

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Changing Dower and Curtesy

October 9, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to change the nature of dower and curtesy to which the surviving spouse of a decedent is entitled from the present life estate in one-half of the real property owned by the decedent during the marriage to a fee estate in an undivided one-fourth interest in the real property owned by the decedent at the time of his death. It is a revision of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the September 12, 1964, meeting. See Minutes, 9/12/64, pages 2 to 7. See also the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964; Minutes, 8/22/64, pages 2 to 7; Minutes, 7/18/64, pages 4 and 5; Minutes, 6/13/64, pages 3 to 5, 7 and 8; Minutes, 5/16/64, pages 3 to 6, and Appendix A.

The general approach adopted by this draft is to abolish dower and curtesy, including the inchoate interest, but "save" interests already vested; and to give a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse dies possessed if the decedent dies intestate and leaves children or other lineal descendants, and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent dies possessed.

There are at least two possible approaches to the treatment of existing statutory provisions that relate to dower and curtesy abolished by this draft. The first is to delete all such provisions by repeal or amendment, relying on the "saving" provision of section 3 to retain in force and effect such of those provisions as are applicable to vested interests. The second is to delete by repeal or amendment only such of those provisions as are applicable to inchoate interests, retaining those provisions that pertain to vested interests or that

otherwise would have some effect after the effective date of the proposed legislation. With the one exception of ORS 113.090 (a 10-year statute of limitations on actions to recover or reduce to possession dower or curtesy), this draft adopts the first of these approaches.

Sections 4 to 19 of this draft are amendments of existing statute sections to delete portions thereof that appear to relate to dower and curtesy. Section 20 repeals a number of existing statute sections that appear to relate wholly to dower and curtesy. I suggest that you examine carefully each of the existing statute sections set forth or referred to in these sections of the draft for the purpose of determining whether the deletions by way of amendment or repeal are proper. With respect to each deletion, consider, among other matters, the effect of the "saving" provision of section 3.

In spite of a fairly exhaustive search, I am not sure that I have found all the existing statute sections that appear to relate wholly or partially to dower and curtesy.

This draft contains new statute sections, amendments of existing statute sections and repeal of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added and matter in brackets, [like this], is existing matter to be deleted.

Robert M. Bundy
Chief Deputy Legislative Counsel

Changing Dower and Curtesy
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Section 1. ORS 111.020 is amended to read:

111.020. When any person dies seised of any real property, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, such real property shall descend, subject to his debts, expenses of administration and to being sold for the best interest of the estate or of the heirs, devisees or legatees or for the purpose of distribution, as follows:

(1) If the intestate leaves a surviving spouse and lineal descendants, an undivided one-fourth interest in such real property shall descend to the surviving spouse; and an undivided three-fourths interest in such real property shall descend in equal shares to [his or her] the children of the intestate, and to the issue of any deceased child by right of representation. [; and] If there is no child of the intestate living at the time of [his or her] the death of the intestate, such [real property] undivided three-fourths interest shall descend to all [his or her other] the lineal descendants of the intestate. [; and] If all such descendants are in the same degree of kindred to the intestate, they shall take [such real property] equally; [, or] otherwise they shall take according to the right of representation.

(2) If the intestate leaves a surviving spouse and no lineal descendant[s], such real property shall descend to the surviving spouse. [; and]

(3) If the intestate leaves no lineal descendant or surviving spouse, [then] such real property shall descend [in equal proportions] to [his or her] the father and mother of the intestate as tenants by the entirety if they are married to each other; otherwise as tenants in common. [(3)] If the intestate leaves no lineal descendant[s], surviving spouse or father, such real property shall descend to [his or her] the mother of the intestate. [;] If the intestate leaves no lineal descendant[s], surviving spouse or mother, such real property shall descend to [his or her] the father of the intestate. [;]

(4) If the intestate leaves no lineal descendant[s], ~~surviving spouse, father or mother, such real property shall~~ descend in equal shares to the brothers and sisters of the intestate, and to the issue of any deceased brother or sister by right of representation.

[(4)] (5) If the intestate leaves no lineal descendant[s], surviving spouse, father, mother, brother or sister, such real property shall descend to [his or her] the next of kin of the intestate in equal degree, [excepting] except that when there are two or more collateral kindred in equal degree but claiming through different ancestors, such real property shall descend to those who claim through the nearest ancestor [shall be preferred].

[(5) When any child] (6) If the intestate dies under the age of 21 years and leaves no surviving spouse or [children] child, any real [estate] property which descended to [such

child] the intestate shall descend to the heirs of the ancestor from [which] whom such real property descended the same as [if such child] though the intestate died before the death of such ancestor.

[(6)] (7) If the intestate leaves no lineal descendant[s], surviving spouse or kindred, such real property shall escheat to the State of Oregon.

Section 2. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent [domiciled in this state at the time of death] shall have an election whether to take under the will of the decedent or to take by descent an undivided one-fourth interest in all the real property of which the decedent died possessed and, if the decedent was domiciled in this state at the time of death, to [have and] take upon distribution an undivided one-fourth interest in all the personal property of which the decedent died possessed. [, which] Such interest shall be in addition to, and not in lieu of, any other statutory right [of dower or curtesy or homestead].

(2) Such undivided one-fourth interest in real and personal property shall be subject to the following:

(a) A proportionate share of the debts of the decedent, the expenses of last illness and administration, the inheritance tax computed under subsection (1) of ORS 118.100, and, if applicable, the inheritance tax of any other state.

(b) A proportionate share of the federal estate tax, if any, provided the total of all property passing to the surviving spouse of a type which qualifies for the marital deduction under the federal estate tax law exceeds the maximum marital deduction permitted under such law. [Said] The proportionate share shall be determined by first multiplying the total federal estate tax by the lesser of:

(A) The total of all such property so passing to the surviving spouse less the maximum marital deduction allowable;
or

(B) The value of such undivided one-fourth interest;

~~and then dividing the product thereof by a sum equal to the~~
value of the taxable estate for federal estate tax purposes plus the exemption allowable under the federal estate tax law.

(c) Being sold for the best interest of the estate or for purpose of distribution.

Section 3. 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 Act shall continue and be governed by the law in effect immediately before that date.

Section 4. ORS 5.040 is amended to read:

5.040. County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining

to a court of probate; that is, to:

- (1) Take proof of wills.
- (2) Grant and revoke letters testamentary, of administration, of guardianship and of conservatorship.
- (3) Direct and control the conduct, and settle the accounts of executors and administrators.
- (4) Direct the payment of debts and legacies, and the distribution of the estates of intestates.
- (5) Order the sale and disposal of the property of deceased persons.
- (6) Order the renting, sale or other disposal of the property of minors.
- ~~(7) Appoint and remove guardians and conservators,~~
direct and control their conduct and settle their accounts.
- [(8) Direct the admeasurement of dower.]

Section 5. ORS 68.420 is amended to read:

68.420. (1) A partner is co-owner with his partners of a specific partnership property, holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, ~~when his right in such property vests in his legal~~ representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to [dower, curtesy, or] allowances to widows, heirs, or next of kin.

Section 6. ORS 91.020 is amended to read:

91.020. 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 7. ORS 91.030 is amended to read:

91.030. 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 8. ORS 93.240 is amended to read:

93.240. (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] the real property.

(3) 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 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. 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) of this section.~~

Section 9. ORS 94.105 is amended to read:

94.105. The court may, in any proceeding under this chapter:

(1) Find and decree in whom the title to, or any interest in, the land is vested, whether in the applicant or in any other person.

(2) Remove clouds upon the title.

[(3) By its decree, bar dower and curtesy rights, whether inchoate, vested, initiate or consummate, in the land sought to be registered, of all persons except the wife or husband of the applicant, unless appearance is made by such persons and such rights are set forth and established, in which case the

same shall be preserved in the decree. Upon failure of such persons to appear and set forth and establish such rights or claims, they shall be forever barred and concluded by the decree from asserting the same in like manner as other defendants, and all such persons shall be made parties defendant in like manner as other defendants.]

[(4)] (3) Find and decree whether the land is subject to any lien, encumbrance, estate, trust or interest, and declare the same.

[(5)] (4) Order the registrar of titles to register such title or interest, and in case the land is subject to any lien, encumbrance, estate, trust or interest, give directions as to the manner and order in which the same shall appear upon the certificate of title to be issued by the registrar.

[(6)] (5) Make all such orders and decrees as are equitable and are in conformity with the principles of this chapter.

Section 10. ORS 94.330 is amended to read:

94.330. 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] has 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 11. ORS 94.445 is amended to read:

94.445. For the purpose of final distribution, the court of probate may determine the right of all persons in the estate or interest of the deceased in registered lands, declare and enforce the rights of devisees, heirs, persons entitled to [dower and] homestead and others, assign [dower and] homestead, and make partition and distribution according to the rights of the parties. The court may give direction to the executor or administrator as to the transfer of any estate or interest in registered lands to the devisees or heirs, and may direct the transfer to be to several devisees or heirs as tenants in common, or otherwise, as shall appear to the court to be most convenient, consistent with the rights of the parties, or as the parties interested may agree.

Section 12. ORS 105.050 is amended to read:

105.050. 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 13. ORS 105.220 is amended to read:

105.220. The plaintiff shall make a tenant [in dower, by the curtesy,] for life or for years of any portion of the entire property and creditors having a lien upon any portion of the property defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties and a partition is made, it is thenceforth a lien only upon the share assigned to such party; but such share shall be first charged with its just proportion of the cost of the partition in preference to such lien.

Section 14. ORS 105.330 is amended to read:

105.330. [The proportion of the proceeds of the sale to be invested, as provided in ORS 105.325, shall be ascertained and determined as follows: (1) If an estate in dower or curtesy is included in the order of sale its proportion shall be one-half of the proceeds of the sale of the property, or of the sale of the undivided share in the property upon which the claim or dower existed. (2) If any [other] estate for life or years is included in the order of sale [its] the proportion of the proceeds of the sale to be invested, as provided in ORS 105.325, shall be the whole proceeds of the sale of the property, or of the sale of an undivided share of the property in which the estate existed.

Section 15. ORS 105.340 is amended to read:

105.340. 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, 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 16. ORS 107.280 is amended to read:

107.280. 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 an 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[,] are extinguished and barred.

Section 17. ORS 111.130 is amended to read:

111.130. If the intestate leaves a [widow] surviving spouse and issue, and any of such issue has received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing

the part to be given to the [widow, but the widow shall only be entitled to receive one-half of the residue, after deducting the value of the advancement] surviving spouse.

Section 18. ORS 114.020 is amended to read:

114.020. Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal[, saving to the widow, if any, her dower, and to the widower, if any, his curtesy].

Section 19. ORS 118.010 is amended to read:

118.010. (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 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.

(2) (a) Whenever property, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a ~~taxable transfer in the same manner as though the whole~~ property to which such transfer relates belonged absolutely to the deceased joint tenant or depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if the property has been acquired from decedent for less than such fair consideration, there shall be excepted from the value of the property a portion equal to the amount of the consideration so furnished.

(b) Upon the death of one of the tenants of real property held by the entirety, the right of the surviving tenant to the immediate ownership or possession and enjoyment of such property

shall be deemed a taxable transfer in the same manner as though one-half of the whole property to which such transfer relates belonged absolutely to the deceased tenant and had been devised or bequeathed to the surviving tenant.

(3) Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to the decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of ORS 118.005 to 118.840; but no such transfer made before such three-year period shall be treated as having been made in contemplation of death if:

~~(a) No gift taxes were payable under ORS chapter 119 on such transfer; or~~

(b) All gift taxes payable under ORS chapter 119 on such transfer were paid when due.

(4) In the event of death of one of the tenants of property held by the entirety, after sale thereof upon an executory or instalment contract, the transfer of the decedent's interest in the unpaid balance owing upon such contract at the time of death shall be deemed a taxable transfer in the same manner as under paragraph (b) of subsection (2) of this section.

(5) When, after August 3, 1955, property passes or vests subject to a general power of appointment, for the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donor, the donee is deemed to have acquired the

full taxable interest from the donor. For the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donee of such a general power, an appointee is deemed to have acquired from the donee the full taxable interest of such of the property which passes or vests only by reason of the exercise of the power by the donee. A general power of appointment is one where the donee has substantial beneficial enjoyment of the property, including one which the donee may exercise in favor of himself, his estate, his creditors or the creditors of the estate, during lifetime or at death, and including one under which the donee may convey or transfer ownership of the property to whomever he may choose.

Section 20. 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.