

(3) In case of the [death or] disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by [or against] his [personal representatives] guardian or conservator or successors in interest.

(4) In case of the transfer of an interest in the action or suit the court may, on motion, allow the action or suit to be continued against the transferor's successors in interest.

Section 3. Continuation of action or suit without claim presentation. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in paragraph (b) of subsection (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 4. ORS 121.090 is amended to read:

121.090 Action against representative not to be commenced until claim is presented and rejected; liability on claim presented after four months from notice to creditors. [An] No action, including an action for death by wrongful act, against [an executor or administrator] a personal representative shall [not] be commenced until the claim of the plaintiff has been duly presented to the [executor or administrator] personal representative, and by him rejected. If the claim is presented after the expiration of the period of [six] four months from and after the date of the [published

(3) In case of the [death or] disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by [or against] his [personal representatives] guardian or conservator or successors in interest.

(4) In case of the transfer of an interest in the action or suit the court may, on motion, allow the action or suit to be continued against the transferor' successors in interest.

Section 3. Continuation of action or suit without claim presentation. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in paragraph (b) of subsection (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 4. ORS 121.090 is amended to read:

121.090. Action against representative not to be commenced until claim is presented and rejected: liability on claim presented after four months from notice to creditors. An action against [an executor or administrator] a personal representative shall not be commenced until the claim of the plaintiff has been duly presented to the [executor or administrator] personal representative, and by him rejected. If the claim is presented after the expiration of the period of [six] four months from and after the date of the [published

notice of his appointment] first publication of notice to creditors, the [executor or administrator] personal representative, in an action therefor, is liable only to the extent of the assets in his hands at the time the summons is served upon him and allocable to the payment of such claim under and pursuant to the provisions of [ORS 116.510] ORS _____ and _____. (Sections 11 and 12, Chapter on Claims.)

Section 5. ORS 12.190 is amended to read:

12.190. Effect of death on limitations. (1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement[, and the cause of action survives,] an action may be commenced by his personal representative[s] after the expiration of [the] that time, and within one year [from] after his death.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement[, and the cause of action survives,] an action may be commenced against his personal representative[s] after the expiration of that time, and within one year after his death, [the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent.]

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Section 6. ORS 116.560, 116.575, 121.030, 121.040,
121.050, 121.060, 121.070, 121.080, 121.100, 121.210,
121.220, 121.230, 121.240, 121.250, 121.260, 121.270, 121.280,
121.290, 121.300, 121.310, 121.320 and 121.330 are repealed.

brought against the personal representative within four months after the first publication of notice to creditors. This conforms to the four months' period adopted in other portions of the code for the priority of claims and other actions against the personal representative.

Subsection (3) is the present language, but covering only disability. It provides for the continuation of the proceeding against the guardian or conservator of the incompetent. Subsection (4) covers transfer of interest. It permits the court to allow the proceeding to be continued against the successors in interest of the transferor.

Section 3. Continuation of action or suit without claim presentation. The committees were advised by Legislative Counsel that upon enactment of this code the amendment to ORS 13.080 would appear in Chapter 13 of the Oregon Revised Statutes where it now appears. He advised the committees that it would be advisable to include in the probate code a reference to the latter section. To avoid misunderstanding, the section provides that an action pending on the date of death may be continued without presentation of a claim against the estate.

Section 4. Action against representative not to be commenced until claim is presented and rejected: liability on

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claim presented after four months from notice to creditors.

This section amends ORS 121.090 to change the priority of the claim filed from six months to four months from the first notice to creditors, to comply with the claims chapter.

Section 5. Effect of death on limitations. This would amend present ORS 12.190 to eliminate the words "and the cause of action survives" as noted. The remainder of the section beginning "the issuing of letters testamentary" was deleted, since it was not considered necessary to extend the Statute of Limitations beyond the one year previously provided.

ADDENDUM

We comment on the proposed repeal of the balance of Chapter 121 as follows:

Except for ORS 121.010, 121.020, 121.080 and 121.090, this chapter has remained in the code without amendment since 1862. ORS 121.040 and 116.565 cover the same subject matter. The personal liability of the personal representative is covered by section 26 of the proposed chapter on Duties and Powers of the Personal Representative. Enforcement of payment of approved claims by the personal representative is covered by section 18 of the proposed chapter on claims, which gives the creditor the right to secure a court order directing the payment of the claim to the extent that funds of the estate are available for such payment.

Your committees felt that, in view of the broad power given by the proposed code to enforce the duties and obligations of the personal representatives, the matters named in ORS 121.050 could be placed in evidence without the benefit of this section.

The committees were agreed that it would be advisable to eliminate the doctrine of "executor of his own wrong", mentioned in ORS 121.060. The proposed code has adopted the approach of the 1967 draft Uniform Probate Code on personal

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Stanton W. Allison

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties. All causes of action or suit, by one person against another, [whether arising on contract or otherwise,] survive to the personal representative[s] of the former and against the personal representative[s] of the latter. [The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.]

Section 2. ORS 13.080 is amended to read:

13.080. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. (1) No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein[, if the cause of action survives or continues].

(2) In case of the death of a party, the court shall, on motion, allow the action or suit to be continued:

(a) By his personal representative or successors in interest at any time within one year after his death.

(b) Against his personal representative or successors in interest at any time within four months after the date of the first publication of notice to creditors, but not more than one year after his death.

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ACTIONS AND SUITS AFFECTING DECEDENTS
ESTATES AND ADMINISTRATIONS
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Stanton W. Allison

COMMENTS

Section 1. What causes of action survive; parties. The only substantive change by this amendment is to make the section applicable to both actions and suits. The other changes are editorial. However, since this section and Section 3 will be all that will remain of the present Chapter 121, we are including as an addendum an explanation of why the remainder of Chapter 121 can be properly eliminated.

Section 2. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. This section would amend ORS 13.080. Chapter 620, Oregon Laws 1965, repealed the former ORS 121.010, which limited survival of actions, and amended ORS 121.020 (Section 1 above) to delete the word "other" from the reference to causes of action and the words "when the cause of action survives". In deleting the words "if the cause of action survives or continues" from ORS 13.080 and from ORS 12.190, the committees are conforming these sections to ORS 121.020.

In the interest of clarity, your committees felt it desirable to state in separate subsections the nonabatement of the action or suit by death, by disability, and by transfer.

Paragraph (a) of subsection (2) conforms to the present ORS 12.190 and to Section 20 of the proposed chapter on Claims. Paragraph (b) adds the requirement that the action must be

brought against the personal representative within four months after the first publication of notice to creditors. This conforms to the four months' period adopted in other portions of the code for the priority of claims and other actions against the personal representative.

Subsection (3) is the present language, but covering only disability. It provides for the continuation of the proceeding against the guardian or conservator of the incompetent. Subsection (4) covers transfer of interest. It permits the court to allow the proceeding to be continued against the successors in interest of the transferor.

Section 3. Continuation of action or suit without claim presentation. The committees were advised by Legislative Counsel that upon enactment of this code the amendment to ORS 13.080 would appear in Chapter 13 of the Oregon Revised Statutes where it now appears. He advised the committees that it would be advisable to include in the probate code a reference to the latter section. To avoid misunderstanding, the section provides that an action pending on the date of death may be continued without presentation of a claim against the estate.

Section 4. Effect of death on limitations. This would amend present ORS 12.190 to eliminate the words "and the cause of action survives" as noted. The remainder of the section beginning "the issuing of letters testamentary" was deleted, since

it was not considered necessary to extend the Statute of Limitations beyond the one year previously provided.

ADDENDUM

We comment on the proposed repeal of the balance of Chapter 121 as follows:

Except for ORS 121.010, 121.020, 121.080 and 121.090, this chapter has remained in the code without amendment since 1862. ORS 121.040 and 116.565 cover the same subject matter. The personal liability of the personal representative is covered by Section 26 of the proposed chapter on Duties and Powers of the Personal Representative. Enforcement of payment of approved claims by the personal representative is covered by Section 18 of the proposed chapter on claims, which gives the creditor the right to secure a court order directing the payment of the claim to the extent that funds of the estate are available for such payment.

Your committees felt that, in view of the broad power given by the proposed code to enforce the duties and obligations of the personal representatives, the matters named in ORS 121.050 could be placed in evidence without the benefit of this section.

The committees were agreed that it would be advisable to eliminate the doctrine of "executor of his own wrong", mentioned in ORS 121.060. The proposed code has adopted the approach of the 1967 draft Uniform Probate Code on personal

liability of the personal representative. ORS 121.070 was eliminated as having no practical use or effect. The question of rights and liabilities of successor personal representatives is treated in the chapter on Initiation of Probate. ORS 121.080, 121.090 and 121.100 are covered in the chapter on Claims.

ORS 121.210 and 121.220 have been covered by including suits in ORS 121.020.

The balance of this chapter covers the liability of distributees to contribution for the debts of the testator. The general question of abatement is covered in Section 8 of the chapter on Accounting and Distribution. See also Section 4 of the chapter on Partial Distribution. Beyond this, however, your committees considered that the liability of the estate and of its distributees should be limited to the estate assets. The statute of nonclaim in the proposed code is Section 1 of the chapter on Claims.

ORS 121.230 to 121.370 are discussed in Sections 557 and 675, Jaureguy and Love, Oregon Probate Law and Practice. We quote from First National Bank of Portland vs. Connolly, 172 Or. 434, 138 P2d 613, 143 P2d 243.

"Although these provisions were enacted in 1862, the year of the adoption of the probate code with its statute of nonclaim, this court apparently has never had occasion to determine the circumstances which justify resort to the remedy which they grant, though obviously they were intended to supplement the provisions of the probate code for the collection of claims against the estates of decedents."

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The Connolly case makes it abundantly clear that the power of equity to grant relief against the distributees of an estate is not dependent upon the sections above referred to. The court states on page 485:

"Generally, it is held that a creditor, whose claim is duly proved but never satisfied, or whose claim has come into existence too late to be proved, or after the administration has been closed, may avail himself of the remedy in equity directly against the heir."

See Also two 1960 cases, Harris vs. Harris, 225 Or. 175, and In Re Horger Estate, 225 Or. 492.

Since equitable remedies are available to creditors and are not dependent upon statutory provisions or sanction, your committees felt it desirable to eliminate the remainder of this chapter, which as stated was enacted in 1862, has never been substantially amended, and has been of doubtful utility during the succeeding 106 years.

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ESTATES AND ADMINISTRATIONS
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Stanton W. Allison

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties. All causes of action or suit, by one person against another, [whether arising on contract or otherwise,] survive to the personal representative[s] of the former and against the personal representative[s] of the latter. [The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.]

Section 2. ORS 13.080 is amended to read:

13.080. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. (1) No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein[, if the cause of action survives or continues].

(2) In case of the death of a party, the court shall, on motion, allow the action or suit to be continued:

(a) By his personal representative or successors in interest at any time within one year after his death.

(b) Against his personal representative or successors in interest at any time within four months after the date of the first publication of notice of the appointment of the personal representative, but not more than one year after his death.

(3) In case of the [death or] disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by [or against] his [personal representatives] guardian or conservator or successors in interest.

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Section 3. Continuation of action or suit without claim presentation. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in paragraph (b) of subsection (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

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12.190. Effect of death on limitations. (1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement[, and the cause of action survives,] an action may be commenced by his personal representative[s] after the expiration of [the] that time, and within one year [from] after his death.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement[, and the cause of action survives,] an action may be commenced against his personal representative[s] after the

expiration of that time, and within one year after his death.
[the issuing of letters testamentary or of administration; but
no suit or action for collection of any claim against the
estate of a decedent may be maintained, when no letters
testamentary or of administration shall have been issued be-
fore the expiration of six years after the death of the
decedent.]

Section 5. ORS 116.560, 116.575, 121.040, 121.050,
121.060, 121.030, 121.070, 121.080, 121.090, 121.100,
121.210, 121.220, 121.230, 121.240, 121.250, 121.260,
121.270, 121.280, 121.290, 121.300, 121.310, 121.320 and
121.330 are repealed.

Proposed revised Oregon probate code
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April 24, 1967

This draft is based primarily on a report of Thomas Gooding dated July 8, 1966, and action of the committees at the June and July, 1966 meetings.

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties.

All causes of action and suits in equity, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. The [executors or administrators] personal representative may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.

Section 2. ORS 121.030 is amended to read:

121.030. Several representatives regarded as one person. In an action or suit against several [executors or administrators] personal representatives, they shall all be considered as one person representing [their testator or intestate] the decedent, and judgment or decree may be given and execution issued against all of them who are defendants in the action, although the summons is served only on part of them[, in the same manner and with like effect as if served on all, except as provided in ORS 121.040].

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Section 3. ORS 116.560, 116.575, 121.040, 121.050,
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are repealed.

References: Advisory Committee Minutes
6/17, 18/66 p. 13
7/15, 16/66 pp. 14 to 20

ORS chapter 121