

Section 9. Small estates; setting apart whole estate; termination of administration. If it appears that necessary and reasonable provision for support requires that the whole of the estate, after payment of claims against the estate, taxes and expenses of administration, be set apart for such support, the court shall so order. There shall be no further proceeding in the administration of the estate unless further property is discovered.

Section 10. ORS 23.260 is amended to read:

23.260. Exemption inapplicable to mechanics' and purchase-money liens and mortgages. ORS 23.240 to 23.270[, 116.590 and 116.595] do not apply to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the property claimed as a homestead, and to purchase money liens and mortgages lawfully executed.

Section 11. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

Section 8. Priority; support treated as administration expense. This section provides priority of support payments over claims against the estate and administration expenses. It spells out that the support is an expense of administration and is not to be charged against the distributive share of the spouse or child receiving the support.

Section 9. Small estates; setting apart whole estate; termination of administration. This section is a rewritten version of ORS 116.020. The changes are that the net value of the estate to be set over is not limited to \$1,000, and the provision is not limited to intestate estates. There is no separate chapter in the proposed code for "small estates". The proposed code gives the court full discretion to set apart property and money necessary for support, after full disclosure of probate and nonprobate assets available for this purpose, and after due notice to interested parties and hearing. If the entire net estate is required for such support, the court may so order, without an arbitrary dollar limit being imposed.

Proposed revised Oregon probate code  
SUPPORT OF SPOUSE AND CHILDREN  
Amended 2nd Draft  
March 15, 1968

Prepared by  
Stanton W. Allison

COMPARATIVE SECTION TABLE

<u>Draft Sections</u>	<u>ORS Sections</u>
1	113.070, 116.005
2	116.015
3	
4	116.005
5	
6	116.010, 116.020
7	
8	116.590, 116.595
9	116.020
10	23.260

SUPPORT OF SPOUSE AND CHILDREN

Section 1. Occupancy of family abode by spouse and children. The spouse and any minor or incompetent child of a decedent may continue to occupy the principal place of abode of the decedent until one year after his death or, if his estate therein be an estate of leasehold or an estate for the lifetime of another, until one year after his death or the earlier termination of his estate. During that occupancy:

(1) The occupants shall not commit or permit waste to the abode; nor shall they cause or permit mechanic's or materialmen's or other liens to attach thereto.

(2) The occupants shall keep the abode insured against fire and other hazards within the extended coverage provided by fire policies. In the event of loss or damage from such hazards, to the extent of the proceeds of such insurance, they will restore the abode to its former condition.

(3) The occupants shall pay taxes and improvement liens on the abode as payment thereof becomes due.

(4) The abode is exempt from execution to the extent that it was exempt when the decedent was living.

Section 2. Support of spouse and children. The court by order shall make necessary and reasonable provision from the estate of a decedent for the support of the spouse and any minor or incompetent child of the decedent upon:

(1) Petition therefor by the spouse or by the guardian of the estate of any minor or incompetent child.

(2) Service of the petition and notice of hearing thereon to the personal representative, unless the petitioner is the personal representative.

(3) Citation to persons whose distributive share of the estate may be diminished by the granting of the petition, unless the court by order shall direct otherwise.

(4) Hearing.

Section 3. Petition and answer. (1) The petition for support shall include a description of property other than property of the estate available for the support of the spouse and children, and an estimate of the expenses anticipated for their support. If the petitioner is the personal representative the petition shall also include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

(2) If the personal representative is not the petitioner, he shall answer the petition for support. The answer shall include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

Section 4. Temporary support. Pending hearing upon the petition temporary support may be allowed by order of the court in an amount and of a nature as the court shall deem reasonably necessary for the welfare of the surviving spouse and any minor or incompetent child of the decedent.

Section 5. Modification or termination of support. Provision for support ordered by the court may be modified or terminated by the court by further order.

Section 6. Nature of support. (1) Provision for support ordered by the court may consist of any one or more of the following:

(a) Transfer of title to personal property.

(b) Transfer of title to real property.

(c) Periodic payment of moneys during administration of the estate, but the payments may not continue for more than two years after the date of death of the decedent.

(2) The court, in determining provision for support, shall take into consideration property available therefor other than property of the estate.

Section 7. Limitations. If it appears to the court that after provision for support is made the estate will be insolvent, the provision for support ordered by the court shall not exceed one-half of the estimated value of the property of the estate, and any periodic payment of moneys so ordered shall not continue for more than one year after the date of death of the decedent.

Section 8. Priority; support treated as administration expense. Provision for support ordered by the court has priority over claims against the estate and other expenses of administration.

Section 9. ORS 23.260 is amended to read:

23.260. Exemption inapplicable to mechanics' and purchase-money liens and mortgages. ORS 23.240 to 23.270[, 116.590 and 116.595] do not apply to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the property claimed as a homestead, and to purchase money liens and mortgages lawfully executed.

Section 10. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

COMMENTS

In considering a simplified approach to the problem of support of the widow or widower and children of the deceased, and the provisions granting a broader discretion to the court in this area, it should be realized that the inheritance rights of the surviving spouse are much enlarged by the proposed code. The surviving spouse, if there are children, would be given not only an undivided half of the personal property as now provided, but also an undivided one-half in fee of the real property, in lieu of the present dower and curtesy interests which will be abolished. In addition, the election against the will by the surviving spouse would include an undivided one-quarter interest in the real property as well as in the personal property as now provided.

Your committees were cognizant of the problems which have arisen from the confusing and in some cases contradictory provisions of the present ORS. After extended discussion and consideration, your committees decided to eliminate any reference to homestead rights or exempt property, upon which our present support statutes are determined, for the reason that the provisions for homestead and exemptions from execution are subject to frequent change by the legislature. It seemed unwise to base provisions for support of the surviving spouse and children on artificial legislative definitions and restrictions on homestead and exemptions enacted with reference

to sales on execution and judgment liens. Your committees therefore decided that the court should be given full discretion and authority to order support purely on the basis of need, rather than have the authority curtailed or complicated by legislation referable to other problem areas. Thus, the so-called "probate homestead" provisions and the setting aside of property exempt from execution are eliminated in favor of broad powers of the court to provide support as needed.

Section 1. Occupancy of family abode by spouse and children. This section would supersede ORS 113.070 which grants the widow the right to remain in the dwelling house of her husband one year after his death, and ORS 116.005 which grants the surviving spouse and minor children of the deceased the right to remain in possession of the homestead until administration is granted and the inventory filed. The proposed section would grant the right of occupancy for one year to the widow and the widower and the minor or incompetent children. It provides the right where there is a leasehold estate or an estate for the life of another. However, the section provides that the occupants shall not commit waste nor permit the attachment of liens, and requires that the premises be insured against fire and other hazards. It requires payment of taxes and currently payable improvement liens. It provides that the exemption from execution possessed by the decedent shall extend to the occupancy by the surviving spouse and children.

The requirements during the occupancy by the spouse and children of the deceased for upkeep and protection of the property are not spelled out in the present code, but their utility for the protection of the property is obvious. The provision for the exemption from execution complies with the philosophy of ORS 116.590 and 116.595.

Section 2. Support of spouse and children. As noted in the introduction, this section would eliminate any restriction to the exempt homestead or to other exempt property in granting the court full power to make necessary and reasonable provision for the support of the spouse and of the minor or incompetent children. It would replace the present ORS 116.015. There is an important difference, however, from the present probate code, in that this section would require not only a proper showing to the court of the need and circumstances, (including non probate property), but would require due notice to the personal representative, citation to interested persons, and a hearing. This is obviously a greater protection to the interested parties than our present procedure which is usually on an ex parte basis.

Section 3. Petition and answer. This section would require that full information be available to the court before it makes its order for support. Unlike our present code the section requires that property other than estate property which may be available for the support of the spouse and children be shown in the petition.

Section 4. Temporary support. This section would replace ORS 116.005 to provide temporary support pending the hearing on the petition. It should be noted that the order for support does not have to be postponed until the inventory is filed, as now provided in ORS 116.015.

Section 5. Modification or termination of support. This section, providing for modification or termination of the support by court order, is not spelled out in the present code, but is a useful provision.

Section 6. Nature of support. Broad power is given to the court to transfer to the surviving spouse such real and personal property as may be necessary for support. This broad provision would replace the present probate homestead. It should be noted that under this section payments may be continued for two years after the death, whereas ORS 116.015 prescribes a period of one year after the filing of the inventory. The section also provides that the court shall take into consideration the property outside of the estate which may be available for the support of the surviving family.

Section 7. Limitations. This section provides that in an insolvent estate the awarded support may not exceed one-half the estimated value of the estate and limits the payments in that case to one year after the date of death. ORS 116.015 provides that no order for further support shall be made if the estate is insolvent.

Section 8. Priority; support treated as administration expense. This section provides priority of support payments over claims against the estate and administration expenses. It spells out that the support is an expense of administration and is not to be charged against the distributive share of the spouse or child receiving the support.

SUPPORT OF SPOUSE AND CHILDREN

COMPARATIVE SECTION TABLE

<u>Draft Section</u>	<u>ORS Section</u>
1	113.070, 116.005
2	116.015
3	
4	116.005
5	
6	116.010, 116.020
7	
8	116.590, 116.595
9	23.260

Proposed revised Oregon probate code  
SUPPORT OF SURVIVING SPOUSE AND CHILDREN  
1st Draft  
January 25, 1967

This draft is based primarily on a draft prepared by Mr. Gilley and Mr. Krause and approved by the advisory and bar committees.

Section 1. Occupancy of family abode by surviving spouse and children. The surviving spouse and any minor or incompetent child of a decedent may continue for one year after the date of death of the decedent to occupy the abode owned by the decedent that they occupied on the date of death. During that occupancy:

- (1) The occupants shall not commit or permit waste to the abode.
- (2) The occupants shall keep improvements to the abode insured against fire.
- (3) The occupants shall pay taxes on the abode as payment thereof becomes due.
- (4) The abode is exempt from execution to the extent it was exempt when the decedent was living.

Section 2. Support of surviving spouse and children; petition, answer and order. (1) The court by order shall make necessary and reasonable provision from the estate of a decedent for the support of the surviving spouse and any minor or incompetent child of the decedent upon:

- (a) Petition therefor by the surviving spouse or the guardian of the estate for any minor or incompetent child;

(b) Citation to the personal representative and interested persons; and

(c) Hearing on the petition.

(2) The petition for support shall include a description of any property available for the support of the surviving spouse and children other than property of the estate and an estimate of the expenses anticipated for their support.

(3) The personal representative shall answer the petition for support. The answer shall include, so far as known, a description of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

Section 3. Nature of support; limitations; change by court. (1) Provision for support ordered by the court as provided in section 2 of this Act may consist of any one or more of the following:

(a) Transfer of real property.

(b) Transfer of personal property.

(c) Periodic payment of moneys during administration of the estate, but for not more than two years after the date of death of the decedent.

(2) The court, in determining provision for support, shall take into consideration property available therefor other than property of the estate.

(3) If it appears to the court that the estate will be insolvent, provision for support ordered by the court shall .

not exceed one-half of the estimated value of the property of the estate and any periodic payment of moneys so ordered shall be for not more than one year after the date of death of the decedent.

(4) Provision for support ordered by the court has priority over claims against the estate and expenses of administration.

(5) Provision for support ordered by the court may be modified or terminated by the court by further order.

Section 4. ORS 23.260 is amended to read:

23.260. Exemption inapplicable to mechanics' and purchase-money liens and mortgages. ORS 23.240 to 23.270 [, 116.590 and 116.595] do not apply to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the property claimed as a homestead, and to purchase money liens and mortgages lawfully executed.

Section 5. ORS 107.280 is amended to read:

107.280. Decreeing disposition of property. Whenever a decree of permanent or unlimited separation from bed and board has been granted, the party at whose prayer such decree was granted shall be awarded in individual right such undivided or several interest in any right, interest or estate in real or personal property owned by the other or owned by them as tenants by the entirety at the time of such decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. The court may, in making such award,

decree that [dower and curtesy, as well as homestead rights under ORS 116.010 and the election provided in ORS 113.050,] the rights of the surviving spouse as provided in ORS are extinguished and barred.

Section 6. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

References: Advisory Committee Minutes  
6/19/65 p. 5  
4/15,16/66 pp. 9 to 14; and Appendix  
8/19,20/66 pp. 7 to 13; and Appendix

Report by Gilley and Krause, 5/14/66 "Support of Surviving Spouse and Minor Children; Homestead"

Report by Mapp, 5/20/66 "Support of Surviving Spouse and Minor Children; Exemptions (Homestead), and Family Allowances"

Report by Allison, 4/15,16/66, Appendix

ORS 113.070, 116.005 to 116.125, 116.590, 116.595, 111.030, 107.280, 23.260.

Comment: What are the consequences if the surviving spouse commits or permits waste, does not pay taxes or insure the property? Should this section specify that the insurance shall be a standard homeowner's policy?

In section 1 is "abode owned by the decedent that they occupied on the date of death" limited to outright ownership? Would the word "owned" cover a long term lease or a contract for deed?

In section 2 (1)(b) who is included in the citation issued to "interested parties"? Would it be better to either allow the order without notice or provide that notice shall be given to the persons ordered to be notified by the court?

Is section 3 meant to limit the order of the court to the three subparagraphs of that section? Are there other things the court might order for support?

SUPPORT OF SURVIVING SPOUSE AND CHILDREN

1st Draft

January 25, 1967

Page 5

Is support charged against the distributive share at the time of final distribution? This should be provided for, either affirmatively or negatively.

The terminology "transfer of" in section 3 is somewhat inconsistent with the theory that title vests upon death in the person entitled to it. Would the terminology of ORS "set apart" be better?