

Proposed revised Oregon probate code
ADVANCEMENTS
3rd Draft
August 17, 1967

Prepared by:
Stanton Allison

ADVANCEMENTS IN INTESTATE ESTATES

Section 1. When gift is an advance. If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir shall be treated as an advancement against the latter's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced shall 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 first occurs.

Section 2. Effect of advancement on distribution. If the value of the advancement exceeds the heir's share of the estate he shall be excluded from any further share of the estate but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, he shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate.

Section 3. Death of advancee before decedent. If the recipient of the property fails to survive the decedent, the amount of the advance shall be taken into account in computing the share of the recipient's issue, whether or not the issue

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take by representation.

Section 4. Repeal of existing statutes. ORS 111.110,
111.120, 111.130, 111.140, 111.150, 111.160 and 111.170 are
repealed.

References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix
5/19,20/67, pp. 11 to 12; and Appendix
6/14,15/67, Appendix B

Frohmayer and Piazza draft 7/5/67

ORS 111.110 to 111.170

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Stanton W. Allison

COMMENTS

Section 1. When gift is an advance. The wording of this section is taken from section 2-113 of the 1967 Draft of the Uniform Probate Code.

(1) This section changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession as opposed to the present limitation to the issue of the intestate. It also restricts the provisions to those cases where the decedent dies intestate as to his entire estate.

(2) Since the intestate share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish between the real and personal property as is done in present ORS 111.150.

(3) Unlike the Iowa Code, Washington Code and Model Probate Code, this draft does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement but who subsequently became heirs prior to the death of the intestate.

(4) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, 342, 267 P. 534, 537 that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

(5) This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, section 224, Washington, 11.04.041 and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking and since the present draft does not substantially change existing Oregon law, it would seem to be the preferred approach.

The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a

gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version which reverses the presumption and makes it rebuttable only by evidence in writing.

(6) This section also changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. Present Oregon law thus makes possible inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted. No such possibility of different and inconsistent valuations is contained in the proposed section.

Section 2. Effect of advancements on distribution. This section is a substitute for ORS 111.140 and substantially reenacts that section.

Section 3. Death of advancee before decedent. This section is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to the Model Probate Code, section 29(c), Iowa Code, section 226, Washington Code, section 11.04.041. The person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code's comment on page 67. For a contrary approach see 1967 draft of Uniform Probate Code, section 2-112 which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
May 6, 1967

Final Revised Draft of Proposal in Appendix to February
1966 Minutes

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

Section 2. Repeal of existing sections. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

References: Advisory Committee Minutes
9/18/65 p. 7; and appendix
2/18,19/66, pp. 22 to 24; and appendix

ORS 111.110 to 111.170

Comment: This draft follows the draft prepared by legislative counsel which was in turn based on the draft discussed at the February 1966 meeting of the committee and printed as an appendix to the minutes thereof.

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
January 11, 1967

This draft is based primarily on the draft prepared by Mr. Frohnmayer and distributed to the committees prior to the December 1965 meeting and discussion of the content thereof at the February 1966 meeting. The draft is an appendix to the February 1966 minutes.

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

(3) If an advancee dies before the decedent, leaving lineal descendants who inherit from the decedent, the advancement shall be considered as if it had been made to the descendant for purposes of that inheritance. If the descendant is entitled to a smaller share of the estate of the decedent than the advancee would have been entitled, the descendant shall be charged with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

(4) An advancement shall be valued as of the date of the advancement.

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References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix

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Comment: Is the transfer of property only considered an advancement if it is gratuitous? If so, would this word be more properly placed in subsection (1) rather than (2)?

Could subsection (2) be stated in the affirmative rather than the negative, for example: "A gratuitous inter vivos transfer of property is an advancement only if decedent expressed that intention in writing or the advancee acknowledges the advancement in writing"?

Does the time of the instrument in which the decedent states his intention or the advancee acknowledges the advancement have any significance? In other words, could the deed be made on one day, and a year later in a separate memorandum the decedent state that it was his intention that the property transferred in the deed was an advancement?

Section 2. Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.