

Section 1. Discharge of encumbrances. (1) As used in this section:

(a) "Voluntary encumbrance" means any mortgage, trust deed, security agreement or pledge, or any lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of real or personal property.

(b) "Involuntary encumbrance" means any encumbrance upon real or personal property other than a voluntary encumbrance.

(2) If property upon which an encumbrance exists on the date of the death of the testator is specifically devised, the devisee shall take it subject to the encumbrance, and the personal representative shall not be required to make any payment on account of the obligation secured by the encumbrance, whether or not the testator was personally liable on the obligation secured by the encumbrance, except as provided otherwise in the will, or in subsections (3) or (4) of this section.

(3) Unless the will provides otherwise, the devisee of specifically devised property may require that an encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised, if

- (a) The encumbrance is an involuntary encumbrance, or
- (b) The encumbrance is a voluntary encumbrance and
- (A) The will specifically directs full or partial discharge of the encumbrance out of other assets; but a provision

in the will for payment of the debts of the testator does not, of itself, constitute such a direction; or

(B) The personal representative receives rents or profits, or both, from the property and the devisee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(C) Any beneficiary under the will requests, in a writing signed by the beneficiary and delivered to the personal representative, that the obligation secured by the encumbrance be fully or partially discharged out of property, or the proceeds of the sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance upon specifically devised property is presented and paid, or if specifically devised real property which is subject to a voluntary encumbrance is redeemed, and the devisee is not entitled to exoneration pursuant to subsection (3), the personal representative shall have a lien upon such property in the amount paid, and the lien shall be administered upon as an asset of the estate.

(5) If property is specifically devised by a will executed before the effective date of this section, and if

an encumbrance upon that property exists on the date of the death of the testator, the rights of the devisee of that property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect on the date the will was executed.

Section 2. Power to redeem estate property. Unless otherwise provided by the will, the personal representative may redeem property of the estate sold on foreclosure of mortgage or upon execution if it appears that the redemption would be for the benefit of the estate and would not be prejudicial to creditors.

Section 3. Encumbered assets. When any assets of the estate are encumbered by an involuntary or voluntary encumbrance, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance shall not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration under subsection (3) of section 1.

Section 4. Repeal of existing statutes. ORS 116.140, 116.145, 116.150, 116.155, 116.160 and 116.165 are repealed.

#### COMMENTS

The proposed sections on Discharge of Encumbrances would repeal and replace ORS 116.140 to 116.165. The general rule of the proposed chapter is that the devisee shall take specifically devised property subject to the encumbrances existing on this property at the date of the testator's death. The personal representative is not required to satisfy the encumbrance, whether or not the testator was personally liable thereon, and whether the encumbrance was placed on the property before or after the execution of the will, subject, however, to the exceptions provided in the chapter. This differs from the approach of the 1967 draft Uniform Probate Code (Section 2-607) which would entitle the devisee to exoneration if the encumbrance is created subsequent to the execution of the will. Your committees concluded that, in the absence of specific directions in the will for discharge of the encumbrances on the devised property, it was impossible to spell out in the proposed code what might have been the testator's intention, whether the encumbrance was in existence when he made the will or whether he subsequently encumbered the property himself. The same uncertainty would apply to the present distinction in the case law in Oregon between obligations upon which the testator was or was not personally liable. See Oregon Probate Law and Practice, Jaureguy and Love, Section 636, and cases there cited.

The exceptions to the general rule above outlined are: Where exoneration is provided by the terms of the will; where the encumbrance is other than a security instrument or material or labor lien; where the encumbrance is paid from rents and profits from the devised property; or where the encumbrance is discharged at the request of a beneficiary out of property passing to him. We refer to comparable provisions in Section 2-607, 1967 draft Uniform Code, Section 863.13, 1967 Wisconsin Probate Code, Section 278, 1965 Iowa Probate Code, Section 189, Model Code, and Section 11.12.040 1965 Washington Probate Code. Detailed comments follow:

Section 1. Discharge of encumbrances. The purport of this section is covered by the preceding comment. The section conforms to the present ORS 114.150 which states:

"Encumbrance as a revocation of previous will.  
A charge or encumbrance upon any real or personal estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not deemed a revocation of any will previously executed relating to the same estate. The devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance."

The section provides that the usual clause in a will for payment of debts does not constitute a direction to pay an encumbrance on specifically devised property. The section also provides that the devisee is entitled to exoneration on "involuntary encumbrances", such as taxes, improvement liens, and judgments against the testator. In none of the comparable

sections of other codes cited is the specific devisee required to take property subject to this type of encumbrance, any more than in the present Oregon Revised Statutes. (See ORS 116.165)

Section 2. Power to redeem estate property. Section 2 would cover the general content of ORS 116.140 and 116.165. As is brought out in the discussion in Jaureguy and Love, Oregon Probate Law and Practice, Section 636, these two statutes seem patently inconsistent. The general language is that used in ORS 116.140: "If it appears that such redemption would be for the interest of the estate, and not prejudicial to creditors."

Section 3. Encumbered assets. The language of this section is taken from Section 3-516, 1967 Uniform Probate Code. There are, of course, cases where the estate has a substantial equity in an encumbered asset and it is essential for the preservation of the asset that the encumbrance be paid. In many cases it is also for the benefit of the estate to avoid entry of a deficiency judgment on foreclosure by conveying the estate property in satisfaction of the indebtedness. It is made clear that such payment of the estate indebtedness would not increase the interest of the devisee unless he is entitled to exoneration. By subsection (4) of section 1, the personal representative is given a lien on the devised property for the amount of the encumbrance paid by the estate if the distributee is not entitled to exoneration.

Proposed revised Oregon probate code  
DISCHARGE OF ENCUMBRANCES  
2nd Draft  
January 26, 1968

Proposed by  
Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections

ORS Sections

1

114.150

2

116.155, 116.165

3

116.140, 116.145,  
116.150, 116.160

Prepared by  
Legislative Counsel

Proposed revised Oregon probate code  
DISCHARGE OF ENCUMBRANCE  
1st Draft  
April 20, 1967

This draft is based primarily on a draft of Mr. Mapp and Mr. Riddlesbarger (which is Appendix A to the minutes of the December 17, 18, 1965 meeting) and the action of the committees at the November 19, 20, 1965 and June 17, 18, 1966 meetings.

Section 1. (1) As used in this section:

(a) "Involuntary encumbrance" means any encumbrance upon real or personal property other than a voluntary encumbrance.

(b) "Voluntary encumbrance" means any mortgage, trust deed, security agreement or pledge, or any lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of real or personal property.

(2) If property is specifically devised or bequeathed in a will executed by a testator on or after the effective date of this section, and if an encumbrance upon that property exists on the date of the death of the testator, whether or not the testator was personally liable upon the obligation secured by the encumbrance, the devisee or legatee of that property shall take it subject to the encumbrance, and the personal representative is not required to make any payment on account of the obligation secured by the encumbrance, except as provided otherwise in the will or in subsection (3) or (4) of this section.

(3) (a) Except as provided otherwise in the will,

the devisee or legatee of property specifically devised or bequeathed as provided in subsection (2) of this section may require that a voluntary encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised or bequeathed.

(b) Except as provided otherwise in the will, the devisee or legatee of property specifically devised or bequeathed as provided in subsection (2) of this section may require that an involuntary encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised or bequeathed if:

(A) The will specifically directs full or partial discharge of the encumbrance out of other assets, but a provision in the will for payment of the debts of the testator does not, of itself, constitute such a direction; or

(B) The personal representative receives rents or profits, or both, from the property and the devisee or legatee requests that all or part of the rents or profits, or both, be applied in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(C) Any beneficiary under the will requests, in a writing signed by the beneficiary and delivered to the personal representative, that the obligation secured by

the encumbrance be fully or partially discharged out of property, or the proceeds of the sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance upon property specifically devised or bequeathed as provided in subsection (2) of this section is presented and paid, or if real property upon which there is a voluntary encumbrance is specifically devised as provided in subsection (2) of this section, is redeemed and the beneficiary is not entitled to exoneration, the personal representative has a lien upon such property in the amount paid, and the lien shall be administered upon as an asset of the estate.

(5) If property is specifically devised or bequeathed in a will executed by a testator before the effective date of this section, and if an encumbrance upon that property exists on the date of the death of the testator, the rights of the devisee or legatee of that property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect on the date the will was executed.

References: Advisory Committee Minutes:  
11/19, 20/65 pp. 5 to 8  
6/17, 18/66 pp. 20 to 23

Section 2. ORS 116.140 is amended to read:

116.140. Right to redeem mortgaged property. If the deceased left any property, [real or personal,] under

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1st Draft  
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mortgage, and did not devise or provide for the redemption of the same by will, the court or judge thereof, upon the application of the [executor or administrator,] personal representative, or the application of an heir or creditor, or other person interested in the estate, may order the [executor or administrator] personal representative to redeem [such] the property out of the proceeds of the other personal property, if it appears that such redemption would be for the interest of the estate, and not prejudicial to creditors.

References: Advisory Committee Minutes:  
6/17, 18/66 p. 21

Section 3. ORS 116.165 is amended to read:

116.165. Power to redeem property sold at foreclosure or execution sale. [Any executor or administrator] The personal representative of an estate of any decedent may redeem, for the benefit of the estate, any real estate belonging to the estate which may at any time be sold at public auction, either by decree of court on foreclosure of mortgage or upon judgment, in the same manner and upon the same terms that property may be redeemed by any debtor.

References: Advisory Committee Minutes:  
6/17, 18/66 p. 22

Section 4. Repeal of existing statutes. ORS 116.135, 116.145, 116.150, 116.155 and 116.160 are repealed.

References: Advisory Committee Minutes  
6/17, 18/66 pp. 20 to 23