

Section 1. Net intestate estate. Any part of the net estate of a decedent not effectively disposed of by his will shall pass to his heirs as prescribed in the following sections.

Section 2. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

Section 3. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

Section 4. Share of others than surviving spouse. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent; if they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degrees take by representation.

(2) If there is no surviving issue, to the surviving parents of the decedent.

better indication to the proper pattern of descent than do present statutes.

(c) Existing Oregon law treats real property differently than personal property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925. The result of these inherited and amended provisions is that present inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend, embodied in this chapter, is toward a single system of inheritance (intestate succession) with abolition of common law dower and curtesy. The "net estate" concept is used to refer to the amount which should descend or be distributed. Support rights are rights or interests in addition to those which descend or are distributed as part of the net estate.

Section 1. Net intestate estate. Section 1 specifies that any part or all of an estate as to which there is no will, or a will not making an effective disposition, will be dealt with under the provisions of the intestate succession chapter.

Section 2. Share of surviving spouse if decedent leaves issue. This section increases the amount passing to the widow or widower where there is surviving issue in that it gives the

spouse one-half the real property in fee in lieu of the present dower or curtesy interest, as well as one-half the personal property as now provided. It attempts to provide adequately for the person closest to decedent and most likely to be dependent upon his estate for continued financial security. Particularly where the estate is small it is desirable to increase the share of the surviving spouse.

Section 3. Share of surviving spouse when decedent leaves no issue. Section 3 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and 111.030(4).

Section 4. Share of others than surviving spouse. This section is taken from Section 2-103 of the 1967 Uniform Probate Code, except as to subsection (5). It involves changes in Oregon law which modernize it to be more consonant with current thought on the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the

Proposed revised Oregon probate code
INTESTATE SUCCESSION
Amended 3rd Draft
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Prepared by
Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections

ORS Sections

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Proposed revised Oregon probate code
INTESTATE SUCCESSION
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Prepared by
Stanton Allison

INTESTATE SUCCESSION

Section 1. Definitions and rules of construction. (Temporary Placement Only) As used in this code, unless otherwise required by context, the following words and phrases shall be construed as follows:

- (1) Obligations - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.
- (2) Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by an accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.
- (3) Issue - when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.
- (4) Net estate - 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.
- (5) Personal property - includes all property other than real property.

(6) Personal representative - includes executor, administrator and special administrator.

(7) Property - includes both real and personal property.

(8) Real property - includes all legal and equitable interests in land in fee and for life.

Section 2. Net intestate estate. Any part of the net estate of a decedent not effectively disposed of by his will shall pass to his heirs as prescribed in the following sections.

Section 3. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent; if they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degrees take by representation.

(2) If there is no surviving issue, to the surviving parents of the decedent.

(3) If there is no surviving issue or parent, to the brothers and sisters and the issue of any deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degrees take by representation.

(4) If there is no surviving issue, parent or issue of a parent, to the grandparents and the issue of any deceased grandparent by representation; if there is no surviving grandparent, their issue take equally if they are all of the same degree of kinship, but if of unequal degree then those of more remote degrees take by representation.

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

(6) If no person takes under the preceding subsections, the net intestate estate shall escheat to the State of Oregon.

Section 6. Representation defined. Representation means the method of determining distribution when the distributees are in unequal degrees of kinship to the decedent. It is accomplished as follows: The estate shall be divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left

issue who survive decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Section 7. Time of determining relationships: After-born heirs. The relationships existing at the time of the death of the decedent govern the inheritance of his net intestate estate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of his death.

Section 8. Requirement that heir survive decedent for five days. Any person who fails to survive the decedent by five days is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly.

Section 9. Persons of the half-blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

Section 10. Illegitimate children. For all purposes of intestate succession an illegitimate child, unless he has been adopted:

(1) Shall be treated as the legitimate child of his mother.

(2) Shall be treated as the legitimate child of the father if, during the lifetime of the child:

(a) The paternity of the child is established under
ORS 109.070; or

(b) The father has acknowledged himself to be the father
in writing signed by him.

Section 11. Persons related to decedent through two
lines. A person who is related to the decedent through two
lines of relationship is entitled to only a single share based
on the relationship which would entitle him to the larger share.

Section 12. Repeal of existing statutes. ORS 111.010,
111.020, 111.030, 111.040, and 111.231 are repealed.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
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Stanton Allison

COMMENTS

Summary of Chapter.

This chapter is a major revision of the existing Oregon law of intestate succession. In the drafting of these proposals, the committees were guided by the following objectives: First, to eliminate the complexities of the provisions for dower and curtesy; second, to treat similarly the provisions for the descent and distribution of real and personal property; third, to augment the share of the surviving spouse; fourth, to clarify language throughout where necessary to eliminate ambiguities and inconsistencies; and fifth, to eliminate some of the more archaic provisions of the law.

This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Under the following provisions several significant changes are generally evident:

(a) All property is treated identically as part of the net estate. There is no priority, as between types of property, for the payment of debts or claims and, unlike the present Oregon code, no difference in the shares of real and personal property receivable by the intestate heirs.

(b) Any system of intestate succession is to a certain extent arbitrary. The shares in any system of descent may alter radically upon the contingency of some person in a closer degree of kindred having predeceased the intestate.

The revised law attempts to approximate as closely as possible the desires of the average intestate. Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes merely by executing a will, but the fact remains that many people do not make wills and human inertia is such that the situation is not likely to change greatly. Hence the intestate succession law -- the "will" made for people by the law -- must attempt to anticipate the wishes of people who die having made no testamentary disposition. No statute can anticipate all the varying desires, facts and circumstances which surround testamentary dispositions. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for a man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be criticized because it does not satisfactorily meet some unusual situation. The existing statutes were drawn a century ago when the family was more independent and when attitudes toward ownership by a widow were different from modern views. Hence modern wills give a

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3rd Draft, 12/1/67

Comments

better indication to the proper pattern of descent than do present statutes.

(c) Existing Oregon law treats real property differently than personal property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925. The result of these inherited and amended provisions is that present inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend, embodied in this chapter, is toward a single system of inheritance (intestate succession) with abolition of common law dower and curtesy. The "net estate" concept is used to refer to the amount which should descend or be distributed. Support rights are rights or interests in addition to those which descend or are distributed as part of the net estate.

Section 1. Definitions and rules of construction. The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The new Oregon probate code would follow the pattern of Iowa, Washington, Wisconsin and the Model and Uniform probate codes in placing a comprehensive definition section at the beginning of the code.

Section 2. Net intestate estate. Section 2 defines the

net intestate estate and specifies that any part or all of an estate as to which there is no will, or a will not making an effective disposition, will be dealt with under the provisions of the intestate succession chapter. The definition is that used in the 1967 draft Uniform Probate Code Section 2-101.

Section 3. Share of surviving spouse if decedent leaves issue. This section increases the amount passing to the widow where there is surviving issue in that it gives the spouse one-half the real property as well as one-half the personal property as now provided. It attempts to provide adequately for the person closest to decedent and most likely to be dependent upon his estate for continued financial security. Particularly where the estate is small it is desirable to increase the share of the surviving spouse.

Section 4. Share of surviving spouse when decedent leaves no issue. Section 4 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and ORS 111.030(4).

Section 5. Share of others than surviving spouse. This section is taken from Section 2-103 of the 1967 Uniform Code, except as to subsection (5). It involves changes in Oregon law which modernize it to be more consonant with current thought on the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the

scheme of distribution both in the case where decedent has left a surviving spouse and issue and in the situation where there is no surviving spouse but where issue or other kindred of the decedent survive.

Subsection (1) retains the priority given in existing Oregon law to the issue of the intestate. It also codifies, in the definition of "representation" in section 6, existing Oregon law. Under existing Oregon law the rights of lineal descendants, where decedent leaves a spouse, are subject to a right of dower and curtesy with respect to the real property, and in cases of intestacy to inheritance of one-half of the personal property. Under the proposed law, where there is a surviving spouse, the rights of issue (lineal descendants) are subject only to the one-half interest of the surviving spouse in the net estate.

Subsection (2) preserves existing Oregon law; see ORS 111.020(2) and 111.030(3).

Subsection (3) is consistent with existing Oregon law, ORS 111.020(3), in that it provides for the brothers and sisters of the intestate. It differs from existing Oregon law, however, in providing succession to the issue of the parents of the intestate, even when no brothers or sisters are living. Under existing Oregon law the issue of deceased brothers or sisters of decedent may take only by right of representation. In the event that all brothers and sisters

should have predeceased the decedent, their descendants, if any, do not presently take by right of representation but only as next of kin. See I Jaureguy and Love, Oregon Probate Law and Practice, section 12 at page 16-17 (1958). Bones v. Lollis, 192 Or 376, 234 P2d 788; Andrews v. First Nat. Bank of Eugene, 192 Or 230, 234 P2d 791; and Op. Atty. Gen. 1934-36, 602, have held that if decedent left nieces and nephews and also grandnieces and grandnephews the latter would take nothing even though their parents predeceased the intestate. Under the proposed statute the latter would be able to take by right of representation.

Subsection (4) represents a change from present law. Under existing Oregon Law (ORS 111.020(5)), if a decedent is not survived by spouse, lineal descendants, parent, brother or sister, the property descends to the next of kin in equal degree who would be the surviving grandparents. Under subsection (4) the grandparents would take only if there were no surviving brothers or sisters or surviving issue of deceased brothers and sisters. Furthermore, unlike the existing law, not only the surviving grandparents, but also the issue of deceased grandparents would take. Thus descent is provided to both paternal and maternal grandparents and to their issue if they are deceased.

This subsection limits inheritance to relatives claiming through the intestate's grandparents and thus excludes more

remote relatives claiming through great-grandparents.

In recent years there has been a trend toward limiting inheritance by remote relatives under the intestacy laws. New York, by chapter 712, effective September 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Also see the 1967 Probate Code of Wisconsin, section 852.01(2). Limitations on inheritance by collateral kindred were proposed in the Model Probate Code in 1946 and adopted in a slightly different form in Pennsylvania in 1947 and in Indiana in 1953. See report No. 1. 1B of the New York Commission on Estates.

These limitations on inheritance were proposed for the following reasons:

(a) In modern times, with increased mobility and loss of close contact due to urbanization, the "family" is more restricted in size. Ties with remote relatives are weakened. Few people can name their second cousins. Normally a decedent does not want his property to pass to these remote relatives; if he does, he can easily make a will naming those he wishes to favor.

(b) Conversely the remote relative has no claim on a decedent's property. He is not likely to have rendered services which might lead to an expectation of inheritance. Frequently he learns of his relationship to decedent only after the latter's

death. For this reason he has been sometimes referred to as "the laughing heir." The inheritance is a mere windfall.

(c) With mobility of persons it is increasingly difficult to trace remote relatives. This increases the cost of settling estates, since these remote heirs must be notified as a matter of due process. Remote relatives often are foreign citizens, complicating the problems of notifying them and transferring property to them.

(d) Remote relatives having standing to contest wills may promote vexatious litigation for its nuisance value in the hopes of getting a settlement, even though they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus may reduce will contests.

(e) Although it is often said that escheat is not favored, a person's obligations to the community in which he lives may be far stronger than those to remote relatives of whom he has long ago lost track. The decedent can prevent an escheat by making a will leaving the property as he pleases to remote relatives, to friends or to charity.

(f) Two other archaic doctrines are eliminated by the present provision. First, such remnants of the doctrine of Ancestral Estates as exist in present ORS 111.020(5) and discussed in Cordon v. Gregg, 164 Or 306, 97 P2d 732, 101 P2d 414 (1940), discussed in I Jaureguy and Love, Oregon Probate Law and Practice, section 15, pages 19 through 22, criticized

and noted, 20 Or L. Rev. 164 (1940). The proposed section also makes no such distinction as exists in present ORS 111.020(4) between next of kin of equal degree claiming through different ancestors. Hence the nearer ancestor rule as it exists in present Oregon law is abolished. Since inheritance by more remote collateral relatives is in any event limited by the proposed statute, there is no occasion for the nearer ancestor rule to arise.

Subsection (5) provides that where a married couple inherits as parents or grandparents they take the real property by the entirety and the personal property jointly with rights of survivorship. This accords with the present rule that devises of real property to a husband and wife create them tenants by the entirety. (See C.J.S. Wills, Section 908). Your committee believes this accords with the usual desire of married couples that they take and hold property jointly.

Section 6. Representation defined. This section defines "representation" in more detail than ORS 111.010(4) and is consistent with present Oregon law. See I Jaureguy and Love, Oregon Probate Law and Practice, sections 9 and 10 (1958). This definition makes it clear that the pattern of stirpital distribution is to be determined at the level of the nearest living lineal descendant of the intestate, rather than at the level of the decedent's children, regardless of whether or not they predeceased decedent. The proposed definition is

taken from the 1967 draft Uniform Probate Code, section 2-106 and prevents the anomalous result of such cases as Maud v. Catherwood, 67 Cal. App.2d 636, 155 P2d 111 (1945), noted 33 Calif. L. Rev. at 324 (1945). Since the operation of the right of representation may differ depending upon the stirpital level chosen as the root generation, it is desirable to specify the level in the definition.

Section 7. Time of determining relations: After born heirs: Section 7 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

Section 8. Requirement that heir survive decedent for five days. This section is taken from the 1967 draft Uniform Probate Code, section 2-104. For a similar provision, see the 1967 Wisconsin Probate Code, Section 852.01(2).

The reporter's comment is as follows:

"This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property;.... This section avoids multiple administration and in some instances prevents the property from passing to persons not desired by the decedent. The five day period should in no case hold up any proceedings relating to a decedent's property."

Section 9. Persons of the half-blood. Section 9 is consistent with present Oregon law in ORS 111.040.

Section 10. Illegitimate children. This section would replace ORS 111.231. The proposed section, unlike ORS 111.231, requires that the paternity of the child must be determined during the child's lifetime. The proposed section would answer the criticism of ORS 111.231 in Jaureguy and Love, Oregon Probate Law and Practice, section 18.

The requirement that paternity be established during the child's lifetime would tend to eliminate fraudulent claims of the father where the child's estate is substantial.

The phrase "all purposes of intestate succession" is defined in the general definition section to mean succession by, through, or from a person, both lineal and collateral. This language is taken from the 1967 Uniform Probate Code (section 2-110).

The proposed section, in your committees' opinion, does not change present Oregon law, except as noted above. Reference is made to ORS 109.060, 109.070, 109.080 and 109.090. These sections, together with ORS 111.231, made up chapter 411 of the 1957 Session Laws which substantially rewrote the former law respecting inheritance rights and other legal relationships of illegitimate children. For this reason the proposed section refers to and incorporates ORS 109.070, which prescribes how paternity shall be established. The language of reference is that used in the following section ORS 109.080.

In addition to the means of establishing paternity set out in ORS 109.070, paternity may be established if "The father has acknowledged himself to be the father in writing signed by him." This language is taken from the Proposed Uniform Probate Code (section 2-111). We refer to similar provisions of the 1965 Washington Code (section 11.04.081); the 1963 Iowa Code, (section 221.222); the Proposed Wisconsin Probate Code (section 852.05). Your committees agreed that provision should be made for an acknowledgment by the father of his parenthood during the child's lifetime, as contained in all the new codes cited. This would be for the obvious benefit of the child.

Since most illegitimate children are ultimately adopted it should be noted that for inheritance purposes the adopted illegitimate child is treated as the child of the adopting parents and not as the child of its natural parents. Thus his right to inherit from his natural parent is cut off, unless the spouse of the natural parent is the adopting parent. The proposed section therefore makes it clear that it would not be operative if the child had been adopted.

Section 11. Persons related to decedent through two lines. This is section 2-112 of the 1967 draft Uniform Probate Code. For example, under the provision for inheritance by issue of the grandparents on both the maternal and paternal sides, marriage of cousins might otherwise entitle their issue to inherit from both sets of grandparents. In any event only one intestate share should be permitted to be inherited.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
ADDENDUM to Comments
March 29, 1968

Prepared by
Stanton W. Allison

ADDENDUM

The proposed code would repeal ORS 111.070 headed "Right of Nonresident Alien to take Property by Succession or Testamentary Disposition." This statute was held unconstitutional by Zschernig vs. Miller, 389 U. S. 429, 19 L.ed.2d 683, 88S.Ct. 664, decided January 15, 1968.

We quote the comment of Mr. Rowland L. Young on the above decision appearing in his Review of Recent Supreme Court Decisions in the March, 1968, American Bar Association Journal:

"This decision held unconstitutional an Oregon statute that required alien heirs of Oregon property to show that their native countries granted reciprocal rights of inheritance to United States citizens. The court said that, as applied, the statute intruded on questions of foreign relations reserved to the Federal Government.

"The case involved the estate of an Oregon resident who died intestate in 1962, leaving as her only heirs the appellees, who were residents of East Germany.***

"The Oregon Supreme Court ruled that the appellants could take the real property involved, but not the personalty, by reason of Article IV of the 1923 treaty with Germany. The court relied on Clark v. Allen, 331 U.S. 503 (1947), which held that the 1923 treaty did not apply to personalty located in the United States 'which an American citizen undertakes to leave to German nationals'.

"The Supreme Court reversed in an opinion by Mr. Justice Douglas. The Court refused the invitation of the Justice Department, which appeared as amicus curiae, to reexamine Clark v. Allen, saying that 'the history and operation of this Oregon statute make clear that

[it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress'.

"The Court noted that Oregon courts and other state courts with similar statutes have launched detailed inquiries into the types of governments of various foreign nations in construing the statutes and that their decisions 'radiate some of the attitudes of the' cold war, 'where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory'. 'It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way', the Court said, and it thus has a direct impact upon foreign relations that might adversely affect the power of the central government to deal with those problems.***"

Proposed revised Oregon probate code
INTESTATE SUCCESSION
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Prepared by
Stanton Allison

COMPARATIVE SECTION TABLE

<u>Draft Sections</u>	<u>ORS Sections</u>
1	111.010
2	111.020, 111.030
3	111.020, 111.030
4	111.020, 111.030
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7	111.010(5)
8	111.020(5)
9	111.040
10	111.231
	111.020(4)

sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degrees take by representation.

(4) If there is no surviving issue, parent or issue of a parent, to the grandparents and the issue of any deceased grandparent by representation; if there is no surviving grandparent, their issue take equally if they are all of the same degree of kinship, but if of unequal degree then those of more remote degrees take by representation.

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under section 2-801.

I quote from Mr. Frohnmayer's letter of September 7, 1967:

First, I have noted that the legislative draft of the proposed Wisconsin Probate Code (Assembly Bill 280) section 852.01(g) at page 22 differs from the proposed Wisconsin Probate Code (study draft), section 852.01(2). Under the study draft collateral kindred under either the parents or grandparents have to be related within the fourth degree of kindred. You will recall that we have selected the fifth degree of kindred as a limitation, but have decided to impose that limitation only on takers under the grandparents. It now appears that Wisconsin has eliminated any limitation on takers as long as they claim under the grandparents.

I have also noted that the 1967 Uniform Probate Code (Boulder Draft) in section 2-103(d) has deviated from earlier tentative draft of the Uniform Probate Code in two respects. First, as in the new draft of the Wisconsin Probate Code, the new Uniform Code places no limitation in degree on the issue of takers under the grandparents. Secondly, it provides that issue of the grandparents take by representation rather than as in the Oregon proposal, per capita. In light of these recent developments, I wonder if we might be well advised to reconsider our limitation to the fifth degree imposed on issue of deceased grandparents of the intestate.

In my reply to Mr. Frohnmayer's suggestion, I wrote in part as follows:

I have taken a new look at the fact that every person has not one but two sets of grandparents, two grandparents on the paternal side and two on the maternal side. I visualize the not uncommon situation where an intestate would be survived by one or both grandparents on the maternal side and no grandparents on the paternal side. Our present proposal would disinherit all of the uncles and aunts, or their issue,

both
on the paternal side, purely because/grandparents on the paternal side had predeceased the intestate while a maternal grandparent survived. This now strikes me as not only unjust but perhaps entirely opposite to the intention of the intestate. The aunts and uncles or cousins on the paternal side might be much closer than the issue of the grandparents on the maternal side. It seems more fair than provision be made for the relatives on the maternal as well as on the paternal side as provided in the Uniform Code. I prefer this approach to that of the Washington Code which requires equal inheritance by the maternal and paternal relatives.

I did not realize the full implication of the proposal we previously adopted until I assumed that I was an only child and died intestate without leaving children of my own. In this case my heirs would be my living first cousins both on my father's and my mother's side. If in this case my cousins on my father's side, all of whom are old were deceased, the cousins on my mother's side would take to the exclusion of all the first cousins once removed on my father's side. Of the cousins on my mother's side, of nine cousins six are deceased, leaving children, and three are living. The children of the deceased cousins are the ones who would really be entitled to inherit on a basis of need, rather than the three surviving cousins.

My letter continues:

I assume the limitation of inheritance to those of the fifth degree was adopted for two reasons: First, to eliminate relatives so remote that they would be beyond the comprehension or intention of the intestate; and, second, to ease the task of determining who might be the heirs in an intestate situation. I have expressed my own reaction in regard to the first

concept. These relatives in the sixth degree I refer to include several children whom I have met and known personally. They don't seem nearly as remote to me as the chart would indicate. In regard to the second reason, all of the relatives of my paternal grandparents live on the East Coast. There are many whom I have never met and some with whom I have lost contact over the years. As to those relatives, equal inquiry would have to be made under the proposal we have adopted or under the language of the Uniform Code. In either case, the personal representative would have to determine which of these relatives were alive, which were dead, and which had left children surviving them.

It seems to me that the drafters of the new Washington, Wisconsin, and Uniform Codes were well advised to drop the limitation of inheritance to those within any particular degree of relationship. I agree with you that serious consideration should be given as to whether we should not change our thinking in this matter.

If the proposed approach of the 1967 Uniform Code is adopted, Section 7, headed Degree of Kinship could be eliminated.

I have had extensive correspondence with Mr. Frohnmayer regarding the elimination and repeal of ORS 111.020(5) which provides:

(5) When any child dies under the age of 21 years and leaves no surviving spouse or children, any real estate which descended to such child shall descend to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor.

Mr. Frohnmayer has suggested that it might be well for the committee to consider Section 852.01(2) of the Wisconsin draft and also Section 2-104 of the new 1967 Uniform Code. The attached contains a proposed section embodying the

Uniform Code provision. The reporter's comment is as follows:

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section 2-601. This section avoids multiple administration and in some instances prevents the property from passing to persons not desired by the decedent. The five day period should in no case hold up any proceedings relating to a decedent's property.

It is my suggestion that the committee also consider adoption of the similar provision with regard to devisees as set out on the attached.

If we are to apply an anti-lapse statute to a devisee who dies one-half hour before a testator, it would seem equally advisable to apply a similar provision to a devisee who dies one-half hour after a testator. It would seem that enactment of these two sections would be of value in many simultaneous death situations which would not be covered by the simultaneous death chapter.

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INTESTATE SUCCESSION
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Prepared by
Stanton Allison

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to a surviving spouse shall pass:

(1) To the issue of the decedent equally if they are in the same degree of kinship or, if in unequal degree, to the issue of more remote degree by representation.

(2) If no issue survives the decedent, to the surviving parents of the decedent;

(3) If no issue or parent survives the decedent, to the issue of either parent by representation;

(4) If no issue, parent, or issue of either parent survives the decedent, to the surviving grandparents of the decedent and the issue of any deceased grandparent by representation.

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship;

(6) If no issue, parent, issue of either parent, or grandparent survives the decedent, equally [without representation] to the issue of the deceased grandparents [in the nearest] if they are in the same degree of kinship to the decedent, [to and including the fifth degree as

provided in ORS _____] or, if in unequal degree, to the issue of more remote degree by representation.

Section 2-104. Requirement that heir survive decedent for five days. Any person who fails to survive the decedent by five full days is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by five full days, it is presumed that the person failed to survive for the required period.

Section 2-601. Requirement that devisee survive testator by five days. A devisee who fails to survive the testator by five full days is deemed to have predeceased the testator, unless the will of the decedent creates a presumption that the devisee is deemed to survive the testator or requires that the devisee survive the testator for any stated period in order to take under the will.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
(with comments)
2nd draft
June 16, 1967

Prepared by
Stanton Allison

This second draft embodies the changes and suggestions following consideration of the first draft by the Advisory Committee on May 19 and 20, 1967. It also includes redrafting of sections 5, 6, 7 and 11.

DESCENT AND DISTRIBUTION OF REAL AND PERSONAL PROPERTY

Section 1. Definitions and rules of construction.

(Temporary Placement Only)

As used in this chapter, unless otherwise required by context, the following words and phrases shall be construed as follows:

(1) Obligations - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

(2) Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.

(3) Issue - when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

(4) Net estate - 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.

INTESTATE SUCCESSION

2nd draft, 6/16/67

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(5) Personal property - includes all property other than real property.

(6) Personal representative - includes executor, administrator and special administrator.

(7) Property - includes both real and personal property.

(8) Real property - includes all legal and equitable interests in land in fee and for life.

Comment: Section 1 of proposal #2 is only temporarily placed with the intestate succession provisions, and will ultimately be included in the definition section of chapter 111. All definitions are retained from proposal #2 except that legislative counsel's proposed change of "net estate" has been adopted. The committee must review its decisions on support rights, exempt property, family allowance and homestead property to determine if the new phraseology in describing the net estate includes adequately all of the property set apart. Legislative counsel's suggestions regarding the definition of "issue" are rejected; the previous definition was agreed by the committee and is consistent with the model and uniform probate codes.

Section 2. Net intestate estate. Any part of the net estate of a decedent which is not effectively disposed of by will constitutes the net intestate estate and shall descend and be distributed as prescribed in the following sections.

References: Section 8, Proposal #2

Advisory Committee Minutes
8/13, 14/65, pp. 10 and 11

Comment: This new section changes section 2 of the proposal #2 and adopts instead section 201 of the first tentative draft of the model's uniform probate code (July 10, 1966). This new section also makes it unnecessary to have a separate section 8 (as in proposal #2) on partial intestacy.

Section 3. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

References: Section 3, Proposal #2

Advisory Committee Minutes
6/19/65, p. 5
8/13, 14/65, pp. 4 and 5

ORS 111.020 and 111.030.

Comment: This changes section 3 of proposal #2 in accordance with the suggestions of legislative counsel. The phrase "of the decedent, in addition to provision for support" is omitted in this section and in the following section because the definition of net estate excludes property used for the support of the surviving spouse.

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

References: Section 4, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 5

ORS 111.020 and 111.030.

Comment: The changes in section 4 correspond to similar changes in section 3.

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to a surviving spouse shall pass:

(1) To the issue of the decedent equally if they are in the same degree of kinship or, if in unequal degree, to the

issue of more remote degree by representation;

(2) If no issue survives the decedent, to the surviving parents of the decedent;

(3) If no issue or parent survives the decedent, to the issue of either parent by representation;

(4) If no issue, parent or issue of either parent survives the decedent, to the surviving grandparents of the decedent;

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship;

(6) If no issue, parent, issue of either parent, or grandparent survives the decedent, equally without representation to the issue of the deceased grandparents in the nearest degree of kinship to the decedent, to and including the fifth degree as provided in ORS _____.

(7) If no person takes under the preceding subsections, the net intestate estate shall escheat to the State of Oregon.

References: Section 5, Proposal #2

Advisory Committee Minutes
6/19/65 pp. 6 and 7
8/13,14/65 pp. 1, 2 and 5 to 10
9/18/65, p. 1

ORS 111.020 and 111.030

Comment: The only change in this draft from that of section 5 in proposal #2 is the addition of a provision in subsection 4 that surviving grandparents married to each other like surviving parents married to each other take real property as tenants by the entirety and personal property as joint owners with a right of survivorship.

Section 6. Representation defined. "Representation" means the method of determining distribution when the distributees are in unequal degrees of kinship to the decedent. It is accomplished as follows: After first determining who are in the nearest degree of kinship of those entitled to share in the net estate, the net estate is divided into equal shares, the number of shares being the sum of the number of living persons in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the decedent, and left issue surviving the intestate. Each share of a deceased person in the nearest degree of kinship is divided in the same manner among his surviving children and the issue of his children who have died leaving issue surviving the decedent. This division continues until each portion falls to a living person. All distributees except those in the nearest degree of kinship take by representation.

References: Section 6, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 10
9/18/65, p. 1

ORS 111.010

Comment: This definition of representation is unchanged from section 6 of proposal #2. It is identical to both the uniform and the model probate code definitions.

Section 7. Degree of kinship. As used in section 5 the degree of kinship computed according to rules of the civil law is determined by counting upward from the decedent to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts.

References: Section 7, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 10

ORS 111.040

Comment: This section is unchanged from section 7 of proposal #2. The drafter sees no necessity to limit the section as suggested by legislative counsel nor does he find the section inappropriate in determining the degrees of kinship for purposes of other references as long as it is remembered that when any degree of kinship is computed, the person from whom the degrees are counted is assumed to be the "intestate" to which the civil rules refer.

Section 8. Time of determining relationships: After-born heirs: The relationships existing at the time of the death of the decedent govern the inheritance of his net intestate estate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of his death.

References: Section 9, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 11

ORS 111.010 (5)

Section 9. Persons of the half-blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

References: Section 10, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 11

ORS 111.040

Comment: No change from section 10 of proposal #2.

Section 10. Persons related to decedent through two lines. A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.

References: Section 11, Proposal #2

Advisory Committee Minutes
8/13/14/65, pp. 11 and 12

Model Probate Code Section 28.
1969 Uniform Probate Code Section 2-112.

Comment: This section should be retained if section 5 of the succession statute is revised to comply with the 1967 Uniform Code.

COMMENTS

1. For Summary of Chapter.

This chapter is a major revision of the existing Oregon law of intestate succession. In the drafting of these proposals, the committee was guided by the following objectives: First, to eliminate the complexities of the provisions for dower and curtesy; second, to treat similarly the provisions for the descent and distribution of real and personal property; third, to augment the share of the surviving spouse; fourth, to clarify language throughout where necessary to eliminate ambiguities and inconsistencies; and fifth, to eliminate some of the more archaic provisions of the law.

2. Comment to Section 1.

The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The new Oregon probate code would follow the pattern of Iowa, Washington, Wisconsin and the Model and Uniform probate codes in placing a comprehensive definition section at the beginning of the code.

3. Comment to Section 2.

This chapter deals throughout with the concept of the net intestate estate. Section 2 defines the net intestate estate and specifies that any part or all of an estate as to which there is no will, or a will not making an effective disposition, will be dealt with under the provisions of the intestate succession chapter. This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Under the following provisions several significant changes are generally evident:

(a) All property is treated identically as part of the net estate. There is no priority, as between types of property for the payment of debts or claims and, unlike the present Oregon code, no difference in the shares of real and personal property receivable by the intestate heirs.

(b) Any system of intestate succession is to a certain extent arbitrary. The shares in any system of descent may alter radically upon the contingency of some person in a closer degree of kindred having predeceased the intestate.

INTESTATE SUCCESSION

2nd draft, 6/16/57

COMMENTS

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The revised law attempts to approximate as closely as possible the desires of the average intestate. Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes merely by executing a will, but the fact remains that many people do not make such wills and that human inertia is such that the situation is not likely to change greatly. Hence the intestate succession law -- the "will" made for people by the law -- must attempt to anticipate the wishes of people who die having made no testamentary disposition. No statute can anticipate all of the varying desires, facts and circumstances which surround testamentary dispositions without becoming unduly complex. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for a man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be criticized because it does not satisfactorily meet some unusual situation. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should, therefore, be designed with the moderate and small estate in mind. The existing statutes were drawn a century ago when the family was more independent and when attitudes toward ownership by a widow were different from modern views. Hence modern wills give a better indication to the proper pattern of descent than do present statutes.

(c) Existing Oregon law treats real property differently than personal property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925. The result of these inherited and amended provisions is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend, embodied in this chapter, is toward a single system of inheritance (intestate succession) with abolition of common law dower and curtesy. The "net estate" concept is used to refer to the amount which should descend or be distributed. Support rights are rights or interests in addition to those which descend or are distributed as part of the net estate.

(4) Comment to Section 3.

This section increases the amount passing to the widow where there is surviving issue. It attempts to provide adequately for the person closest to decedent and most likely to be dependent upon his estate for continued financial security. Particularly where the estate is small it is desirable to increase the share of the surviving spouse.

5. Comment to Section 4.

Section 4 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and ORS 111.030(4).

6. Comment to Section 5.

This section involves several changes in Oregon law which modernize it to be more consonant with current thought on the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the scheme of distribution both in the case where decedent has left a surviving spouse and issue and in the situation where there is no surviving spouse but where issue or other kindred of the decedent survive. Subsection 1 retains the priority given in existing Oregon law to the issue of the intestate. It also codifies, in the definition of "representation" in section 6, existing Oregon law as to the meaning and operation of the right of representation. All of the shares are calculated with reference to the net estate of the decedent. Under existing Oregon law the rights of lineal descendants where decedent leaves a spouse are subject to a right of dower or curtesy with respect to the real property and in cases of intestacy to inheritance of one-half the personal property. Under the proposed law where there is a surviving spouse, the rights of issue (lineal descendants) are subject only to the one-half interest of the surviving spouse in the net estate.

Subsection 2 preserves existing Oregon law, see ORS 111.020(2) and (3).

Subsection 3 is consistent with existing Oregon law, ORS 111.020(3) in that it provides for the brothers and sisters of the intestate. It differs from existing Oregon law, however, in giving priority to all of the issue of the parents of the intestate, even when no brothers or sisters are living. Under existing Oregon law the issue of deceased brothers or sisters of decedent may take only by right of representation. In the event that all brothers and sisters should have predeceased the decedent, their descendants, if any, do not presently take by right of representation but only as next of kin. See I Jaureguy and Love, Oregon Probate Law and Practice section 12 at page 16-17 (1958). In the proposed section all issue of the parents of the decedent, including nephews and grand-nephews, who are within the fourth and fifth degrees of kindred respectively would take to the exclusion of grandparents, aunts and uncles and first cousins of the deceased even though the latter are, respectively, in the second, third and fourth degrees of kindred from the deceased. In providing for the

right of representation as to the issue of the parents of decedent, the proposed section represents a change from the existing statute, which is limited to the brothers and sisters of the intestate and to the issue of any deceased brother or sister by right of representation. By specifying "issue" of the parent, rather than brothers and sisters of the deceased, the statute's wording is clear that any lineal descendants of the intestate's parents, rather than merely his brothers and sisters, are entitled to take under this section either directly or by right of representation. This is contrary to existing Oregon case law, Bones v. Lollis, 192 Or 376, 234 P2d 788; Andrews v. First Nat. Bank of Eugene, 192 Or 230, 234 P2d 791; Op. Atty. Gen. 1934-36, P. 602. Those authorities have held that if decedent left nieces and nephews and also grandnieces and grandnephews the latter would take nothing even though their parents predeceased the intestate. Under the proposed statute the latter would be able to take by right of representation.

Subsection 4 is new but only declaratory of existing Oregon law since a grandparent is the nearest in degree if a decedent left no surviving spouse, parents, issue, brothers or sisters or issue of brothers and sisters.

Subsection 5 provides that where a married couple inherits as parents or grandparents they take the real property by the entirety and the personal property jointly with rights of survivorship. This accords with the present rule that devises of real property to a husband and wife create them tenants by the entirety. (See C.J.S. Wills, Section 908). Your committee believes this accords with the usual desires of married couples that they take and hold property jointly.

Subsection 6 limits inheritance to relatives claiming through the intestate's grandparents and within the fifth degree of kindred or less. More remote relatives are excluded. In recent years there has been a trend toward limiting inheritance by remote relatives under the intestacy laws. New York, by chapter 712, effective September 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Likewise, the proposed probate code of Wisconsin, section 852.01(2) limits inheritance by remote relatives unless within the fourth degree of kinship or less. Limitations on inheritance by collateral kindred were proposed in the Model Probate Code in 1946 and adopted in a slightly different form in Pennsylvania in 1947 and in Indiana in 1953. See report no. 1. 1B of the New York Commission on Estates.

These limitations on inheritance were proposed for the following reasons:

(a) In modern times, with increased mobility and loss of close contact due to urbanization, the "family" is more restricted in size. Ties with remote relatives are weakened. Very few people can even name their second cousins. Normally a decedent does not want his property to pass to these remote relatives; if he does, he can easily make a will picking out those he wishes to favor.

(b) Conversely the remote relative has no claim on a decedent's property. He is not likely to be dependent or to have rendered any of the services which might lead to an expectation of inheritance. Frequently he learns of his relationship to decedent only after the latter's death. For this reason he has been sometimes referred to as "the laughing heir." The inheritance is a mere windfall.

(c) With mobility of persons it is increasingly difficult to trace remote relatives. This increases the cost of settling estates, including those in which decedent left a will and made no provision for his relatives for the very reason that they were remote. Even with a will, these remote heirs must be notified as a matter of due process. Remote relatives often are foreign citizens, complicating the problems of notifying them and transferring property to them.

(d) Remote relatives having standing to contest wills may promote vexatious litigation for its nuisance value in the hopes of getting a settlement, even though they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus in some measure will cut down on will contests.

(e) Although it is often said that escheat is not favored, a person's obligations to the community in which he lives may be far stronger than those to remote relatives of whom he has long ago lost track. It must always be remembered that the decedent can prevent escheat by making a will leaving the property as he pleases to remote relatives or to friends or to charity.

(f) Two other archaic doctrines are eliminated by the present provision. First, such remnants of the doctrine of Ancestral Estates as exist in present ORS 111.020(5) and discussed in Cordon v. Gregg, 164 Or 306, 97 P2d 732, 101 P2d 414(1940), discussed in Jaugrey and Love, Oregon Probate Law and Practice, section 15, pages 19 through 22, criticized and noted, 20 Or L. Rev. 164(1940). The proposed section also makes no such distinction as exists in present ORS 111.020(4) between next of kin of equal degree claiming through different

ancestors. Hence the nearer ancestor rule as it exists in present Oregon law is abolished. Since inheritance by more remote collateral relatives is in any event limited by the proposed statute, there is no occasion for the nearer ancestor rule to arise.

Subsection 6 provides for escheat if the decedent leaves no surviving relatives within the preceding subsection. It is similar to the provision of ORS 111.020(6) and 111.030(5) except for the limitations on inheritance by more remote collateral relatives.

7. Comment to Section 6.

This section defines "representation" in greater detail than does present ORS 111.010(4). This definition is consistent with the present interpretation of Oregon law. See I Jaureguy and Love, Oregon Probate Law Practice, sections 9 and 10 (1958). This definition makes it clear that the pattern of stirpital distribution is to be determined at the level of the nearest living lineal descendant of the intestate, rather than at the level of the decedent's children, regardless of whether or not they predeceased decedent. The proposed definition is taken from Model Probate Code, section 22(c) and prevents the anomalous result of such cases as Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P2d 111(1945), noted 33 Calif. L. Rev. at 324(1945). Since the operation of the right of representation may differ depending upon the stirpital level chosen as the root generation, it is desirable to specify the level in the definition. The present definition has been adopted by the tentative drafts of the Uniform Probate Code.

8. Comment to Section 7.

Section 7 represents the codification of existing Oregon law. The phrase "degree of kindred" is presently defined and interpreted in ORS 111.040. Supplemental wording defining the precise civil law method of computation is taken from the Model Probate Code of 1946, section 22 (b)(5) at page 61. Washington has adopted a similar definition, Washington Probate Code, section 11.02.005(5).

9. Comment to Section 8.

Section 8 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

10. Comment to Section 9.

Section 9 is consistent with present Oregon law in ORS 111.040.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
2nd Draft
June 16, 1967

Prepared by
Stanton Allison

COMPARATIVE SECTION TABLE

<u>Draft Sections</u>	<u>ORS Sections</u>
1	111.010
2	111.020, 111.030
3	111.020, 111.030
4	111.020, 111.030
5	111.020, 111.030
6	111.010 (4)
7	111.040
8	111.010 (5)
9	111.040
10	111.020 (4)

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
INTERSTATE SUCCESSION
1st Draft
April 27, 1967

This draft constitutes a final revision of committee proposal #2 and is formulated in light of the first draft of January 11, 1967, prepared by Legislative Counsel.

DESCENT AND DISTRIBUTION OF REAL AND PERSONAL PROPERTY

Section 1. Definitions and rules of construction.

(Temporary Placement Only)

As used in this chapter, unless otherwise required by context, the following words and phrases shall be construed as follows:

1. Claims - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

2. Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.

3. Issue - when used to refer to persons who take by intestate succession, includes all lawful lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

4. Net estate - the real and personal property of

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a decedent, except property used for the support of his surviving spouse and children and for the payment of claims against the estate.

5. Personal property - includes interests in goods, money, choses in action, evidences of debt and chattels real.

6. Personal representative - includes executor, administrator and special administrator.

7. Property - includes both real and personal property.

8. Real property - includes all land, tenements and hereditaments and rights thereto and all interest therein, in fee simple or for the life of another.

9. Gender and number - the masculine gender includes the feminine and neuter; singular number includes the plural.

Comment: Section 1 of proposal #2 is only temporarily placed with the intestate succession provisions, and will ultimately be included in the definition section of chapter III. All definitions are retained from proposal #2 except that legislative counsel's proposed change of "net estate" has been adopted. The committee must review its decisions on support rights, exempt property, family allowance and homestead property to determine if the new phraseology in describing the net estate includes adequately all of the property set apart. Legislative counsel's suggestions regarding the definition of "issue" are rejected; the previous definition was agreed by the committee and is consistent with the model and uniform probate codes.

Section 2. Net intestate estate. Any part of the net estate of a decedent which is not effectively disposed of by his will, constitutes the net intestate estate and shall descend and be distributed as prescribed in the following sections.

References: Section 8, Proposal #2

Advisory Committee Minutes
8/13,14/65, pp. 10 and 11

Comment: This new section changes section 2 of proposal #2 and adopts instead section 201 of the first tentative draft of the model's uniform probate code (July 10, 1966). This new section also makes it unnecessary to have a separate section 8 (as in proposal #2) on partial intestacy.

Section 3. Share of surviving spouse if decedent leaves issue. If the decedent dies intestate, leaving a surviving spouse and issue, the surviving spouse shall have an undivided one half interest in the net estate of the decedent, in addition to provision for support.

References: Section 3, Proposal #2

Advisory Committee Minutes
6/19/65, p. 5
8/13,14/65, pp. 4 and 5

ORS 111.020 and 111.030.

Comment: This changes section 3 of proposal #2 in accordance with the suggestions of legislative counsel. The phrase "provision for support" is substituted for "portion of the estate set apart to him for family allowances, homestead rights and exempt property."

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent dies intestate, leaving a

surviving spouse and no issue, the surviving spouse shall have all of the net estate of the decedent, in addition to provision for support.

References: Section 4, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 5

ORS 111.020 and 111.030.

Comment: The changes in section 4 correspond to similar changes in section 3.

Section 5. Share of others than surviving spouse.

The part of the net estate not passing to a surviving spouse shall pass:

1. To the issue of the intestate equally if they are in the same degree of kinship, or if in unequal degree, those of more remote degree take by representation;

2. If no issue survives the intestate, to the surviving parents of the intestate; when both parents of the intestate survive him they shall take the real property as tenants by the entirety and the personal property as joint owners with the right of survivorship, if they are married to each other; otherwise they shall take as tenants in common;

3. If no issue or parent survives the intestate, to the issue of either parent by representation;

4. If no issue, parent or issue of either parent survives the intestate, to the surviving grandparents of the intestate; when grandparents of the intestate survive

him they shall take the real property as tenants by the entirety and the personal property as joint owners with the right of survivorship, if they are married to each other; otherwise they shall take as tenants in common;

5. If no issue, parent, grandparent, or issue of either parent, survives the intestate, to the issue of deceased grandparents in the nearest degree computed according to the rules of the civil law, per capita without representation;

6. If no person takes under the preceding subsection, the net estate shall escheat to the state of Oregon.

References: Section 5, Proposal #2

Advisory Committee Minutes
6/19/65, pp. 6 and 7
8/13, 14/65, pp. 1, 2 and 5 to 10
9/18/65, p. 1

ORS 111.020 and 111.030

Comment: The only change in this draft from that of section 5 in proposal #2 is the addition of a provision in subsection 4 that surviving grandparents married to each other like surviving parents married to each other take real property as tenants by the entirety and personal property as joint owners with a right of survivorship.

Section 6. Representation defined. "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate and is accomplished as follows: After first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into

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equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving. Each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate. This division shall continue until each portion falls to a living person. All distributees except those in the nearest degree take by representation.

References: Section 6, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 10
9/18/65, p. 1

ORS 111.010

Comment: This definition of representation is unchanged from section 6 of proposal #2. It is identical to both the uniform and the model probate code definitions.

Section 7. Civil rules defined. The degree of kinship computed according to rules of the civil law is determined by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts.

References: Section 7, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 10

ORS 111.040.

Comment: This section is unchanged from section 7 of proposal #2. The drafter sees no necessity to limit the section as suggested by legislative counsel nor does he find the section inappropriate in determining the degrees of kinship for purposes of other references as long as it is remembered that when any degree of kinship is computed, the person from whom the degrees are counted is assumed to be the "intestate" to which the civil rules refer.

Section 8. Partial intestacy. (This section is omitted)

Comment: Section 2 now deals with partial and total intestacy, making section 8 of proposal #2 now unnecessary.

Section 9. Time of determining relationships: After-born heirs: The relationships existing at the time of the death of the intestate govern the inheritance of the net estate of the intestate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of the death of the intestate.

References: Section 9, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 11

ORS 111.010.

Comment: No change from section 9 proposal #2.

Section 10. Persons of the half blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

References: Section 10, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 11

ORS 111.040.

Comment: No change from section 10 of proposal #2.

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April 27, 1967
Page 8

Section 11. Person related through two lines. A
person related to the intestate through more than one is
entitled only to the share which is largest.

References: Section 11, Proposal #2

Advisory Committee Minutes
8/13,14/65, pp. 11 and 12

Comment: No change from section 11 of proposal #2.