

Proposed revised Oregon probate code
ELECTIVE SHARE OF SURVIVING SPOUSE
Revised 3rd Draft
December 1, 1967

Prepared by
Stanton Allison and
C. Richardson

Section 1. Surviving spouse's election to take against will. (1) If decedent dies testate, the surviving spouse of a decedent domiciled in this state at the time of his death has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent, reduced by the value of the following property given to the spouse under the decedent's will:

(a) Property given outright;

(b) The present value of any legal life estates if capable of valuation with reasonable certainty;

(c) The present value of the spouse's right to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will which is capable of valuation with reasonable certainty without regard to the powers which are forfeited under subsection (2).

(2) Except as to property applied under subsection (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, such spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in ORS 118.010(5) and the testator has

not provided otherwise, but the spouse forfeits any general power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under paragraph (c) of subsection (1) of this section, or to apply additional principal or income in behalf of the electing spouse, cannot be exercised in favor of the electing spouse.

(3) The right to elect may be barred under ORS _____ or may be denied or the share reduced under ORS _____.

Section 2. How elective share barred. (1) The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage.

(2) The surviving spouse is barred if he receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property: the net estate, joint annuities furnished by the decedent, proceeds of insurance on decedent's life, whether or not he had any of the incidents of ownership at his death, transfers within three years of death to the extent to which decedent did not receive consideration in money or money's worth, transfers by decedent during lifetime as to which he had retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary, payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and his employer (but

excluding workmen's compensation and social security payments), property appointed by the decedent by will or by deed executed within three years of his death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse, and property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by persons other than the decedent. For this purpose the surviving spouse is deemed to receive any property as to which he is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse. As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, U. S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

Section 3. Denial of election or reduction of share when

decedent and surviving spouse are living apart. In any case where the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there has been a judgment for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court deems reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: length of the marriage, whether the marriage was a first or subsequent marriage for either or both of the parties, the contribution of the surviving spouse to the decedent's property either in the form of services or transfers of property, length and cause of the separation, and any other relevant circumstances.

Section 4. What constitutes election under ORS _____.

The surviving spouse is deemed to have elected to take under the will unless, within ninety days after the admission of the will to probate, he serves on the personal representative or his attorney and files a statement that he elects to take the interest mentioned in ORS _____ instead of under the will.

The spouse may bar any right to take under this chapter by filing a writing, signed by the spouse, electing to take under the will.

Section 5. Election by guardian of spouse. An election

may be filed on behalf of the spouse by a guardian of an incompetent spouse. A guardian may elect against the will only if additional assets are needed for the reasonable support of the spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse, and any other assets (whether or not owned by the spouse) available for such support. Such election shall be subject to the approval of the court, with or without notice to other interested parties.

Section 6. Payment of elective share. Estate property shall be applied in satisfaction of the elective share in the following order, unless the will directs otherwise:

- (1) Any intestate property;
- (2) After the intestate property is exhausted, each devisee must contribute ratably to the elective share out of the portion of the estate passing to him under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible. However, persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from such property unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 7. Repeal of existing statutes. ORS 113.050, 113.060 and 126.300 are repealed.

Proposed revised Oregon probate code
ELECTIVE SHARE OF SURVIVING SPOUSE
Revised 3rd Draft
December 22, 1967

Prepared by
Stanton Allison and
Campbell Richardson

COMMENTS

Introductory. The fundamental change in the proposed chapter from ORS 113.050 and 113.060 is that, to accord with the proposed abolition of dower and curtesy and the policy of the proposed code to make no distinction between realty and personalty, the election is not limited to personalty, as now provided, but is granted as to an undivided one-quarter interest in both realty and personalty. Secondly, provision is made for consideration of nonprobate assets and income, and the elective share is barred if the spouse receives at least one-half the total of the estate property and nonprobate assets. The proposed chapter also indicates the manner in which the estate property should be applied to the elective share and the method of contribution by the beneficiaries. The language of the proposed chapter follows very closely Section 861 of the 1967 Wisconsin Probate Code. Detailed comments follow.

Section 1. Surviving spouse's election to take against will. Section 1 gives the right to elect an undivided one-quarter interest in the reduced net estate. It will correct present inequities by allowing the spouse to accept property given by will but reduces the undivided one-quarter interest by the amount so given by the will. This provision will therefore preserve the testamentary disposition in favor of the spouse without any increase in the net cost to the estate. On the other hand, the section spells out that by election the

spouse forfeits benefits not specifically enumerated as reducing the elective share, and forfeits general powers of appointment and rights to invasion of trust principal.

Net estate is elsewhere defined as the real and personal property of a decedent, except property used for the support of his surviving spouse and children and for the payment of obligations of the estate. Thus, the electing spouse would be entitled to provision made by the court for support, in addition to the elective share.

We quote the comment on the comparable Wisconsin Code Section 861.05. We have made the indicated changes and deletions to make the comment applicable to our situation.

"An election against a will by a widow under existing law often results in distortion of the estate plan; dower gives her a one-half interest in each parcel of realty; the elective share in personalty passes to her outright free of any trust set up by the will. This section preserves the testamentary scheme to a large degree by reducing the elective share of one-quarter by interests passing to the spouse under the will if those interests are capable of valuation. Thus if she is given a life interest under a trust, and that interest can be valued on the basis of life expectancy tables, an election would not destroy the trust; but the wife could elect only the difference between the value of her interest under the trust and her one-quarter elective share.

"An election to take against the will forfeits all rights in the estate (except those preserved in reducing the elective share); this includes a right to share in intestate property....It should, however, be noted that where the spouse takes under the will,...the Intestate Succession chapter will give the spouse a share in intestate property;....In the latter situation a testator would normally want the spouse to share in intestate property. Where the spouse elects against the will, however, the spouse is already taking a share of

intestate property since that is included in the net probate estate on which the share is computed; moreover, under Section 6 the intestate property is used to satisfy the elective share.

"The impact of election on powers of appointment and on powers of a trustee deserves special treatment. Sub. (2) sets forth the rules. The existing law is that an electing spouse retains powers of appointment created by the will, on the basis of the concept of a power as not an interest in property.... This subsection provides for forfeiture of general and unclassified powers of appointment created in the spouse by the will. If the will creates a special power... such as a 'power to appoint among our issue,' the spouse may retain such a power unless the will itself provides for forfeiture by an election; the reason is that such a power is primarily intended to benefit the class among whom appointment may be made, to allow for flexibility, rather than to benefit the donee. Powers in a trustee which may confer direct benefits on the spouse, such as a power to invade principal to meet the needs of the spouse, will likewise normally be nullified by an election against the will. The theory underlying this section is that the spouse may not elect against the will and still derive benefits under it, except as those benefits are used to reduce the elective share.

"Sub. (3) ties this section with the ensuing sections, which may in appropriate cases operate to restrict or nullify the right to elect."

Section 2. How elective share barred. Subsection (1) permits the right to elect to be barred by written agreement entered into either before or after marriage. ORS 108.140 provides that pre-nuptial agreements are effective as to property rights between the spouses. It is intended that the proposed subsection would change Oregon law by making the right of election subject to bar not only by a pre-nuptial but by a post-nuptial agreement.

Subsection (2), which would bar election if the spouse

receives at least one-half of the total of probate and non-probate property, would correct what has in some instances caused serious inequities or distortion of careful estate plans. Frequently, a substantial part of a decedent's estate passes "outside" probate. Under our present law, a widow can accept substantial provisions made for her by life insurance or inter vivos trusts and inter vivos transfers of property and still have the unimpaired election to receive an undivided one-quarter of the estate personal property. We quote from the comment to the Wisconsin Section 861.07.

"This section replaces obsolete concepts of jointure... and is generally new. It is designed to facilitate advance family planning. Sub. (1) provides for barring the surviving spouse by simple written agreement. In order to prevent overreaching by a dominant spouse, consideration would still be necessary;....It applies to both antenuptial and postnuptial agreements. Such an agreement could, of course, be set aside by the court if the surviving spouse lacked capacity or was subject to undue influence or if the agreement was the product of overreaching or misrepresentation. No attempt has been made to embody such tests in the statute, but they are left to court determination as is true of a challenge on such grounds to any voluntary transfer or agreement. The statute reflects the present judicial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.

"Sub. (2) is a completely new approach. The existing law allows a surviving widow to elect against a will and receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through nonprobate arrangements, such as life insurance payable to her or joint ownership passing to her by survivorship. This is obviously unfair, and this statutory provision bars the surviving spouse where he or she has received a majority of both probate and nonprobate assets considered together. In addition, the statute recognizes that such property may be tied up in an arrangement which would qualify for the marital

deduction, rather than passing outright, and still constitute a bar."

Section 3. Denial of election or reduction of share when decedent and surviving spouse are living apart. The last sentence of ORS 107.280 which covers a decree of permanent or unlimited separation from bed and board, now reads:

"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."

The proposed chapter on abolishment of dower and curtesy amends ORS 107.280 to delete this sentence. The deleted material permitting the court in a separation decree to bar the spouse's election is replaced by the proposed section. This section gives the court the right to either deny, reduce, or grant the elective right, both in a voluntary separation and in a judicial separation. The comment from the Wisconsin Section 861.09 follows:

"This section is new and changes existing law. The inequity of allowing election where the surviving spouse has deserted the decedent during lifetime should be obvious. The existing law allows even an adulterous widow to claim dower....The difficulty, however, of providing a fixed rule for separated couples has led to the proposed section which would vest discretion in the court to deal with individual cases on the basis of all available facts. In some cases of separation no right to elect should be given; in others a full elective share is proper; in still others a reduced share would be consistent with the facts. The judicial burden should not be great since the number of cases will be few, and the issues are no more troublesome than a property division in a contested divorce. The presence of this section should operate to deter election in many instances where the surviving spouse might otherwise elect.

"The phrase 'living apart' is designed to mean more than physical separation. Thus the section would not apply merely because an elderly husband or wife was in a nursing home while the other spouse resided elsewhere."

Section 4. What constitutes election under ORS

Section 4 is similar in language to the present ORS 113.060. There are, however, two differences. The time is shortened from six months to 90 days after the admission of the will to probate, and the spouse is given the right to file a writing electing to take under the will. Because the proposed code shortens the period for preferred treatment of claims and the time for filing will contest from six months to four months, your committees considered 90 days after admission of the will to probate sufficient time to decide whether or not to elect against the will. The last sentence is taken from Section 861.11 of the 1967 Wisconsin Code. The usefulness of this provision to estate administration is apparent.

Section 5. Election by guardian of spouse. This section will replace the present ORS 126.300. In explanation of the language restricting the right of the guardian to elect, which is taken from Section 861.11 of the 1967 Wisconsin Code, we quote the comment by the Wisconsin editors.

"Although 233.14 allows election by a guardian, no criterion for such election is stated; whereas this section allows election in such a case only if additional assets are needed for the reasonable support of the spouse; election merely to swell the estate subject to guardianship is undesirable for the entire family."

Section 6. Payment of elective share. There is no equivalent section in the Oregon Revised Statutes indicating the manner in which the elective share is to be selected and paid from the estate. The impact of election on distribution of the estate to other beneficiaries under the will is presently left to judicial determination. The language specifically exempting from contribution to the elective share heirlooms, pictures, home furniture and other specific bequests will be useful in an area which has caused problems in the past.

Section 1. Surviving spouse's election to take against will.

(1) If decedent dies testate, the surviving spouse of a decedent domiciled in this state at the time of his death has a right to elect to take the share provided by this section. The elective share consists of one fourth of the value of the net estate of the decedent, reduced by the value of the following property given to the spouse under the decedent's will:

(a) Property given outright;

(b) The present value of any legal life estates if capable of valuation with reasonable certainty;

(c) The present value of the spouse's right to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will which is capable of valuation with reasonable certainty without regard to the powers which are forfeited under subsection (2).

(2) Except as to property applied under subsection (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, such spouse by electing to take under this section retains the power unless it is a general power of appointment as defined in ORS 118.010 (5) and the testator has not provided otherwise, but forfeits any general power of appointment. A power to pay more than the

income or annuity or withdrawals, the value of which reduced the elective share under paragraph (c) of subsection (1) of this section, or to apply additional principal or income in behalf of the electing spouse, cannot be exercised in favor of the electing spouse.

(3) The right to elect may be barred under ORS _____ or may be denied or the share reduced under ORS _____.

Section 2. How elective share barred. (1) The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage.

(2) The surviving spouse is barred if he receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property: the net estate, joint annuities furnished by the decedent, proceeds of life insurance as to which decedent had any of the incidents of ownership at his death, transfers within two years of death to the extent to which decedent did not receive consideration in money or money's worth, transfers by decedent during lifetime as to which he has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary, payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and his employer (but excluding workmen's compensation and social security payments),

property appointed by the decedent by will or by deed executed within two years of his death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse, and property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent. For this purpose the surviving spouse is deemed to receive any property as to which he is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse. As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, U. S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

Section 3. Denial of election or reduction of share when decedent and surviving spouse are living apart. In any case where the decedent and the surviving spouse were living apart at

the time of the decedent's death, whether or not there has been a judgment for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court deems reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: length of the marriage, whether the marriage was a first or subsequent marriage for either or both of the parties, the contribution of the surviving spouse to the decedent's property either in the form of services or transfers of property, length and cause of the separation, and any other relevant circumstances.

Section 4. What constitutes election under ORS _____.

The surviving spouse is deemed to have elected to take under the will unless, within ninety days after the admission of the will to probate, he serves on the personal representative or his attorney and files a statement that he elects to take the interest mentioned in ORS _____ instead of under the will. The spouse may bar any right to take under this chapter by filing a writing, signed by the spouse, electing to take under the will.

Section 5. Election by guardian or guardian ad litem. An election may be filed on behalf of the spouse by a guardian of an incompetent spouse or a guardian ad litem. Either a guardian or guardian ad litem may elect against the will only if additional assets are needed for the reasonable support of the

spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse, and any other assets (whether or not owned by the spouse) available for such support. Such election shall be subject to the approval of the court, with or without notice to other interested parties.

Section 6. Assignment of elective share. Property shall be applied in satisfaction of the elective share in the following order unless the will directs otherwise:

- (1) Any intestate property;
- (2) The residue under the will;
- (3) After the residue is exhausted, each person

receiving a non-residuary gift under the will must contribute, in proportion to the value of his gift, to the remaining balance of the elective share, except that persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 7. Repeal of existing statutes. ORS 113.050 and 113.060 are repealed.

Proposed revised Oregon probate code
ELECTION OF WIDOW - DOWER, CURTESY
2nd Draft
June 12, 1967

This draft is proposal #6.

Section 1. 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 dies seised 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] the estate of the decedent. 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 2. 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 3. 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 4. 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 5. ORS 91.030 is amended to read:

91.030. A [tenancy by curtesy,] 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 6. 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 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 7. 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 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 8. 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 9. 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 10. ORS 107.100 is amended to read:

107.100. (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 11. 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.

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Section 12. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes:
6/19/65, pp. 5 and 6
9/18/65, pp. 6 and 7

Prepared by
Mr. Allison

Proposed revised Oregon probate code
ELECTION OF WIDOW - DOWER, CURTESY
1st DRAFT
APRIL 28, 1967

This draft is proposal #6.

Section 1. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent 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 dies seised and, if the decedent was domiciled in this state at the time of death, to take upon distribution an undivided one-fourth interest in all the personal property of the estate of the decedent. Such interest shall be in addition to, and not in lieu of, any other statutory right.

(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 110.100, 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.

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 2. 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 3. 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 or curtesy of the surviving spouse of any person who died before the effective date of this 1967 Act.

Section 4. 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 entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 5. ORS 91.030 is amended to read:

91.030. 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 6. 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 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 the property shall likewise be subject to like rights of survivorship.

(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) of this section.

Section 7. 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.

Section 8. ORS 105.340 is amended to read:

105.340. In all cases of sales in partition when it appears that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of the 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 9. 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 the 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 the decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. The court may, in making the award, decree that homestead rights under ORS 116.010 and the election provided in ORS 113.050 are extinguished and barred.

Section 10. ORS 111.130 is amended to read:

111.130. If the intestate leaves a surviving spouse and issue, and any of the issue has received an advancement from the intestate in his lifetime, the advancement shall not be taken into consideration in computing the share to which the surviving spouse is entitled.

Section 11. ORS 114.020 is amended to read:

114.020. Any person who has attained the age of majority and is of sound mind may make his will.

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.

Section 13. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes
9/13/65 pp. 6 and 7