

Proposed revised Oregon probate code  
DOWER AND CURTESY ABOLISHED  
3rd Draft  
October 18, 1967

Prepared by  
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DOWER AND CURTESY ABOLISHED

Section 1. Dower and curtesy abolished. 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 the effective date of this code shall continue and be governed by the law in effect immediately before that date.

Section 2. ORS 91.020 is amended to read:

91.020. Tenancies classified. Tenancies are as follows: Tenancy at sufferance, tenancy at will, tenancy for years, tenancy from year to year, tenancy from month to month, [tenancy by curtesy,] tenancy by entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 3. ORS 91.030 is amended to read:

91.030. Tenancy by entirety or for life. A [tenancy by curtesy, a] tenancy by entirety and a tenancy for life shall be such as now fixed and defined by the laws of the State of Oregon.

Section 4. ORS 93.240 is amended to read:

93.240. Rights of sellers to deferred or unpaid balance of purchase price where two or more persons join as sellers in contract of sale of real property. (1) Subject to the provisions contained in this section, whenever two or more persons join as sellers in the execution of a contract of

sale of real property, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price shall be owned by them in the same proportions, and with the same incidents, as title to the real property was vested in them immediately preceding the execution of the contract of sale.

[(2) If immediately preceding the execution of any such contract one or more of the sellers held no estate in the real property covered thereby other than an inchoate estate of or right to dower or curtesy, then, unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the purpose of barring dower or curtesy only and, except to the extent specifically prescribed therein, such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of said real property.]

[(3)] (2) If immediately prior to the execution of a contract of sale of real property title to any interest in the property therein described was vested in the sellers or some of the sellers as tenants by the entirety or was otherwise subject to any right of survivorship, then, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price of [such] the property shall likewise be subject to like rights of survivorship.

[(4) This section, being declaratory of existing law,

applies to contracts of sale of real property heretofore executed as well as to those hereafter executed.]

(3) Nothing contained in this section shall be deemed to modify or amend the provisions of subsection (4) of ORS 118.010 relating to inheritance taxes payable by reason of succession by survivorship as provided by subsection [(3)] (2) of this section.

Section 5. ORS 94.330 is amended to read:

94.330. Registration of transfer or mortgage when interests are outstanding. No transfer or mortgage of any estate or interest in registered land shall be registered until it is made to appear to the registrar that the land has not been sold for any tax or assessment upon which a deed has been given and the title is outstanding, or upon which a deed may thereafter be given [, and that the dower, right of dower, and estate of homestead, if any, have been released or extinguished or that the transfer or mortgage is intended to be subject thereto, in which case it shall be stated in the certificate of title].

Section 6. ORS 105.050 is amended to read:

105.050. Cotenant shall prove ouster. In an action [for the recovery of dower before admeasurement or] by a tenant in common of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right or did some act amounting to a denial.

Section 7. ORS 105.340 is amended to read:

105.340. Provision for future rights or interests. In all cases of sales in partition when it appears that [a married woman has an inchoate right of dower in any of the property sold, or that] any person has a vested or contingent future right or estate [therein] in any of the property sold, the court shall ascertain and settle the proportional value of the [inchoate,] contingent or vested right or estate according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Section 8. ORS 107.100 is amended to read:

107.100. Provisions of decree of divorce or annulment.

(1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(Paragraphs (a) to (g), inclusive, omitted here)

[(h) for the extinguishment and barring of dower and curtesy.]

(Remainder of ORS 107.100 omitted here)

Section 9. ORS 107.280 is amended to read:

107.280. Decreeing disposition of property. Whenever a decree of permanent or unlimited separation from bed and board has been granted, the party at whose prayer such decree was granted shall be awarded in individual right such undivided or several interest in any right, interest or estate

in real or personal property owned by the other or owned by them as tenants by the entirety at the time of such decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. The court may, in making such award, decree that [dower and curtesy, as well as homestead rights under ORS 116.010 and the election provided in ORS 113.050,] the rights of the surviving spouse and children as provided in ORS \_\_\_\_\_ are extinguished and barred.

Section 10. Statute of limitation for recovery of dower or curtesy. No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent.

Section 11. ORS 118.010 is amended to read:

118.010. Property, transfers and interests subject to tax. (1) All property, tangible or intangible, and any interest therein, within the jurisdiction of the state, whether belonging to the inhabitants of this state or not which passes or vests by [dower, curtesy,] survivorship, will or by statutes of inheritance of this, or any other state, or by revesting, repayment or settlement of any previously escheated estate or part thereof, or by the exercise or non-exercise of a general power of appointment as provided in subsection (5) of this section, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate, made in contemplation of the death of the grantor or

bargainor or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, is subject to tax at the rate specified in ORS 118.100, to be paid to the State Treasurer for the use of the state.

(Remainder of ORS 118.010 omitted here)

Section 12. ORS 93.170, 105.065, 111.050, 113.010, 113.020, 113.030, 113.040, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530, 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680, and 113.690 are repealed.

Proposed revised Oregon probate code  
ABOLISHMENT OF DOWER AND CURTESY  
3rd Draft  
November 7, 1967

Prepared by  
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#### COMMENTS

The proposed section would abolish dower and curtesy, including inchoate dower and curtesy, except with respect to the surviving spouse of a person who may have died prior to the effective date of this code. With respect to the rights of dower and curtesy of the surviving spouses of those landowners who may have predeceased the effective date of this code, all the provisions of the present law will continue in effect.

The proposed code would substitute for present rights of dower and curtesy the right of a spouse of an intestate who died leaving children to inherit not only an undivided one-half of the personalty, as at present, but also an undivided one-half of the real property. If the decedent died testate the proposed code would give an election against the will to the surviving spouse for an undivided one-quarter of the real estate as well as of the personal property of the estate. Thus, in either situation, the proposed code would give the surviving spouse a fee interest in real property in lieu of the present dower or curtesy interest.

The common law right of dower and curtesy has been modified or abolished in many states. In the opinion of your committees, present dower and curtesy laws have in practice become of less and less utility and value. Property

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acquired by a married couple is usually taken as a tenancy by the entirety, except when title of valuable property is taken as a tenancy in common for tax purposes. Proceedings for admeasurement and assignment of consummate dower and curtesy are becoming rarities in our practice. Yet, in the absence of a proceeding for admeasurement and assignment of the consummate dower or curtesy interest, the value of this interest to the spouse is illusory. I quote Section 111 of Volume I of Oregon Probate Law and Practice, Jaureguy and Love:

Upon the death of the husband what was theretofore dower inchoate is called dower consummate, but it is not yet an estate in land. It is only a chose in action, a right to have dower as assigned. . .

A dictum in *McDermid v. Bourhill*, that the right of dower is "an estate which vests in the wife immediately on the death of her husband" is accordingly not a correct statement of Oregon law. (Citations omitted)

At this stage, and prior to assignment or admeasurement, the widow has no right to any particular tract, nor to any portion of any particular tract, nor is she a tenant in common with the heirs.

The proposed code does not in any respect modify the law with respect to dower or curtesy consummate. Inchoate interests are mere expectancies or possibilities and legislation affecting or abolishing them does not impair any property right or obligation of any contract. This is

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well established in other jurisdictions and it is the holding of our own Supreme Court in United States National Bank vs. Daniels (1947), 188 Or. 356, 177 P. (2d) 246.

The comment in the 1967 draft of the Uniform Probate Code states:

Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence, the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy.

Your committees have taken cognizance of the trend toward the abolition of common law estates of dower and curtesy and consider that the proposed new code is in keeping with the trend away from an agrarian economy. The proposed change would repeal 41 sections of the present code.

In your committees' opinion, by giving the surviving spouse an undivided fee title to the real property of the estate the new code makes a more appropriate and useful provision for the surviving spouse than is given under present law.

The sections following amend existing ORS sections to eliminate reference to dower and curtesy.

in real or personal property owned by the other or owned by them as tenants by the entirety at the time of such decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. [The court may, in making such award, decree that dower and curtesy, as well as homestead rights under ORS 116.010 and the election provided in ORS 113.050, are extinguished and barred.]

Section 10. Statute of limitation for recovery of dower or curtesy. No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent.

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