if the decedent died not more than five years after the conviction.

Section 22: This section clarifies that any property held in the decedent’s name or in trust that would have passed to a slayer or abuser by reason of the death of the decedent will pass as if the slayer or abuser predeceased the decedent.

Section 23: This section combines ORS §§ 112.475 and 112.485 into one section, now § 112.475, to deal with situations in which the decedent held property in joint tenancy with right of survivorship with the slayer or abuser. In subsection (1), which had been § 112.475, if the decedent held property with right of survivorship with the slayer or abuser, the property is converted into tenancy in common property, with half being distributed to the decedent’s heirs or devisees and half to the slayer or abuser. Because the slayer or abuser might have contributed the entire value of the property, this change seemed more fair than current law, which converts the slayer or abuser’s interest into a life estate and converts the decedent’s interest into a remainder in the entire property.

New subsection (2) is former § 112.485 and deals with situations in which the decedent held property with multiple other owners. This subsection remains the same as current law.

Section 24: This section amends ORS § 112.535, which states that an insurance company or financial institution will not be subject to liability under ORS §§ 112.455 – 112.555 if the company or institution had no notice of a claim under those sections. Section 24 simply deletes the word “additional” from this section as superfluous and confusing.

Section 25: The Work Group wanted to clarify that property could be distributed under the slayer statutes after a civil determination that someone was a slayer, without waiting for a final determination of the criminal case against the slayer. A final judgment of conviction is conclusive but not necessary for a civil determination.
Section 26: This section introduces Sections 27-30, sections of the Act that will add new sections to Chapter 112.

Section 27: An issue that has arisen around the country is the question of whether a child conceived using genetic material from a deceased person should be considered a child of that person. The determination of status for intestacy purposes may affect the definition of “descendants” or “issue” used in a trust or other dispositive document and will also affect the determination of dependency for social security purposes. The Oregon statute has been silent on this issue. Around the country some states have begun to address the question, and the Work Group reviewed statutes and cases from other states as well as the UPC before making a recommendation for Oregon.

As under current law (ORS § 112.074, which is replaced by the new section), a person conceived before the decedent’s death but born thereafter is considered born as of the decedent’s death. The statute clarifies that an embryo is not considered “conceived” for this purpose until it is implanted.

The proposed new section treats a child conceived posthumously as a child of the deceased parent only if the parent provided for posthumously conceived children in a will or trust, the deceased parent left a signed and dated writing saying that the decedent’s genetic material could be used posthumously, and the child conceived posthumously was in utero within two years of the decedent’s death.

A concern with providing for possible posthumously conceived children is the delay for the administration of estates. The statute requires the person with control of the genetic material to notify the personal representative of the decedent’s estate within four months of the date of appointment. Thus, if the personal representative has not received notice within four months (which is also the claims period so an estate normally would not be distributed during that period), the personal representative can make distributions without concern that a posthumously conceived child will later surface.

The Work Group’s goal was to limit the situations in which a posthumously conceived child could share in an estate but not to preclude a person from planning for posthumous conception and arranging to have his genetic child treated as his child for inheritance and social security purposes.

Section 28: This section creates rules for satisfaction of a devise in a will through a lifetime gift by the testator to the devisee. The doctrine is similar to ORS § 112.135, the doctrine of advancements as applied to intestate estates. The language for the new section follows the language in the UPC § 2-609 and ORS § 130.570, the section of the Oregon Uniform Trust Code (the “OUTC”) that adopts rules for satisfaction (termed advancement in the OUTC) for trusts. The new section provides that a gift to a devisee will be treated as satisfying (or reducing) a devise in the will only if the will provides for deduction of the gift, the testator declares in writing that the gift is
in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction of the devise.

The Work Group discussed whether the new section should require the writing by the testator to be “contemporaneous” with the gift. UPC § 2-609 includes the word contemporaneous, and some Work Group members thought the requirement could help address issues of undue influence, but the OUTC does not include the word contemporaneous, and the Work Group concluded that it would be preferable to be consistent with the OUTC provision.

If a gift made before death is intended to satisfy a devise under a will, it will be important for the testator to put that intention in writing. If the gift is a specific item, the devise will be adeemed if the item is no longer in the estate, but a gift of money can lead to questions about whether a gift during life was intended to be in satisfaction of the devise in the will. The new provision makes clear that a gift will be treated as satisfying a devise only if a writing so provides.

Section 29: This section adopts the doctrine of harmless error. This doctrine was developed to address the problems that occur when a person’s testamentary wishes are thwarted due to mistakes in the execution of a will, a codicil, or a written revocation of a will. Harmless error requires a determination by the court, based on a clear and convincing evidence standard, that the decedent intended a writing to be a will, codicil or document revoking a will.

Harmless error does not require a particular level of compliance with the execution formalities (i.e., it does not require a “near miss”), and instead focuses on proof of the decedent’s intent. The doctrine will be used in situations in which a decedent thought she had executed her will but made a mistake in doing so. A person trying to prepare a will without a lawyer might have the document signed by only one witness, have two witnesses observe her sign but fail to ask the witnesses to sign the document, or have the will notarized but not witnessed. A person might write out her will and sign it but not realize that she needed witnesses.

In order to establish the decedent’s intent by clear and convincing evidence, the proponent of the document should have more evidence than simply the document itself. A piece of paper and an authenticated signature should not be sufficient to show the decedent’s intent. Additional evidence could include evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his intent to execute a will, testimony of people who saw the decedent prepare or sign the will, or other documents prepared by the decedent that described the will. Any circumstances that suggest fraud in the creation of the document will, of course, lead a court not to admit the document as a will.

The advantage of adopting the harmless error rule rather than relaxing the execution requirements directly or authorizing holographic wills is that a court will oversee the determination of whether a document should be admitted to probate as
a will. The harmless error rule permits the court to fix a number of the problems that occur with will execution, but because the proponent must produce clear and convincing evidence, the change should not lead to a significant number of additional hearings. Most wills, codicils and documents of revocation will still be admitted to probate based on compliance with the statutory execution requirements. These requirements will remain as a safe harbor, and any lawyer assisting a client with a will should follow those requirements when the client executes the will. The Work Group found no information to suggest that states that have adopted harmless error have seen a significant rise in proceedings to establish wills using the doctrine.

Although the concept of harmless error comes from the UPC, the Work Group added several additional provisions to the new section. The section requires the proponent of the document to give notice to heirs and devisees under prior wills and then provides for a 20-day period for any person receiving notice to object before the court makes its determination. Although the document cannot be admitted to probate before the end of the 20-day period, the court can appoint a special administrator if necessary. Also, if the court determines that the writing was a will, codicil or revocation, the court must prepare written findings of fact supporting the determination and enter a limited judgment to that effect.

**Section 30:** Section 30 adopts a provision based on UPC § 2-513 authorizing a testator to use a separate writing to distribute tangible personal property (sometimes referred to as a “tangibles memo”). The new provision permits a writing to dispose of tangible personal property if the testator signs the writing, even if it does not otherwise meet will execution requirements (i.e., if the document was not signed by two witnesses) and even if it was created or modified after the date of the will (and therefore does not meet the requirements of incorporation by reference). The testator’s will must refer to the writing, and the writing must describe the items and devisees with reasonable certainty.

Members of the Work Group noted that decedents already do this both by giving the tangibles to the personal representative to be distributed in accordance with a list providing precatory guidance for the personal representative and by distributing the tangibles through a revocable trust, for which a tangibles list can be used and amended by the settlor. Work Group members also noted that not having statutory authorization for a tangibles memo leads to partial or total revocation of wills, because testators attempt to revise gifts of tangibles made in the will and do so unsuccessfully, sometimes revoking the entire will.

Although the UPC simply uses the term “tangible personal property” without definition, the Work Group thought that term was too broad. The proposal limits the use of a tangibles memo to property described as “household items, furniture, furnishings and personal effects,” and the tangibles memo cannot be used for “[m]oney, property used in trade or business and items evidenced by documents or certificates of title.” The Work Group thought the tangibles memo would be most
appropriate for items of modest value, although the Work Group recognized that household items could include a Tiffany lamp of great value and personal effects could include valuable jewelry. Nonetheless, the proposal limits the sorts of property that could be distributed this way, especially when compared with the UPC. For example, under the UPC an airplane is an item of tangible personal property and therefore included, but under the proposal an airplane is excluded because it has a certificate of title.

The Work Group noted that because the types of property that can be distributed under the new provision will be more limited than under the UPC and therefore more limited than in a number of states, lawyers will need to be careful about their documents and instructions to clients. Forms from other states may be misleading.

If a testator creates a tangibles memo and includes something in the memo that cannot be distributed because the type of item is not permitted under the statute, the memo may be given effect if it can be incorporated by reference. If the memo was created or modified after the will was executed and cannot be incorporated by reference, the memo can serve as precatory information for the person who receives the items under the will.

**Section 31:** This section adds a definition of “generation” to ORS § 111.005, the statutory section that provides definitions for use throughout the chapters that comprise the probate code.

**Section 32:** This section amends ORS § 116.313 a provision in the Oregon Uniform Trust Code that directs the apportionment of estate tax unless the decedent’s will provides otherwise. The amendment adds a reference to a revocable trust of the decedent, so that if either the will or revocable trust contains language on apportionment, that instruction can be consulted and applied. This amendment was included at the request of the Estate Planning and Administration Section.

**Section 33:** This section amends ORS § 419B.552, the provision on emancipated minors, to add making a will to the list of things an emancipated minor can do.

**Section 34:** ORS § 112.685 currently provides for dower and curtesy rights that expired in 1980. Consequently, the Work Group determined that the first sentence of the section should be left in the statute, but the remainder of the statute should be deleted as no longer necessary. The deletion is not intended to revive any rights.

**Section 35:** This section provides that the unit captions used are for convenience only and do not become part of the law.

**Section 36:** This section provides that the amendments made to existing law and the repeal of exiting provisions of law apply to decedents dying and wills and writings executed after the effective date of the proposed bill.
VI. Conclusion

These amendments to Chapter 112 will improve the statutory law that provides rules for intestacy and wills.
Chapter 5

Conflicting Conundrums: Current Ethical Issues Facing Trusts and Estate Lawyers—Presentation Slides

DAVID ELKANICH
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Conflicting Conundrums: Current Ethics Issues Facing Trusts & Estate Lawyers

David J. Elkanich
June 12, 2017

Agenda for Today

» Who is the Client?
» Can I represent more than one party?
» When are there conflicts between clients?
» Should I worry about conflicts with the lawyer?

» New ethics opinions!!!

» Questions
Defining The Client And The Representation

» FACTS:
» Grandfather passes away a few months ago and another law firm in town handles the matter. Granddaughter thereafter hires Lawyer to challenge Grandfather’s will.
» Last night – Lawyer received an unsolicited email from Grandfather’s widow/executor, asking Lawyer to represent him in what he expects will be a lawsuit by Granddaughter challenging the will. The email provided some confidential information about the Grandfather that would be useful in the lawsuit Lawyer plans to file on behalf of Granddaughter.

» QUESTIONS:
» 1. Who is Lawyer’s client?
» 2. May Lawyer tell Granddaughter about the email she received?
» 3. May Lawyer continue to represent Granddaughter?

Who Is The Client?

Subjective:
Did the person believe you were his or her lawyer?

Objective:
Was that belief objectively reasonable?

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Chapter 5—Current Ethical Issues Facing Trusts and Estate Lawyers—Presentation Slides

Why Is This Important?

» Lots of reasons. Among them:

» Conflicts
  - 1.7, 1.9, 1.10

» Confidentiality
  - 1.6(a)

RPC 1.18 – Duties to Prospective Clients

» (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

» (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

» (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

» UNLESS:
  - (1) informed consent confirmed in writing
  - (2) timely screen.
But What About That Email????

» We believe . . . that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential.

» See NY City LEO 2001-1 (3/1/01)
» See also San Diego LEO 2006-1 (2006)
Conflicts of Interest and Joint Representation

» FACTS:

» Husband and Wife are both in their second marriage.
» Husband and Wife are intelligent, experienced in business, and independently wealthy.
» Husband and Wife ask Lawyer to represent them jointly with regard to their estate plan.

» QUESTION: Is it permissible for Lawyer to represent Husband and Wife with proper disclosure and consent?

Why Should You Care About Conflicts?
- Loyalty
- Confidential Information
- Expensive Replacement Counsel
- Discipline
- Disqualification
- Tort Liability
- Fee Disgorgement

American Collect of Trust and Estate Counsel Commentaries 1.7:
- A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests.
» Oregon RPC 1.7(a): Current client conflict of interest if:
- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; * * *

» Oregon RPC 1.7(b): notwithstanding the conflict, you may go forth if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- * * *
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

How to obtain effective informed consent?

1. Make it informed:
   - Communicate adequate information and explanation about material risks of and reasonably available alternatives to the proposed course of conduct.

2. When it must be confirmed in writing or in writing signed by client:
   - Recommend the client seek independent legal advice to determine if consent should be given.
   - They don't have to – but it is up to them.

3. When and how?
   - Spell things out, put it in writing, get signatures where you can.
   - Clearly identify the consents being sought
   - Clearly identify why the client should care
   - Obtain or transmit within "reasonable time"
» Answer: Mostly yes. See Oregon Ethics Opinion 2005-86.

» Examples:
- Spouses may disagree on distribution.
- One spouse may want to avoid bankruptcy (by asserting that all debts at issue were solely those of the other spouse).
- One or both spouses may have children from prior marriages. See, e.g., In re Plinski, 16 DB Rptr 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues).

But…. Wait for it….

» Oregon may soon have an elective share opinion:
- Married, children from prior marriages, one spouse with more assets
- Opinion may say: can provide info on elective share but generally cannot represent both in waiving the elective share.
Joint Representation

» What to consider when considering joint representation?
  - If a conflict may arise. Provide notice if you can / what happens.
  - Confidentiality – the "no secrets" rule.
  - See ABA cmt [31] to ABA RPC 1.7:
    • The lawyer should, at the outset of the common representation and as part of the
      process of obtaining each client's informed consent, advise each client that
      information will be shared and that the lawyer will have to withdraw if one client
      decides that some matter material to the representation should be kept from the other.
  - Have you ever heard: “Don't tell my spouse, but…”
  - Exception – in litigation between the two. OEC 503(4)(e)

Advance Waivers?

» What about an advance/prospective waiver
  - See ABA RPC 1.7 cmt [22]:
    • The effectiveness of such [prospective] waivers is generally determined by the extent
      to which the client reasonably understands the material risks that the waiver entails.
  - May be difficult in this context:
    • Confidentiality
    • Emotion
More Conflicts:

» FACTS:
» You have represented the grandmother of a wealthy family for many years. You also represent a number of her children in fairly minor matters, such as traffic infractions. Grandmother just called you to say that she has decided to disinherit one of the children whom you are currently representing in a minor traffic matter.

» QUESTION: May you represent Grandmother in preparing a will that leaves nothing to one of his children (whom you currently represent in an unrelated matter)?

See ABA LEO 434 (12/8/04): Yes, qualified.

- Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests.
- Here, beneficiary only has expectancy of money from testator

» But there may be limitations.
- Is there an overall estate plan?
- Advising on whether to disinherit.
Former Client Conflicts

» FACTS:
» Lawyer previously represented Wife and Husband in family estate planning matters. Wife now asks Lawyer to represent her in the dissolution of the parties’ marriage. Neither Husband nor Wife is still a current client of Lawyer.

» QUESTION: May Lawyer undertake the representation of Wife against Husband in the dissolution proceedings?


Oregon RPC 1.9(a) and (c) provide:

» (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing

» * * *

» (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
» Are the matters the same or substantially related within the rule?

» The Substantial Relationship Test:
  - **Matter Specific Conflicts**: the present and former representations are a part of sufficiently factually related matters
  - **Information Specific Conflicts**: confidential information learned in the former representation could be used against the former client in the new representation

» Cf. ABA Formal Ethics Op No 05-434 (absent additional factors, there is no conflict in representing testator in disinheriting beneficiary who is also client, because testator is free to change will at any time).

All former client conflicts can be waived.

But that doesn’t mean you are going to get one – or that you would want to ask for one in all circumstances.
Deceased Clients

» FACTS:
» In mid-90s, Lawyer represents Fred in obtaining a series of loans from Daphne, and drafted documents to evidence and secure those loans.
» Fred dies in 2004.
» During 2004 and 2005, Daphne retains Lawyer in collecting the outstanding loans made to Fred, and Fred asserted a probate claim on Daphne's behalf against Fred's estate based on the notes and mortgages he had prepared for Fred.

» QUESTION: May Lawyer represent Daphne?

Generally no.

» In re Hostetter, 348 Or 574 (2010)
  - Matter of First Impression: Whether a former client, now deceased, is protected by the former-client conflict of interest rules?
  - Yes, qualified.
  - Do former client's interests survive his or her death?
  - Are those interests adverse to the current client during the subsequent representation?
FACTS:
- Parent A, the father of Lawyer A, asks Lawyer A to draft a will for Parent A in which Lawyer A will be left a substantial gift.
- Lawyer B is asked to act as counsel for the personal representative in probating the estate of Parent B, Lawyer B’s mother. Lawyer B and several of Lawyer B’s siblings are all beneficiaries of Parent B’s estate.

QUESTIONS:
- 1. May Lawyer A draft will?
- 2. May Lawyer B serve as counsel for PR (or even as PR) of Parent B’s estate?

Yes, Lawyer A is OK. See Oregon RPC 1.8(c):

- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

But consider whether RPC 1.7(a)(2) applies and whether to seek informed consent confirmed in writing.

Lawyer B likely OK – cannot assist PR to violate statutory or common-law obligations owed by PR to other beneficiaries.
- Should consider Oregon RPC 1.7(a)(2).
Conflicts With The Lawyer

» FACTS:
» You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients.

- (a) May you solicit substantial gifts from your clients to fund a scholarship named in your parents’ honor at a local law school?

- (b) May you accept your client’s offer to name you as a beneficiary in her estate (the bequest is $250,000)?

- (c) May you prepare a will for a client who has asked you to include a provision under which your daughter (for whom your client has been a “second mother” for her whole life) will receive enough money for a college education?

» QUESTION: Is this OK?

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Are you related? Then, OK under RPC 1.8(c) to solicit gift and prepare instrument. But, of course, consider RPC 1.7(a)(2).

» Otherwise, lawyer may not solicit a gift but may generally accept.

» The more substantial the gift, the greater concern of overreach and undue influence (fraud).

» Look at whether gift is disproportionally large in relation to the give client proposed to make to others equally related.

» If accepting:
  - 1. Cannot prepare the instrument. Oregon RPC 1.8(c).
  - 2. Consider RPC 1.7(a)(2) and material limitations on representation.

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Oregon Ethics Op 2017-191

» FACTS:

» Lawyer prefers to maintain client file documents in electronic form only, to the greatest extent possible. For open matters, Lawyer plans to convert documents to electronic form and contemporaneously destroy the paper copies as they are received. Lawyer’s closed matters contain a mix of paper and electronic documents. Lawyer plans to similarly convert the paper documents in her closed files to electronic form and destroy the paper copies of the documents.

» QUESTION:

» May Lawyer maintain electronic-only files and convert existing paper files to electronic form?

Oregon Ethics Op 2017-192

» FACTS:

» Client A terminates Lawyer A while a matter is ongoing. Client A does not owe Lawyer A any fee. Client A asks Lawyer A to provide a copy of the entire file to Client A’s new lawyer. Lawyer B represented Client B in a matter some years ago. Client B now requests a copy of Lawyer B’s entire file. Client B does not owe any fee to Lawyer B. Lawyer A and Lawyer B would like to withhold portions of the client files. Lawyer A and Lawyer B also would like to keep either the original or a copy of what they do provide to Client A and Client B.

» Questions:

» 1. What portions of the client files must Lawyer A and Lawyer B make available to their clients?
» 2. May Lawyer A and Lawyer B retain a copy of the client files and charge their clients for expenses related to duplicating the files?
» 3. When may Lawyer A and Lawyer B charge costs related to locating and segregating file documents?
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Chapter 6

Intellectual Property: Types, Tips, and Traps—Presentation Slides

Ian Gates
Dascenzo Intellectual Property Law PC
Portland, Oregon
INTELLECTUAL PROPERTY
TYPES, TIPS, AND TRAPS

Presented by Ian Gates to
Advanced Estate Planning 2017

Objectives

- Understand the basics of the following areas of intellectual property law:
  - Trademarks
  - Copyrights
  - Patents
  - Trade secrets
  - ~Publicity rights~

- Highlight where to conduct preliminary due diligence on ownership of intellectual property

- Highlight issue spotting for estate planners and business counsel
INTELLECTUAL PROPERTY

3

- What is it?
  - bundle of intangible rights associated with someone’s creation, whether artistic, commercial, or otherwise
  - exclusive rights to exclude others from doing something

- Why?
  - Reward for creativity and contribution to society
    - inherent value: limited monopoly, competitive edge, etc.
  - consumer protection

TRADEMARKS

4

® ® ® ®
What is a Trademark?

- A source identifier for goods and services
  - Word, name, symbol, device, or combination that indicates the source
  - Source does not have to be known
  - Theory is consumer protection
  - Used to distinguish goods or services from those of others

Examples of Trademarks

- COCA-COLA: Word
- Stylized Word
- Word and Symbol
Examples of Trademarks

7

Symbol

Device

Examples of Trademarks

8

got milk?

Color

Slogan

Sound
How to Select a Mark - #1

- Two main considerations:
  - (1) Not all trademarks are created equal
    - A mark must have a distinctive element to be entitled to protection
    - The strength of a mark is initially a function of the mark’s inherent distinctiveness

| Arbitrary/Fanciful marks | Inherently distinctive
| Suggestive marks          | Inherently distinctive
| Merely Descriptive marks | May acquire distinctiveness
| Generic words             | Never distinctive

(1) Can “Cake” be a Trademark?

- No – generic use
  - Common commercial name for the goods
  - Does not distinguish goods from others in marketplace

- Yes – arbitrary use
  - Identifies goods
  - Distinguishes goods from others in marketplace
How to Select a Mark - #2

- Two main considerations:
  - A mark may not cause a likelihood of confusion with existing marks
    - Likelihood of confusion is not a bright-line test
    - Compare such factors as appearance, sound, commercial impression, meaning, goods/services, channels of trade, distinctiveness of terms, and existing similar marks

(2) Can “Delta” be my Trademark?*

- For an airline? NO
- For jet fuel? NO
- For travel pillows? NO
- For pillows? Maybe
- For power tools? NO
- For replacement blades? NO
- For non-power hand tools? NO
- For screws, nails, etc.? Maybe
- For faucets? NO
- For replacement gaskets? NO
- For kitchen cabinets? NO
- For lamps? Maybe
- For estate planning legal services? SURE

* Closed Universe Example / Not Legal Advice!
Securing Trademark Rights

- **Unregistered Rights**
  - Common law rights exist only where the mark is used and only for the goods and services for which it is used
  - Accrue automatically through use of the mark
  - Burden is on the owner to prove rights
  - No database to search

- **Federal Registered Rights**
  - Nationwide priority
  - May be “reserved” long before actual use of the mark begins
  - Provide presumptions of ownership and distinctiveness - presumptions may become incontestable
  - On the federal books
  - Interstate commerce required
  - Recordable with U.S. Customs Service

- **State Registered Rights** (not ABN/DBA or corporate name registration)

- **International Registered Rights**

Trademark Ownership & Transfer

- Based on actual use of mark in connection with sale/distribution of goods or rendering of services
- Not based on who came up with the mark
  - But copyrights may vest in a non-employee designer of a logo
- Licenses may be implied
- Written license and assignments recommended!
- Licenses must include quality control provisions
- Assignments must include goodwill of business
Trademark Guidelines and Pitfalls

- Always search/“clear” selected mark early
  - Do not fall in love with a mark before searching it

- Marks need a distinctive element
  - Do not fall in love with a descriptive mark
  - Do not fall in love with a mark in a crowded field of similar marks

- Consider filing federally as early as possible
  - Preparing to use a mark does not provide any rights or priority over others

Where to Search for Registered Marks

- Federal: http://tmsearch.uspto.gov/
### Federal Mark Owner Search

**United States Patent and Trademark Office**

**Trademarks > Trademark Electronic Search System (TESS)**

TESS was last updated on Mon, May 15 03:41 EDT 2017.

**Search Terms**

- Owner Name and Address

**Fields**

- **Result Must Contain:**
  - All Search Terms (AND)

**Search Results**

- Owner Name and Address: 193 Records(s) found (This page: 1 ~ 50)

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Federal Mark Owner Search

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Where to Look for Registered Marks

- **Oregon**: [http://sos.oregon.gov/business/Pages/trademarks.aspx](http://sos.oregon.gov/business/Pages/trademarks.aspx)
COPYRIGHTS

What is a Copyright?

A right to exclude others from “copying” an “original work of authorship”

- What are original works of authorship?
  - Original = independently created
  - Original ≠ unique, although threshold level of creativity required
- What is copying?
What are “Original Works of Authorship”?

- Literary works
- Pictorial, graphic, and sculptural works
- Audiovisual works
- Musical works
- Dramatic works
- Sound recordings
- Architectural works
- Choreographic works

Examples of Copyrights

Harry Potter – Book  (Literary Work)
Harry Potter – Movie  (Motion Picture)
Examples of Copyrights

Harry Potter – Soundtrack
(Sound Recording and underlying Musical Work)

Harry Potter – Movie Poster
(Pictorial Work)

Business Copyrights

- Website
- Product manuals
- Engineering drawings
- Press releases
- Advertisements
- Product drawings and photographs
- Product packaging
- Software
- Logos
What is “Copying”?  

- Reproducing the copyrighted work  
- Distributing copies of the copyrighted work  
- Publishing the copyrighted work  
- Preparing derivative works  
- Performing the copyrighted work  
- Displaying the copyrighted work

Securing Copyrights

- Automatic Rights  
  - Creating an original work of authorship  
  - Fixing it in a tangible medium of expression  

- Registered Rights  
  - Required to enforce your rights  
  - Term:  
    - Individuals – life of author plus 70 years  
    - “Work made for hire” – shorter of 120 years from creation or 95 years from first publication  
  - Statutory damages ($750 – $150,000 for each infringement)
Copyright Registration

- Simple and inexpensive (copyright.gov)
- Required to enforce rights
- Enables recordation with U.S. Customs
- Delay may limit damages
- Statutory damages option

Ownership of Copyrights

- **Author (default owner)**
- **“Work Made for Hire”**
  - Employees within scope of employment
  - Some specially ordered or commissioned works if agreement *in writing* (motion picture, translation, compilation, instructional text, test, answer material for test, atlas) → RARE
- **Independent contractors**
  - Ownership vests in the independent contractor
- **Transfer of ownership must be in writing**
Termination and Copyright Assignments and Licenses

- Authors (or, if deceased, their surviving spouses, children or grandchildren, or executors, administrators, personal representatives or trustees) may terminate copyright assignments and licenses that were made on or after January 1, 1978 when certain conditions have been met.

- Notices of termination may be served no earlier than 25 years or 30 years from grant and not effective until 35 or 40 years from grant depending on factors associated with grant.

- Property right that has the potential to be extremely valuable!!! (Did deceased assign or license valuable copyrights? Heirs need to know!)
  - Literature – publishing contracts
  - Music – record label contracts
  - Etc.

Copyright Pitfalls

- Transfer must be in writing and expressly recite “copyrights”
- Waiting to register until too late
- “Work made for hire” does not apply
- Forgetting about termination rights
Where to Search for Registered Copyrights

- https://www.copyright.gov/
Where to Search for Registered Copyrights

Public Catalog
Copyright Catalog (CFP to present)
Search Results: Displaying 1 through 3 of 3 resources.

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PATENTS
Patent Rights

- A patent provides its owner with a right to exclude others from making, using, selling, offering for sale, and importing into the U.S. a “patented invention”

- A patent does not provide its owner with any right to make, use, sell, offer for sale, or import into the U.S. a patented invention

Examples of Exclusive Patent Rights

Utility Patent

Design Patent

Plant Patent
What can be Patented*?

- Statute: “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof
- Supreme Court: “Anything under the sun made by man”
  - Devices
  - Compositions of Matter
  - Processes
  - Articles of Manufacturing
  - Methods of Use
  - Software (sometimes)
  - Genetically Engineered Organisms (sometimes)

* “Can be patented” (patent eligible subject matter) vs. “Patentable”

What cannot be Patented?

- Principles
- Laws of Nature
- Mathematical Formulae
- Natural Phenomena
- Fundamental Truths
- Ideas and Concepts
- Mental Processes
- Isolated Gene Sequences
- Human organisms
- Tax strategies

However, the use and/or application of these may be able to be patented
Standards for Patentability

To be patentable, an invention must be:

- Novel (New)
- Non-obvious
- Useful
- Invented by you or assigned to Applicant

Examples of Exclusive Utility Patent Rights

Ian’s Invention
- A sitting apparatus, comprising:
  - a seat; and
  - a five-legged base that supports the seat.

Jane’s Invention
- A sitting apparatus, comprising:
  - a seat;
  - a five-legged base that supports the seat; and
  - a back extending upward from the seat.
What Rights Do Ian and Jane not Have?

- Ian can exclude everyone from making, using, selling, and importing a seat supported by a five-legged base.
- Jane can exclude everyone from making, using, selling, and importing a seat plus a back supported by a five-legged base.
- Therefore, neither Ian nor Jane can offer the public a five-legged chair (with a back) without getting a license from the other.

Value of Patent Rights

- Enforcement against others
- Licensing
- Patent pending
  - Marketing
  - First to market advantage
- Investment
  - Angels, Venture Capital, Loan Collateral
- Accounting
Ownership of Invention/Patent Rights

- Initially vests in the inventor
- Licenses may be implied
- Employment agreements may control
- Written assignments recommended and recordable

Patent Pitfalls

- Delay in filing
  - First Inventor to file wins at the Patent Office
- ***Disclosure/commercialization/sale before filing***
  - One year grace period in North America
  - No grace period in most other countries
Where to Search for Patent Rights

- [https://www.uspto.gov/patent](https://www.uspto.gov/patent)

Published Applications

Where to Search for Patent Rights
Where to Search for Patent Rights

Other Patent/Copyright-like Rights

- Vessel Hull Design
  - Administered by the Copyright Office
- Semiconductor Mask Works (computer chip design)
  - Administered by the Copyright Office -
TRADE SECRETS

What is a Trade Secret?

Information that:

- Derives independent economic value from not being generally known (it's a secret!)
- Is the subject of “reasonable” efforts to maintain its secrecy
Examples of Trade Secrets

- Drawings
- Cost Data
- Customer Lists
- Compositions
- Patterns
- Compilations
- Programs
- Devices
- Techniques
- Processes
- Methods of Assembly
- Other Methods

Trade Secrets – Specific Examples

- KFC’s 11 Secret Herbs and Spices
- Coca-Cola’s Secret Soft Drink Formula
What do Trade Secrets Protect?

- Acquisition or disclosure by “improper means”
  - Theft
  - Bribery
  - Misrepresentation
  - Breach of a duty to maintain secrecy
  - Espionage

Benefits of Trade Secrets

- Potentially last forever
  - Until information no longer has economic value
  - Until information is generally known
- Relatively Cheap
Pitfalls of Trade Secrets

- All value can be lost at any time
  - Reverse engineering
  - Accidental disclosure
  - Independent development
- If others patent what you have as a secret, they could limit your rights to use your “secret”
- Not formally recorded anywhere

PUBLICITY RIGHTS

- Right of an individual to control the commercial use of his or her name, image, and likeness
- Causes of action under common law and state statutes
- Get releases/contracts for photo shoots, advertisements, commercials, marketing material, etc!
MISCELLANEOUS ESTATE PLANNING ISSUE SPOTTING

- Part of residual personal property unless called out otherwise
  - Sole proprietorships (kids vs. spouse vs. business)
- IP Valuation
  - Black art
- Computer vs. Its Contents vs. IP of Contents
  - Physical vs. intangible
  - Manuscript, artwork, etc.
- Copyright termination
- Issued patents require maintenance fees and ultimately expire
- Trademark registrations must be maintained (renewal fees)
Chapter 7
25 Drafting Tips from a Recovering Lawyer

Christopher Cline
Riverview Trust Company
Vancouver, Washington

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What part of our professional lives HASN’T changed in the last 20 years? Estate and gift tax reform of a type no one thought possible when I started my career, sweeping changes to state laws (including the adoption of many Uniform Acts) and the breathtaking changes to our economy all make this a very different environment. As a result of these changes, many practitioners have started to focus on more exotic (and, some might argue, esoteric) tools to fill the void once occupied by the estate tax discussion.

But this focus on the exotic and esoteric has come, to a large extent, at the expense of the foundational. Rather than thinking of new techniques for enhancing our practice, a more fruitful exercise may be to take a harder look at our own preconceived notions. Those of us who have seen both the drafting and administration sides of the business know that, as in sports, it’s the fundamentals that need the most attention.

This presentation attempts to bring attention to those fundamentals by identifying the areas that create the most problem for administrators, but that are often given the least attention by drafters. These twenty-five drafting tips are divided into five categories: Purpose, Distribution, Control, Fiduciaries and (the critically important) Miscellaneous.

I. Purpose.

We will discuss, in Section II below, the importance of control in estate planning. But before we even get there, if a trust is to give greater control to both trustees and beneficiaries, its purpose has to be very clearly spelled out. Purpose in a document gives the beneficiaries and trustee knowledge about why the trust exists. Failure to define purpose is one of the biggest drafting flaws because it allows the beneficiary to say, “but Mom always wanted me to have . . . [fill in the blank with bigger distributions].” In fact, most planners would acknowledge that this is so.

However, even though we might recognize its importance, most drafters still don’t seem to use “purpose” language. This has been a historical problem. Over 50 years ago, the Oregon Supreme Court noted that

“[t]he difficulty in many if not most of these [abuse of trustee discretion] cases is finding the purpose of the settlor with sufficient definiteness to be helpful . . . The settlor’s specific design in framing a discretionary trust is normally unexpressed or vaguely outlined.”

Two years later, Professor Edward C. Halbach, Jr., repeated those sentiments:

“[t]oo frequently trust instruments provide no guidance as to the purpose and scope of the [discretionary] power. Although determining and assisting in the formulation of the donor’s intentions is a primary counseling function, it is apparently one of the

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1 Rowe v. Rowe, 219 Or. 599, 606; 347 P.2d 968, 972 (1959).
most neglected aspects of estate planning. A poorly defined discretionary power often results.”

**Tip 1:** Add general purpose language to all trusts.

Regardless of the purpose for which it is intended, any trust can benefit from a clear statement of the grantor’s intent. This is the area of drafting most overlooked by lawyers, and also the most critical to the success of a trust administration. Such language should be included in a separate paragraph, so that there is no risk of a trustee or the court confusing precatory purpose language with distribution language.

**Tip 2:** Add beneficiary preference to all trusts.

Is this a trust primarily for the benefit of the current or remainder beneficiaries? Should one class be favored over another? Although this is sometimes very hard for a grantor to deal with, if such expressions of preference were used more frequently, many trust disputes would be resolved more quickly (to the extent that they are ever resolved at all).

**Tip 3:** Find out who the client is trying to protect, and from what?

The only reason any trust is put in place is to protect one or more people from one or more other people. The universe of protection can be broken down into four categories:

- Protect beneficiaries from themselves (minors, spendthrifts, those with special needs);
- Protect beneficiaries against creditors (including future ex-spouses);
- Protect beneficiaries against each other (kids from a prior marriage vs. the second spouse); and
- Protect beneficiaries from the IRS.

Identifying with the client the thing that they are protecting beneficiaries from will go a long way to identifying the real purpose of the trust. This is more of an interview technique than a drafting one, but if you get this one right, the rest of the tips discussed below lay out much more easily.

### II. Beneficiary Control.

Now we come to the most important point in the presentation: nothing is more important than control. Control over your own circumstances leads to greater happiness. However, our clients can feel lacking in control: over their finances, the state of the tax law, their kids’ futures, everything. Whatever feelings of control we can give back to our clients will reap huge benefits for us, regardless of our professional discipline. Control, not money, is a

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much greater determinant of happiness. The opposite is also true. When people lack control over a thing, they tend to become cynical about it and withdraw.

**Defining Control**

“Control” has many different connotations, not all of them positive. Control can be defined in three different ways. First, there is control of external things (like controlling others through rewards or punishment). Second, there is internal control over our assets, attitudes and outlook. Finally, knowledge is a third type of control.

Generally, exercising external control through rewards or punishment actually decreases internal motivation. There are only a couple of exceptions to this rule: motivating someone to undertake a boring activity or to try something new.³

On the other hand, more internal control leads to greater “self-efficacy,”⁴ which is inspiring. Self-efficacy is a “better predictor of career selection and success than actual ability, prior preparation, achievement and level of interest.”⁵

The importance of self-efficacy is shown in the fact that happiness leads to success, not the other way around (it’s not true, in other words, that a person becomes happy only after he or she becomes successful, a common misperception).⁶ And becoming happy is within a person’s control. In fact, research shows that behaving as though you are happy makes you happier.⁷ In a “walking” study, undergraduates who walked in a depressed manner showed signs of depression, while those who walked in a "happy" manner showed the opposite. Another study showed that sitting in a slumped manner tended to make people more depressed, while sitting upright improved mood. Similar results occurred when commuters in trains and cabs struck up conversations with strangers and found themselves happier than those commuting quietly (the same is also true for people who strike up conversations with their local barista!).

One of the most famous happiness studies tracked the journals of 180 nuns, all of whom were born before 1917. When in their 20’s, the nuns were asked to write down autobiographical journal entries. Fifty years later, researchers coded the entries for positive emotional content. It turned out that the nuns whose entries were more positive lived nearly ten years longer than those whose entries were negative or neutral. In fact, by age 85, 90 percent of the happiest quartile of nuns was still alive, as compared to only 34 percent of the least happy quartile.⁸

Further, research with entry-level accountants confirms the proposition that the more you believe in your ability to succeed, the more likely it is that you will. Of the 112 accountants surveyed, those who believed they could accomplish what they set out to do scored the best

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³ Stephens, infra note 13.
⁴ Id. (citing Bandura, Self-Efficacy: The Exercise of Control (1997)).
⁵ Id.
⁷ "Walk This Way: Acting Happy Can Make It So," Wall St. J., D-3 (11/18/14).
⁸ Achor, supra note 6, at 42.
performance ratings ten months later. Put another way, a specific focus on your strengths during a difficult task produces the best results. Feelings of control are important for well-being and performance. Among students, feeling in control leads to higher grades and motivation to pursue desirable careers. Among employees, it leads to more job satisfaction and better performance. Further, control at work spreads happiness everywhere: family, job, relationships.

And research also confirms that actual control is less important than perceived control. The most successful people have what psychologists call an "internal locus of control," the belief that their actions have a direct effect on their outcomes. People who believe that they have this internal control have "higher academic achievement, greater career achievement, and are much happier at work." In fact, the importance of this kind of control goes beyond job performance and outward success; it impacts our health as well. One sweeping study indicated that employees who felt they had little control over deadlines imposed by others had a 50% higher rate of coronary heart disease than their counterparts. In a study of the elderly, a group of nursing home residents who were given more control over simple daily tasks, like being in charge of their own house plants, not only became happier, but cut their mortality rate in half.

Finally, if a person has sufficient information about a process or outcome so that he or she can respond based on that knowledge, then he or she has at least a feeling of control. This third type of control indicates that one’s involvement, even if it is only to be fully informed and without any actual control, can be empowering.

**Control and Others**

If control is critical to happiness, it also is contradictory, at least when more than one person is involved. Our clients’ habit of being in control (and specifically external control) often extends to the estate planning decisions they make. However, when the goal of those decisions is to make for happier and more productive beneficiaries, they may be more successful by giving control away.

For instance, many clients (and some advisors) believe that withholding information will help their heirs. The general idea is that if the heirs (especially the client’s children) don’t know the family has money, then they will go about leading a “normal” life. In other words, the knowledge itself will spoil them.

There are several reasons why this approach may be misguided. First, children almost always figure out the family has money, based on membership in clubs, vacations taken, the cars the family drives, and so on. Most clients won’t want to deny themselves those things simply to create the illusion of a “normal” life. Second, plenty of children who were kept in the dark about money come out spoiled anyway (this is an entirely unscientific observation

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9 Id. at 74-75.
10 Id. at 130.
11 Id. at 131.
12 Id. at 132.
based on experience). Finally, we’ve learned that knowledge, if dispensed properly, is a form of self-control and can be used to help the heirs develop by getting them to ask the right questions and giving them the proper tools to handle the information.

**Tip 4:** (Almost) always give beneficiaries the power to remove and replace trustees.

The whole point of having a trust is to vest control in the hands of someone other than the beneficiary. So deciding how to give a beneficiary more control with that in the background is a challenge. The best way to achieve this is to give adult beneficiaries the power to remove and replace trustees, even if it’s only with a corporate trustee. This is actually a form of internal control over the beneficiaries’ own interest in the trust.

The interesting thing is that, in most cases, if a beneficiary knows that he or she has this power, the beneficiary tends not to use it. Knowing that he or she has some level of control creates a sense of calm about problems that may arise with the trustee, and tends to enable the beneficiary to arrive at a compromise regarding that problem.

Like any rule of thumb, this is a generalization. Of course some beneficiaries should not have this power. Of course some beneficiaries will be unhappy no matter what. But the ability to remove and replace trustees, in our view, should be the rule, not the exception.

**Tip 5:** Give the adult beneficiaries the power to change situs, jurisdiction, state law.

This is a power typically given to trust protectors (which, for reasons discussed below, tend to be less useful than most drafters believe). But why shouldn’t the beneficiaries have this power instead? When a beneficiary is informed about issues and consulted, he or she feels more empowered, which in turn tends to make them more reasonable and cooperative. This is a small matter, to be sure, but it argues in favor of giving the power to beneficiaries. After all, if it’s a small matter, there’s no harm in giving the power to the beneficiaries.

**Tip 6:** Consider giving beneficiaries veto power over selling inception assets, along with intent language.

If a grantor funds a trust with an asset that has a special connection with the family (a business, a vacation home, income-producing real estate), the trustee is always in a dilemma: should the trustee sell the asset in order to comply with its duty to diversify? Washington law creates an exception to the duty for inception assets, and it’s always possible to draft around the duty to diversify, but trustees have still been sued (and even lost) when such language is in place.

Giving beneficiaries the veto power over sale (rather than having a party like a trust protector or advisor govern such decisions) accomplishes two goals. First, it gives the beneficiaries greater control over trust assets, which we’ve already established is a good thing. Second, it eliminates the confusion over where fiduciary duty lies. The trustee is in charge of all assets, but cannot sell an inception asset if all or a majority of adult trustees object. If the trustee feels strongly enough about selling, it can seek a TEDRA or nonjudicial settlement agreement.
Adding such a veto power is best done in conjunction with precatory language about the purpose of the trust being to hold the inception asset, and also a provision eliminating the duty to diversify with respect to this asset. This may be seen as overkill, but in light of ways in which courts have strictly construed “nondiversification” language, it is probably warranted.

**Tip 7:** Make it clear that minors don't have to be consulted, and create a clear system for decision-making.

When giving beneficiaries these kinds of control rights, it’s probably a good thing to develop a decision-making process. For instance:

- Do a majority of beneficiaries have to agree, or does it have to be unanimous?

- Should it be all “qualified beneficiaries” as defined in the Uniform Trust Code? Probably, since remaindermen should be included in the decision as well as current beneficiaries. On the other hand, if the purpose of the trust (discussed above) is to benefit current beneficiaries to the exclusion of remaindermen, then maybe the latter should not have a vote.

- Give only adult beneficiaries the vote. This eliminates the need to appoint guardians ad litem or special representatives for minor and unborn beneficiaries, which only leads to delay and confusion.

**Tip 8:** Develop a beneficiary communication system. It's better to keep them more informed than less.

A lot of lawyers were outraged when the Uniform Trust Code imposed the mandatory duty of annual reporting to qualified beneficiaries (which begs the question whether a trustee can ever exercise its fiduciary duty without even telling a beneficiary about the trust’s existence). This outrage, however, was misplaced: giving a beneficiary knowledge of a trust’s existence, its assets, income and expense, can only be good. If only because all beneficiaries find out about a trust’s existence sooner or later, and when they find out later, trust-devouring litigation often ensues.

This is less a drafting tip than a client-communication tip. Discussing the fact that beneficiaries have to be given notice can lead to very fruitful discussions about distributions, trust purpose and the whole reason for the trust’s existence.

### III. Distributions.

The universe of trust distribution provisions can be divided into two large subsets: subjective and objective provisions. Since the only provisions that most beneficiaries care about are those that deal with what they get and when, reviewing the pros and cons of these two types with clients is very useful.
Objective Terms

There are generally two groups of objective trust terms: income-based and incentive-based. The income-based terms are the traditional group most estate planners are familiar with; under this model a beneficiary is entitled to all the income from the trust. There are a couple of modern offshoots, the unitrust and the adjustment between principal and income. Both, however, are based on the traditional notion of “all income,” but with modifications to take into account the mandates of modern portfolio theory.

The second group, incentive trusts, has increased dramatically in popularity over the past twenty years. Indeed, a 1999 article in the Wall Street Journal discussed their use. The article actually mentioned several incentive trust provisions, which are illustrative of the type of provisions common to the trust: matching earned income up to a specified amount; distributing a fixed amount for the beneficiary to start a business or professional practice; making a monthly payment for a “stay-at-home” parent; denying distributions if the beneficiary fails a drug or alcohol test; and making fixed distributions for each year in which a beneficiary has no driving violations.

Such provisions have some superficial appeal and (at least in the case of drug testing) may be critical in caring for a beneficiary. They encourage or discourage positive or negative beneficiary behaviors. They are also easy to administer: show me your W-2 and I give you the money, pass your drug test and I give you the money. They leave no room for a trustee to be over-indulgent.

However, objective provisions also have serious problems. The traditional “income only” provisions are virtually useless in most settings, because they bear no relation to any goals that the grantor might have. The income might be too much or too little for purposes for which the trust was created. The same is true for unitrusts and for income with the trustee ability to adjust between principal and income: neither relates to real-world client goals for the beneficiary. They are often as not short-hand solutions suggested by the drafter.

One variant of the “income-only” model has some relevance to real world goals, and that is the dollar amount, adjusted for inflation. For instance, the beneficiary is to receive $100,000 per year, adjusted for inflation. This type of provision allows the grantor to establish a standard of living by creating essentially a salary from the trust. Inflation adjustment is obviously critical in this context to ensure that the beneficiary does not lose pace to inflation over time. Note that, even in those cases when an “all income” provision is required (for example, in the case of QTIP trusts), a “greater of” provision can be used (i.e., the beneficiary shall be entitled to the greater of all net income or the inflation adjusted dollar amount).

Another problem with objective provisions is that they cannot adapt to the needs of a particular individual. For example, by promoting a daughter to stay at home with her

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14 Id.
children, they might discourage her developing her natural abilities in other areas. Further, by simply encouraging higher earnings, the trust terms might convince a beneficiary who wanted to be a school teacher to be a lawyer instead. To take this notion further, a document that specifically provides for one thing specifically excludes another. Behaviors not specifically set forth, but which may be equally desirable are not accounted for.

A third problem is that objective provisions, which are fundamentally restrictive, do not allow for changing circumstances. The beneficiary who develops a debilitating illness that prevents her from earning at prior levels, for example, may find herself impoverished if the trust is not drafted broadly enough. In a more general sense, anyone who drafts a long-term trust with specific, objective terms, believing he knows what the world will look like 20 or 50 years from now, is probably thinking too narrowly.

Finally, and most importantly, a grantor who creates an incentive trust that focuses on behaviors usually doesn’t seek to promote those behaviors per se. Instead, the grantor seeks to promote something that the behaviors represent. For example, a client is not really trying to encourage W-2 income, but rather productivity; entrepreneurship is ultimately less important than “independence, ingenuity and innovation.” In other words, the grantor identifies certain behaviors that are a surrogate for maturity and drive. But by naming surrogates rather than the thing itself, the grantor runs the very serious risk of missing the mark altogether: a “teacher of the year” might receive smaller trust distributions than a mediocre lawyer.

Subjective Provisions

So if objective provisions are inadequate, does that mean that we should favor subjective instead? Subjective provisions are those that require the exercise of discretion by the trustee in making certain value judgments. For example, the subjective standard most of us are familiar with is the trustee’s ability to distribute principal for “health, education, maintenance and support.” The trustee must decide what constitutes “support,” which could include living in anything from a shack to a mansion. This flexibility is seen by many as a significant benefit. At least one commentator has noted that objective, “incentive” provisions are not the solution to most family relationship problems, and so should not be the “first weapon out of the arsenal.” Indeed, the incentive trust works best “in the most desperate situations” (as an alternative to disinheritance for a beneficiary engaging in antisocial behavior, for instance). Discretionary trusts “should be seen as generally preferable to incentive trusts” because the increased flexibility.

However, if a discretionary trust is to be used, several additional provisions should be added. First, the grantor should give clear guidance as to the exercise of the discretion. The grantor’s intention “should be set forth in sufficient detail to tell the trustee what the [grantor] really wants.” Further, trustee exculpation should be added, including perhaps

15 Id.
16 McCue, supra note 3, at §609.2.
17 Id.
18 Id. at §609.3.
19 Id.
provisions that set forth how the costs of litigation are to be paid (such costs may be assessed against the beneficiary who brought it, for example). These measures will ensure that the trustee will exercise discretion in a manner as close as possible to that which the grantor intended, and may do so with less fear that he or she will be sued for doing so.

Finally, even if such provisions are added, some problems remain. First, the more discretion given to the trustee, the greater the likelihood that the trustee will exercise it in a manner the grantor would not have agreed with. This may not be all bad, by the way. Second, discretion guarantees only flexibility, not success.

**Tip 9:** Don't use "all income"

There are few habits in trust drafting as thoughtless and counterproductive as giving a beneficiary “all income.” Excluding the few times when it is required (in QTIP trusts, for example), there is no reason to give a beneficiary all income. It has no relation to any real world goal, and pits beneficiaries against each other, because the trustee’s investment choices benefit one beneficiary over another.

Honestly, “all income” just makes no sense. So then what does?

**Tip 10:** Consider an inflation-adjusted dollar amount.

If “all income” is the most overused distribution provision, the most underused is the inflation-adjusted dollar amount (e.g., “beneficiary shall receive $75,000 per year, increased in each year by CPI”). No client knows how much “all income” will buy in the future, but everyone knows how much $75,000 per year in today’s dollars will buy. Using this standard makes principal distributions easier to draft as well, because there will be less need for “support” or “maintenance” if a minimum standard has been applied.

**Tip 11:** Consider a unitrust.

If the inflation-adjusted dollar amount is too radical for you, at least consider the unitrust distribution. This has two benefits over “all income:” the trustee can invest for total return, and not income production, and the percentage can be fine-tuned more than “income” can.

**Tip 12:** Add “standards” preferences to all trusts.

A great many, probably most, irrevocable trusts allows for distributions of principal for a beneficiary’s “health, education, maintenance and support.” However, not all of these standards necessarily are created equal. Is education more important than other purposes, for example? Clarity about standards is not often included, but many grantors do have strong feelings about priority. This tip is especially useful with the inflation adjusted dollar amount. In that case, education and medical care would likely be emphasized over support or maintenance.
Tip 13: Be more specific about what the standards mean

For too long we’ve blindly referred to “health, education, maintenance and support,” for no good reason other than they’re included in the Internal Revenue Code. Consider the following:

- First, why do we even use “maintenance” and “support” when the Regulations state clearly that they are identical terms? This is not a substantive issue, but rather evidence that we’ve tended to gloss over the issue.

- Second, paying for a beneficiary’s support can often be contrary to not only the grantor’s objectives (most grantors want their beneficiaries to be productive) but also the factors that tend to create happiness (namely, self-efficacy). Of course, there are plenty of circumstances in which support is appropriate (when a beneficiary is attending college, for instance, or for a surviving spouse who has spent her life working in the home). But the number of times that the term is actually used probably outweighs the number of times it’s appropriately used.

- Third, broaden “education” to include things like personal enrichment classes and courses that lead to professional designations. Such courses may help with the beneficiary’s personal growth (a happiness factor) and are unlikely to sap a beneficiary’s incentive.

- Fourth, distributions for “health” should almost always be added, and might be expanded to be clear that the trustee can pay insurance premiums and perhaps also reimburse employee co-pays for such insurance. While we’re on the subject of insurance, by the way, “health” might also include payment of insurance premiums for disability, AD&D and perhaps even long-term care or life insurance designed to replace the income of the working spouse in the event of her death (being mindful, of course, not to create any “incidence of ownership” problems).

Tip 15: Realize that "may" look to other resources means "shall" look to them

Many trust agreements state that the trustee “may” consider other resources when considering whether to make discretionary principal distributions to a beneficiary. However, when considering the trustee’s undivided duty of loyalty to both current and remainder beneficiaries, a strong argument can be made that a trustee with the ability to consider other resources should always do so. For this reason, most if not all corporate trustees consider “may” in this context to mean “shall.”

IV. Fiduciaries (and Non-Fiduciaries).

Any experienced estate planner can tell you that there is no estate plan so poorly written that thoughtful and well-meaning beneficiaries and trustees can’t work with. Nor any plan so well written that a bad trustee can’t dismantle it.
**Tip 16:** Determine needs before choosing a trustee.

As mentioned before, start with the purpose of the trust, the control given to the beneficiaries and the distribution terms. Once the client has laid out all of these issues, then the conversation can begin about who should be in charge as trustee and successor trustee.

Perhaps even more importantly when considering a successor trustee of a revocable living trust is who will serve when the clients are incapacitated. So much of the conversation circles around what happens after death, yet what happens during life is often of even greater (if sometimes unstated) concern.

**Tip 17:** Don’t use trust protectors or advisers unless you absolutely have to. And then don’t anyway.

One of the most popular recent topics in estate planning has been the use of trust protectors and advisors. Although it may be that trust protectors are more spoken of and written about than actually used, the argument for using them is that they can provide greater flexibility to accommodate changes in beneficiary circumstance, oversee trustee behavior and do so without generating the cost of court proceedings. However, in their haste to try the latest flavor, many drafting lawyers are missing the nuance, and potentially creating confusion.

For example, the terminology itself is confusing, as the terms “trust protector” and “trust advisor” are often used interchangeably. It can be argued, however, that they are different, as a trust protector tends to be the holder of a power, while a trust advisor tends to have the power to control or constrain a trustee. Maintaining this distinction may be useful for the drafter and the client.

Of much more importance is the unresolved question of fiduciary duty, and whether the document or state law effectively can eliminate such a duty altogether. If those duties can be completely eliminated, where does the fiduciary duty lie, if anywhere? If a trustee’s fiduciary duty is trumped by a person with no such duty, where does that leave the beneficiaries? Many commentators and even some state laws seem to believe that those duties can be eliminated, even though the Restatement (Third) of Trusts and the Uniform Trust Code both indicate that a non-beneficiary holding a trust power is presumed to be a fiduciary.

This “obsession” with exculpating trust protectors from liability for breach of fiduciary duty is perhaps the original product of those who drafted and promoted offshore asset protection

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20 See, e.g., Alexander A. Bove, Jr., The Case Against the Trust Protector, 37 ACTEC L. J., 77 (Summer 2011).
21 Id.
22 Id. at 78.
23 Id. at 82.
trusts, even though subsequent offshore cases involving the question of whether a trust protector is a fiduciary seem to say that they are.

Regardless of where the fad came from, however, eliminating a trust protector’s fiduciary duty raises practical and ethical concerns. To begin with, doesn’t the drafting attorney have an obligation to let the grantor-client know that, when a protector is exculpated from liability from certain actions, the beneficiaries are at the protector’s mercy, with no potential recourse? Indeed, taken to its logical conclusion, no drafting lawyer, in allowing a non-fiduciary trust protector with the power to remove or replace a trustee, would feel comfortable with the following language in a trust agreement:

*It is the settlor’s intention that in exercising this power the protector shall not be deemed a fiduciary, shall not be required to monitor the trustee’s performance, and shall not be bound by or required to consider any particular standards of trustee performance. He shall not be required to act upon notice that a trustee is in breach of its fiduciary duty, and in the event of appointment of a successor trustee, the protector shall not be required to consider whether any such successor trustee has any experience in or knowledge of trust administration, or is a suitable person or entity to act as trustee. The protector may exercise or refrain from exercising such power in a capricious or whimsical manner at his total personal discretion, without liability therefor.*

Yet this is exactly what the grantor (through the drafting lawyer) is saying by allowing a non-fiduciary to remove and replace a trustee. This already challenging problem is almost insurmountable in the case of longer-term trusts, because even if the grantor has absolute faith in the trust protector initially named in the trust agreement, the grantor will almost certainly not know who might be appointed in the future.

Second, at least one commentator has opined that there is little question that if the “drafted-away” duty is breached by a disinterested protector who is deemed to be a fiduciary and a claim is made, the particular state law exculpating the protector would have to be struck down by a court.

Further, faced with a decision made by a non-fiduciary trust protector, which would be considered a breach of duty if made by a trustee, it is also quite likely that a court would go out of its way to find that some kind of minimum standard exists, regardless of the document or state law.

In light of these concerns, drafting lawyers who are thinking of adding third-party decisionmakers (either trust advisors or trust protectors) to a trust agreement should think hard about whether said decisionmaker is really necessary, or just fashionable? At least

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24 Id. at 84.
25 Id. at 85.
26 Id. at 82.
27 Id. at 89.
28 Id. at 83.
one important commentator has said that, except in enumerated circumstances, “most trusts do NOT need a trust advisor or trust protector.” A trust advisor or protector is best added to address specific needs in specific circumstances. Adding one simply in the name of general “flexibility” is probably a bad idea because the uncertain identity of the trust advisor or protector many years in the future is probably riskier than the uncertainty of future laws. Put another way, it’s probably better to deal with changed circumstances through judicial process than through an unnamed future party, especially one with no fiduciary duty.

**Tip 18:** If you must violate Tip 17, be clear about the exact role.

Be clear about whether the decision-maker is a “trust advisor” or a “trust protector.” Even though, as noted above, the terms are often used interchangeably, at least one commentator has drawn the useful distinction between “trust advisors,” who should be considered the persons “to whom one or more powers are given to direct the trustee in carrying out the trustee’s traditional trustee duties,” and “trust protectors,” the persons “to whom one or more powers have been given that relate to one or more specific trust matters but do not involve or infringe on the trustee’s performance of traditional trustee duties.” Under this approach, a trust advisor may be responsible for participating investment decisions, for example, while trust protectors may be responsible for things like changing trust situs.

This seemingly esoteric distinction is actually very helpful, because you and your client can clarify what you expect the decision-maker to actually do.

**Tip 19:** Be clear about relationships and responsibilities.

Even though many states, including Washington and Oregon, have statutes governing the relationships of trustees and third-party decisionmakers, do not rely on them alone. State law varies significantly with regard to these relationships, and is still developing. Further, one of the chief roles of a trust protector may be to change situs or jurisdiction. Therefore, a thoughtful drafter who has distinguished between trustees, advisors and protectors also will want to distinguish among the powers, duties and liabilities of those parties.

And even more importantly, in the absence of a good reason to the contrary, all third-party decisionmakers should be held to a fiduciary standard. To do otherwise might create a situation in which important trust decisions are being made without any fiduciary oversight.

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30 *Id.* at ¶1501.2.

31 *Id.* at ¶1508.2.
**Tip 20:** Carefully limit the scope of a decisionmaker’s duties.

This can come in two forms. First, limit all third-party decisionmakers to powers and duties that are specifically enumerated in the document. The trust agreement should spell out that those parties have only those powers specifically included, with no additional powers being implied.\(^{32}\)

Second, consider giving third-party decisionmakers only the power to veto a trustee’s decisions, rather than independent decision-making authority. While not perfect for every situation, thinking about it in these terms limits the scope of the third party’s power, especially if that third party is not being held to a fiduciary standard.

V. Miscellaneous.

What follows are a number of miscellaneous thoughts about trust drafting that don’t really have any unifying theme to them, but are important anyway.

**Tip 21:** Always review the tax clause

Less a drafting tip than a reminder, there is no clause more consistently wrong in wills or trusts than the tax clause. In particular, be careful when copying and revising a trust agreement in its entirety as the basis for an amendment. Look especially to:

- Who pays tax on specific gifts;
- Who pays tax on assets outside the trust or will (especially retirement plan assets);
- Who pays tax on marital trust assets; and
- Who pays state estate tax, even when federal tax isn’t due.

Be sure to add this to a checklist for final review.

**Tip 22:** Don’t use pot trusts (except in very specific situations).

One factor in determining how money can affect happiness is “social comparison:” a majority of people surveyed would rather make $50,000 a year when those around them are making $25,000 on average, than make $100,000 a year when those around them are making an average of $250,000. Happiness as measured by income, in other words, can be more a function of comparison rather than absolute dollars.\(^{33}\)

This study reinforces a fact that most estate planners know: pot trusts are a bad idea. This is because beneficiaries are always comparing what they get against what other beneficiaries are getting. This is especially true when distributions are coming from the

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\(^{32}\) *Id.* at ¶1508.4.

same place, because if one beneficiary is getting more it means that another might be getting less, and they are all receiving the same accountings.

Pot trusts are appropriate when one beneficiary has medical or other needs that may require that he or she receive a disproportionate share of the trust property. In that case, it’s a good idea to add specific language favoring that beneficiary over the others.

**Tip 23:** Don’t rely on "initial assets" exception in WA to prudent investor act.

Pursuant to RCW 11.100.060, a trustee may “hold and retain any real or personal property received into or acquired by the trust from any source” and, if acquired without consideration, may hold such property “without need for diversification as to kinds or amount and whether or not the property is income producing.” A trustee following this statute “is not liable for any loss incurred with respect to any investment” covered by this statute if “permitted when received” and if the trustee “exercises due care and prudence in the disposition or retention of any such investment.”

Do not rely on this statute if you know that the grantor actually wants the trustee to retain a single asset representing a significant concentration in the trust asset mix. There are three reasons for this concern. First, the trust situs could be moved to a state with no such similar statute. Second, courts like to go out of their way to find a duty to diversify, and reliance only on statute, with no precatory language indicating the grantor’s intent provides little back up. Finally, even if the statute holds up, it doesn’t provide any context: under what conditions should the asset be sold? Why is it being held?

The solution, as already discussed, is to provide precatory language indicating that the trust’s purpose is to hold this special asset, guidance regarding when the asset might be sold, and exculpation language for the trustee for failing to diversify.

**Tip 24:** When debating state-only shelter trusts, consider disclaimers, terminatables and divisibles.

Before 2011, married clients who didn’t want to waste their exemption amounts had to create a “shelter trust” at the first spouse’s death for the benefit of the survivor. The deceased spouse would have access to as much of the trust property as he or she needed, but at his or her passing the trust property would pass to the remainder beneficiaries (usually the couple’s children) without being taxed at the surviving spouse’s death.

Starting in 2011, the federal law was changed to allow a spouse to “give” his or her exemption amount to the other spouse by making a “portability” election at the first spouse’s death. This greatly reduced the need for creating a shelter trust at the first spouse’s death.

The pros of using portability rather than a shelter trust in an estate plan are:

- An irrevocable trust, which has separate tax reporting, higher tax rates and disclosure requirements to remainder beneficiaries, never has to be created; and
• At the surviving spouse’s death, all of the assets get a full stepped-up basis for capital gains tax purposes, whereas the basis in the shelter trust assets only gets stepped up at the first spouse’s death.

The cons of using portability are:

• The amount of the first spouse’s exemption isn’t indexed for inflation (it’s fixed as of the date of the first spouse’s death), so less might be sheltered from estate taxes on the second spouse’s death;

• Oregon and Washington don’t allow portability, so although it protects federal exemption amounts, state exemption amounts are still wasted without a shelter trust; and

• Using portability requires filing a potentially expensive election within 9 months of the first spouse’s death.

The fact that the Oregon or Washington estate tax exemption of the first spouse might be wasted is not as bad as it seems. Although a shelter trust will help avoid at least some state estate taxes for the couple’s heirs, it comes at a cost. First, the trust generates administrative costs and potentially higher income tax than if the surviving spouse owned the assets outright. More importantly, the trust assets do not receive a stepped up basis for either state or federal incomes taxes at the surviving spouse’s death. This means the heirs may have to pay additional income tax when they sell assets after the surviving spouse’s death. So the state estate tax savings to heirs has to be compared against the increased income tax cost.

All of this means that flexibility in planning is more important than ever. A prudent planner may choose to kick the state estate tax can down the road by using one of three techniques: a disclaimer trust, a “terminatable” trust or a “divisible” trust.

As we all know, disclaimer trusts provide the ability to wait until the first spouse’s death to make the decision to create a shelter trust, allowing the surviving spouse to make the decision (with her advisors) after taking into account any change in the laws or the couple’s financial picture. However, as we also know, IRC §2518 imposes a number of requirements for a disclaimer to be “qualified,” and therefore not a taxable gift. Most important of these is that the spouse cannot have taken any benefit from the asset, and that the disclaimer must be made within 9 months of the decedent’s death.

If such uncertainty is unacceptable, another option is to automatically create a shelter trust in each spouse’s estate plan, but allow that trust to be terminated by a third party (this actually might be a good place for a trust protector!). This provides the same flexibility as the disclaimer trust, but without the restrictions. The downside here is in finding a willing third party to make that decision. It can’t be the surviving spouse or any potential beneficiary, in order to avoid adverse tax consequences. So an advisor or family friend is the likeliest suspect. This is a case where the third party advisor definitely should NOT be a fiduciary, because he or she might be deemed to have a duty to the remainder beneficiaries.
to allow the trust to stand. There also should be fairly extensive precatory and exculpatory language included as well.

Finally, if the estate plan is to leave everything in trust to the surviving spouse in any event, allow the shelter trust to be created based upon the election to treat only a portion of the trust as marital deduction property. The portion of the trust over which no election is made becomes the shelter trust. The only requirement of course is that the shelter trust (because it is an offshoot of the marital trust) will have to have the same terms (e.g., all income to the surviving spouse, no other beneficiaries, etc.).

**Tip 25:** Exonerate the trustee from the acts of the prior trustee, and don’t require the trustee to pursue any prior acts of earlier trustees (or specifically REQUIRE it).

OK, this might be just a little self-serving at the end of the presentation, but no trustee wants to be hired simply to go beat up a prior trustee. And no trustee wants to be held liable for the bad actions of a prior trustee either. So in general, it’s a good idea to both exonerate the current trustee from liability for the acts of prior trustees, and to relieve the current trustee to pursue prior acts.

Having said that, there are times when that’s exactly what you DO want the trustee to do. In this case, it might be wise to state that expectation in the document naming the successor trustee. It can be drafted into the appointment document, and could be a part of the beneficiary’s ability to remove and replace trustees, discussed above. That way, the new trustee would have a clear understanding of its duties.