

his death, to his children or heirs, vests an estate or interest for life only in the devisee and remainder in the children or heirs.

Section 15. Devise passes all interest of testator.

A devise of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to devise a lesser interest.

Section 16. Property acquired after making will. Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent is clear and explicit to the contrary.

Section 17. Effect of direction to pay debts, charges, taxes or administration expenses. A mere testamentary direction to pay debts, charges, taxes or expenses of administration shall not be deemed a direction for exoneration from encumbrances or against apportionment of estate taxes.

Section 18. Non-ademption of specific devises in certain cases. In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the sale, destruction, damage, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the gift fail under the particular circumstances appears in the will, or if the testator during his lifetime gives property to the specific

Section 1. Definition of will. The term "will" as used in this chapter includes codicil; it also includes a testamentary instrument that merely appoints an executor, and a testamentary instrument that merely revokes or revives another will.

Section 2. Who may make a will. Any person who is 18 years of age or older or who has been lawfully married, and who is of sound mind, may make a will.

Section 3. Execution of a will. A will shall be in writing and shall be executed with the following formalities:

(1) The testator, in the presence of each of the witnesses, shall:

(a) Sign the will; or

(b) Direct one of the witnesses or some other person to sign thereon the name of the testator. Any person who so signs the name of the testator shall sign his own name thereon and write on the will that he signed the name of the testator at the direction of the testator; or

(c) Acknowledge the signature previously made on the will by him or at his direction.

(2) At least two witnesses shall each:

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(6) If securities are specifically willed to a devisee, and subsequent to execution of the will other securities in the same or another entity are distributed to the testator by reason of his ownership of the specifically bequeathed securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange, or any other similar transaction, and if such other securities are part of testator's estate at death, the specific devise is deemed to include such additional or substituted securities. "Securities" has the same meaning as in ORS 59.030(3).

(7) Throughout this section the amount the specific devisee receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.

Section 18. When estate passes to issue of devisee or legatee, anti-lapse. When property is devised to any person who is related by blood or adoption to the testator and who dies before the testator leaving lineal descendants, the descendants take by representation the property the devisee would have taken if he had survived the testator.

Section 19. Children born or adopted after execution of will (pretermitted children). (1) If a testator is survived by a child born or adopted after the execution of his will and dies, leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for nor in any way mentioned in the will, a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

(2) If the testator has one or more children living when he executes his will and:

(a) No provision is made in the will for any such living child, an after-born or after-adopted child shall not take a share of the estate.

(b) Provision is made in the will for one or more of such living children, an after-born or after-adopted child is entitled to share in the estate as follows:

(A) The portion of the estate in which the after-born or after-adopted child may share is limited to the portion passing to the living children under the will.

(B) The after-born or after-adopted child shall receive such share of the estate, as limited by subparagraph (A) of this paragraph, as he would have taken had the testator included all after-born and after-adopted children with the living children for whom provision is made in the will, and given an equal share of the estate to each such child.

(C) To the extent feasible, the interest of an after-born or after-adopted child in the estate shall be of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(3) If the testator has no child living when he executes his will, an after-born or after-adopted child shall take a share of the estate as though the testator had died intestate.

(4) The after-born or after-adopted child may recover the share of the estate to which he is entitled, as provided in this section, either from the other children under paragraph (b) of subsection (2) of this section or from ^{the} testamentary beneficiaries under subsection (3) of this section, ratably, out of the portions of the estate passing to those persons under the will. In abating the interests of those beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved so far as possible. However, persons to whom the will gives only tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 20. Delivery of will by custodian; liability.

(1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after

the date of receiving information that the testator is dead, to the court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to the court having jurisdiction of the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

Section 21. Disposition of wills deposited with county clerk. So far as he is able, the county clerk of each county shall deliver to the testator, or to the person to whom the will is to be delivered after the death of the testator, each will deposited in his office for safekeeping pursuant to ORS 114.410. Any will he has been unable to so deliver before January 1, 2010, may be destroyed by the county clerk.

Section 22. ORS 41.520 is amended to read:

41.520. Evidence to prove a will. Evidence of a [last] will [and testament, except when made pursuant to ORS 114.050, shall not be received, other than] shall be the written instrument itself, or secondary evidence of [its contents] the contents of the will, in the cases prescribed by law.

Section 23. Repeal of existing statutes. ORS 114.010, 114.020, 114.030, 114.040, 114.050, 114.060, 114.070, 114.110,

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114.120, 114.130, 114.140, 114.150, 114.210, 114.220, 114.230,
114.240, 114.250, 114.260, 114.270, 114.310, 114.320, 114.330,
114.340, 114.410, 114.420, 114.430, 114.440, 115.110, 115.130
and 115.990 are repealed.

Proposed revised Oregon probate code
WILLS
2nd Draft
July 26, 1967

Prepared by
Stanton W. Allison

Section 1. Definition of will. The term "will" as used in this chapter includes codicil; it also includes a testamentary instrument that merely appoints an executor, and a testamentary instrument that merely revokes or revives another will.

Reference: ORS 114.010

Section 2. Who may make a will. Any person who is 18 years of age or older or who has been lawfully married, and who is of sound mind, may make a will.

References: Advisory Committee Minutes:
11/19, 20/65 p. 5
4/15, 16/66 p. 2

ORS 114.020

Section 3. Execution of a will. A will shall be in writing and shall be executed with the following formalities:

(1) The testator, in the presence of each of the witnesses, shall:

(a) Sign the will; or

(b) Direct some other person to sign thereon the name of the testator. Any person who so signs the name of the testator shall sign his own name thereon and write on the will that he signed the name of the testator at the direction of the testator;
or

(c) Acknowledge the signature previously made on the will by him or at his direction.

(2) At least two witnesses shall each:

- (a) See the testator sign the will; or
- (b) Hear the testator acknowledge the signature on the will; and
- (c) Having been informed that the instrument is the will of the testator, attest it by subscribing his name to the will in the presence of the testator and at his request.

References: Advisory Committee Minutes:
11/19, 20/65 p. 5; and Appendix
3/18, 19/66 pp. 10 to 12; and Appendix (Report
March 16, 1966)
4/15, 16/65 p. 2

Section 4. Witness as beneficiary. An interested witness is one to whom is devised a personal and beneficial interest in the estate. A will attested by an interested witness is not thereby invalidated. If an interested witness attests a will and the will is not attested also by two disinterested witnesses, the interested witness may take under the will only so much of the provision made for him therein as in the aggregate equals in value, on the date of death of the testator, the part of the estate of the testator that would have passed to him had the testator died intestate.

References: Advisory Committee Minutes:
12/17, 18/65 p. 19; and Appendix
11/19, 20/65 pp. 5 and 6; and Appendix
3/18, 19/66 pp. 10 to 12; and Appendix (Report
March 16, 1966)

Section 5. Law governing validity of a will. A will is lawfully executed if it is in writing, signed by the testator and otherwise executed in accordance with the law of:

(1) This state at the time of execution or at the time of death of the testator; or

(2) The domicile of the testator at the time of execution or at the time of his death; or

(3) The place of execution at the time of execution.

References: Advisory Committee Minutes:
12/17, 18/65 Appendix A
3/18, 19/66 pp. 10, 12 and 13; and Appendix
(Report dated March 16, 1966)

Section 6. Testamentary additions to trusts. (1) A devise may be made by a will to the trustee or trustees of a trust, regardless of the existence, size or character of the corpus of the trust, if:

(a) The trust is established or will be established by the testator, or by the testator and some other person or persons, or by some other person or persons; and

(b) The trust is identified in the testator's will; and

(c) The terms of the trust are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator.

(2) The trust may be a funded or unfunded life insurance trust, although the trustor has reserved any or all of the rights of ownership of the insurance contracts.

(3) The devise shall not be invalid because the trust:

(a) Is amendable or revocable, or both; or

(b) Was amended after the execution of the testator's will or after the death of the testator.

(4) Unless the testator's will provides otherwise, the property so devised:

(a) Shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given; and

(b) Shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.

(5) A revocation or termination of the trust before the death of the testator shall cause the devise to lapse.

(6) This section shall not be construed as providing an exclusive method for making devises to the trustee or trustees of a trust established otherwise than by the will of the testator making the devise.

(7) This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the same or similar provisions.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 4 to 6; and Appendix A
3/18, 19/66 pp. 6 and 7

Section 7. Manner of revocation or alteration exclusive.

A will may be revoked or altered only as provided in sections 7 to 11 of this Act.

Section 8. Express revocation or alteration. (1) A will may be revoked or altered by another will.

(2) A will may be revoked by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator, or by another person at the direction of the testator and in the presence of the testator. Such injury or destruction by a person other than the testator at the direction and in the presence of the testator shall be proved by at least two witnesses.

Section 9. Revival of revoked or invalid will. If a will or a part thereof has been revoked or is invalid, it can be revived only by a re-execution of the will or by the execution of another will or codicil in which the revoked or invalid will or part thereof is incorporated by reference.

Section 10. Revocation by marriage. A will is revoked by the subsequent marriage of the testator if the testator is survived by his spouse, unless:

(1) The will indicates an intent that it not be revoked by the subsequent marriage or was drafted under circumstances indicating that it was in contemplation of the marriage.

(2) Testator and spouse have entered into a contract before marriage which either makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

Section 11. Revocation by divorce or annulment. Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution

of the will revokes all provisions in the will in favor of the former spouse of the testator and any provision therein naming the former spouse as executor, and the effect of the will is the same as though the former spouse did not survive the testator.

References: Advisory Committee Minutes:
11/19, 20/66 pp. 6 to 8
12/17, 18/66 Appendix A

Section 12. Contract of sale of property devised not a revocation. An executory contract of sale made by a testator to convey property devised in a will previously made, is not deemed a revocation of such previous devise, either in law or equity; but such property shall pass by the devise, subject to the same remedies on such agreement, for specific performance or otherwise, against devisees as might be had against the heirs of the testator, if the property had descended to them.

Reference: Advisory Committee Minutes:
12/17, 18/65

ORS 115.140

Section 13. Encumbrance or disposition of property after making will. An encumbrance or disposition of property by a testator after he makes his will shall not affect the operation of the will upon a remaining interest therein which is subject to the disposal of the testator at the time of his death.

References: Advisory Committee Minutes:
12/17, 18/65 p. 10; and Appendix

ORS 114.230

Section 14. Devise of life estate. A devise of property to any person for the term of the life of the person, and after

his death, to his children or heirs, vests an estate or interest for life only in the devisee and remainder in the children or heirs.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 7 to 9; and Appendix

ORS 114.220

Section 15. Devise passes all interest of testator. A devise of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to devise a lesser interest.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 10 and 11; and Appendix

ORS 114.230

Section 16. Property acquired after making will. Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent is clear and explicit to the contrary.

References: Advisory Committee Minutes:
12/17, 18/65 p. 10 and Appendix

Section 17. Non-ademption of specific devises in certain cases. In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the sale, destruction, damage, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the gift fail under the particular circumstances appears in the will, or if the testator during his lifetime gives property to the specific

beneficiary with the intent of satisfying the specific gift.

(1) Whenever the subject of a specific devise is property only part of which is destroyed, damaged, sold or condemned, the specific devise of any remaining interest in the property owned by the testator at the time of his death is not affected by this section; but this section applies to the part which would have been ademed under the common law by the destruction, damage, sale or condemnation.

(2) If insured property which is the subject of a specific devise is destroyed or damaged, the specific beneficiary has the right to receive (reduced by any amount expended or incurred by the testator in restoration or repair of the property):

(a) Any insurance proceeds paid to the personal representative after death of the testator with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to any insurance proceeds paid to the testator within six months before his death.

(3) If property which is the subject of a specific devise is sold by the testator, the specific devisee has the right to:

(a) Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, if part of the estate, with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to the amount of the purchase price paid to the testator within six months before his death. Acceptance of a promissory note of the purchaser or

a third party is not considered payment, but payment on the note is payment on the purchase price. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on his death, is a sale by the testator for purposes of this section.

(4) If property which is the subject of a specific devise is taken by condemnation prior to the testator's death, the specific devisee has the right to:

(a) Any amount of the condemnation award unpaid at the time of death, with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to the amount of an award paid to the testator within six months before his death. In the event of an appeal in a condemnation proceeding, the award is for purposes of this section limited to the amount established on such appeal.

(5) If property which is the subject of a specific devise is sold by a guardian or conservator of the testator, or a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific devisee has the right to a general pecuniary legacy equivalent to the proceeds of the sale, or the condemnation award, or the insurance proceeds (reduced by any amount expended or incurred in restoration or repair of the property). This provision does not apply if testator subsequent to the sale or award or receipt of insurance proceeds is adjudicated competent and survives such adjudication for a period of six months.

(6) If securities are specifically willed to a devisee, and subsequent to execution of the will other securities in the same or another entity are distributed to the testator by reason of his ownership of the specifically bequeathed securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange, or any other similar transaction, and if such other securities are part of testator's estate at death, the specific devise is deemed to include such additional or substituted securities. "Securities" has the same meaning as in ORS 59.030 (3).

(7) Throughout this section the amount the specific devisee receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.

(Draftsman's note: Section 18 will be redrafted following further committee consideration.)

Section 19. When estate passes to issue of devisee or legatee, anti-lapse. When property is devised to any person who is related by blood or adoption to the testator and who dies before the testator leaving lineal descendants, the descendants take by representation the property the devisee would have taken if he had survived the testator.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 11 and 12.

Section 20. Children born or adopted after execution of will (pretermitted children). (1) If a testator is survived by a child born or adopted after the execution of his will and dies, leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for nor in any way mentioned in the will, a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

(2) If the testator has one or more children living when he executes his will and:

(a) No provision is made in the will for any such living child, an after-born or after-adopted child shall not take a share of the estate.

(b) Provision is made in the will for one or more of such living children, an after-born or after-adopted child is entitled to share in the estate as follows:

(A) The portion of the estate in which the after-born or after-adopted child may share is limited to the portion passing to the living children under the will.

(B) The after-born or after-adopted child shall receive such share of the estate, as limited by subparagraph (A) of this paragraph, as he would have taken had the testator included all after-born and after-adopted children with the living children for whom provision is made in the will, and given an equal share of the estate to each such child.

(C) To the extent feasible, the interest of an after-born or after-adopted child in the estate shall be of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(3) If the testator has no child living when he executes his will, an after-born or after-adopted child shall take a share of the estate as though the testator had died intestate.

(4) The after-born or after-adopted child may recover the share of the estate to which he is entitled, as provided in this section, either from the other children under paragraph (b) of subsection (2) of this section or from the testamentary beneficiaries under subsection (3) of this section, ratably, out of the portions of the estate passing to those persons under the will. In abating the interests of those beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved so far as possible.

References: Advisory Committee Minutes:
3/18, 19/66 p. 15; and Appendix
1966 New York Revision, "Estates, Powers - Trusts
Law" Sec. 5-3.2

ORS 114.250

Section 21. Delivery of will by custodian; liability. (1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to the court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to the court having jurisdiction of the

estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

References: Advisory Committee Minutes:
3/18,19/66 pp. 9 and 10; and Appendix
ORS 115.110, 115.130 and 115.990

Section 22. Disposition of wills deposited with county clerk. So far as he is able, the county clerk of each county shall deliver to the testator, or to the person to whom the will is to be delivered after the death of the testator, each will deposited in his office for safekeeping pursuant to ORS 114.410. Any will he has been unable to so deliver before January 1, 2010, may be destroyed by the county clerk.

References: Advisory Committee Minutes:
1/14/66, p. 11

ORS 114.410, 114.420, 114.430, 114.440.

(Draftsman note: This section was drafted by Legislative Counsel)

Section 23. ORS 41.520 is amended to read:

41.520. Evidence to prove a will. Evidence of a [last] will [and testament, except when made pursuant to ORS 114.050, shall not be received, other than] shall be the written instrument itself, or secondary evidence of [its contents] the contents of the will, in the cases prescribed by law.

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Section 24. Repeal of existing statutes. ORS

114.010, 114.020, 114.030, 114.040, 114.050, 114.060,
114.070, 114.110, 114.120, 114.130, 114.140, 114.150,
114.210, 114.220, 114.230, 114.240, 114.250, 114.260,
114.270, 114.310, 114.320, 114.330, 114.340, 114.410,
114.420, 114.430, 114.440, 115.110, 115.130 and 115.990
are repealed.

Proposed revised Oregon probate code
WILLS
2nd Draft
August 16, 1967

Prepared by:
Stanton Allison

COMMENTS

Section 1. Definition of will. This definition of will is taken from the 1963 Iowa Probate Code, Sec. 3, Subsection 35. It broadens the definition in ORS 114.010, which this would replace, to include testamentary instruments appointing an executor or merely revoking or reviving another will. The broader definition would make clear that the following requirements as to execution and proof would apply not only to the usual will, but also to the documents included in this definition. Although the present plan is to group all the definitions in the beginning of the new probate code, which will contain this definition, since our present chapter begins with a definition it would seem sensible that this broader definition be also included as the first section.

Section 2. Who may make a will. This section changes ORS 114.020 to reduce the age for unmarried persons who may make a will from 21 to 18. ORS 109.520 provides that all persons shall be deemed to have arrived at the age of majority upon their being married according to law. ORS 106.010 provides that marriage may be entered into by males at least 18 years of age and females at least 15 years of age. Thus, under our present statute, married persons of these ages can make will. Your committee felt that it was

advisable to keep the present rule as to married people but remove the present discrimination against unmarried people by making males and females 18 years of age, even if not married, able to make wills.

I quote a portion of the comment on Section 853.01 of the proposed Wisconsin Probate Code, explaining lowering the age of testamentary capacity to 18 years:

Minors today are increasingly owners of substantial amounts of property. In an era when accumulation of wealth was the major means of acquiring an estate, few, if any, men acquired an estate before they reached 21. Today the tax advantages of inter vivos gifts have induced parents and grandparents to make transfers, outright or in trust, for minors.

Marriage of minors is increasingly frequent. Patterns of marriage and raising a family have changed drastically. There is more need for a minor to be able to make a will to provide for a changing family situation.

Minors can avoid existing limitations by resorting to legal devices which bypass probate: insurance, joint bank accounts, government bonds with beneficiary designations, etc.

With modern public education, a young person of 18 ought to have sufficient judgment to make a testamentary disposition.

Eighteen states have already recognized these changed conditions and set the age of 18 as the minimum age requirement. This also is the age adopted in the Model Probate Code.

Section 3. Execution of a will. This section incorporates and replaces ORS 114.030, 114.040, and 114.050. The format of the proposed new section follows in general Section 47 of the Model Probate Code. However, the new section has not changed the present ORS requirements that the will shall be in writing, signed by the testator, or by

some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. The present proposal does, however, spell out a situation where the will has been already signed by the testator or by another person at his direction at the time the witnesses are asked to subscribe their names.

There has been, however, added a further statutory requirement that the subscribing witnesses be informed that the instrument they are asked to subscribe is the will of the testator.

The additional requirement may be summarized as requiring that the subscribing witnesses attest the will of the testator, and not merely the signature of the testator. This is in line with the requirement of the Model Probate Code, Section 47, Section 279 of the 1963 Iowa Probate Code, Section 50 of the Probate Code of California, West's California Codes, Section 14-303, Idaho Probate Code, and Section 21 Decedent Estate Law, McKinney's Consolidated Laws of New York, to cite a few examples.

Your committees believe that this publication requirement is in line with the usual practice in this state.

Section 4. Witness as beneficiary. This section covers the interested witness. It replaces ORS 114.310, 114.320, 114.330, and 114.340. The general wording of the revised section follows Section 281 of the 1963 Iowa Probate Code. The definition of an interested witness is generally taken

from the proposed Wisconsin Probate Code, Section 853.07. In essence, your committee believes that the proposed revision incorporates the present statutory provisions in that the validity of the will is established in any case, and that only in case there are not two or more disinterested witnesses does the rule apply that the interested witness may, on the basis of intestacy, receive an amount not to exceed the provision in the will. The inclusion of the definition makes clear that the section does not apply to one who was merely appointed a personal representative of the estate, or would merely derive some benefit therefrom, other than being a devisee.

Section 5. Law governing validity of a will. The proposed Section 5, governing the validity of a will, represents a broadening of the present ORS 114.060. The present statute makes a distinction between a devise of real property and a bequest of personalty. As to real property, the will must be executed in accordance with the laws of Oregon, but a bequest of personalty may be made by a will which is valid in the state where the will was executed. Thus, a will executed in California which contained provisions for both real and personal property, if a holographic will, would be good as to the personalty, but not as to the realty. The proposed section removes the difference between real and personal property and provides that the will would be good as to both realty and personalty if executed pursuant to

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Oregon Law or if executed according to the law of the domicile, either at the time of execution, or at the time of death, or the law of the place of execution at the time of execution.

Your committees were of the strong opinion that the strong interests of the testators and the beneficiaries would be preserved and protected if wills which were valid at the time and place of execution be admitted to probate in this state. For reference, see Section 3-205 of the 1967 Draft Uniform Probate Code, Section 50 of the Model Code, and Section 283 of the 1963 Iowa Code.

It should be especially noted, however, that the proposed section requires that in all cases the will must be in writing and signed by the testator and otherwise executed according to the law of the particular jurisdiction, as noted. Thus, this section would not only replace ORS 114.060, but would repeal ORS 114.050 and would require the amendment of ORS 41.520, since soldiers' and sailors' nuncupative wills would not be legal.

It was the considered decision of your committees that the so-called "Soldiers' and Sailors' Wills" are great rarities in Oregon practice. Actually, with the literacy requirement of the armed services where all of their members are able to read and write, the immediate availability of service officers, the provisions which were originally enacted in 1849 seem no longer necessary as a part of our Probate Code.

Section 6. Testamentary additions to trusts. This section embodies in the proposed code the uniform testamentary additions to trusts act. This section is of course new, but it was the unanimous feeling of our committees that the adoption of the uniform act would provide for a uniformity of construction in many situations which Oregon practitioners will recognize have in the past caused many problems and uncertainties in the trust field. It is felt that the adoption of this act will not only provide uniformity of construction, but will spell out many of the problems and uncertainties now existing in this area.

Section 7 to 11 on Manner of Revocation and Alteration replace and recodify the present ORS sections 114.110 and 114.150 inclusive.

Section 8. Express revocation or alteration. This section is practically identical in wording with the present ORS 114.110. The only changes from the ORS section are editorial.

Section 9. Revival of revoked or invalid will. This section would replace and supersede ORS 114.120. The language of the proposed section was taken from Section 284 of the 1963 Iowa Probate Code which in turn was adopted from Section 55 of the Model Probate Code. The comment under the Iowa section states in part that "the last sentence is taken directly from Section 55 of the Model Probate Code to prevent the inadvertent revival of a will which the

testator did not actually desire." The present ORS section is discussed and to some extent criticized in Sections 279 and 380, Jaureguy and Love Probate Law and Practice.

(1) It is believed that the proposed section conforms to the general purpose and intent of the present ORS section, but avoids the difficulties and ambiguities criticized by the above authors. For discussion see Minutes of November 16, 17, 1965 at pages 6 and 7. For comparable provisions see Section 2-508 of the proposed 1967 draft Uniform Probate Code, which language appears similar to the language of Section 853.11 (6) of the 1967 proposed Wisconsin Probate Code. Your draftsman prefers the approach of the Model Code and the Iowa Code to the last two mentioned references which, in his opinion, would involve many more problems than the simple language proposed above.

Section 10. Revocation by Marriage. This section covering revocation by marriage, and section 11, covering revocation by divorce by annulment, cover and replace ORS 114.130. The language of the proposed section 10 is taken from Section 853.11 of the Proposed Wisconsin Probate Code.

Prior to 1965, ORS 114.130 provided that a will made by any person is deemed revoked by his or her subsequent marriage or divorce. This section is discussed in Section 376, Jaureguy and Love, Oregon Probate Law and Practice, and the cases cited there make it clear that prior to the 1965 amendment the statute operated automatically to revoke a

will upon the subsequent marriage of the testator, regardless of the intent of the testator. By Chapter 506, 1965 Session Laws, ORS 114.130 was amended by striking the word or between marriage and divorce and inserting "or annulment of marriage, unless the will expressly declares the intention of the testator that the will shall not be revoked by such action."

The proposed statute, copied from the Wisconsin proposed code, goes further than the 1965 amendment in attempting to give effect to the actual intention of the testator. In several of the cases cited in the section from Jaureguy and Love, and in the 1964 pocket part, the fairly restrictive language of the 1965 amendment would not have prevented a revocation of the will even though the intent of the testator was clear that the provision for the second wife was in his mind and she was provided for, although the will, in these cases, did not expressly declare that intention. It seems only right that where a subsequent marriage settlement upon the marriage of the testator makes provision for the wife and evidences the intent that the will not be revoked, the statute give full effect to the intention of the testator and prevent an automatic revocation of the will.

Thus, there seems every reason for adopting the proposed language, which would preserve the will and prevent a revocation if in fact that was the intent and desire of the testator.

There is one very important change in the proposed

section on revocation by marriage in that the proposed section makes the revocation dependent upon the testator being survived by his spouse. Our present statute does not have this provision and therefore, although the sole purpose of the revocation by subsequent marriage statute is to protect the spouse, actually under the Oregon statute the will is revoked even though the spouse predeceases the testator. This is obviously an unjust and unnecessary provision in these cases and the proposed statute makes the revocation only effective if in fact the spouse survives the testator.

Section 11. Revocation by divorce or annulment. The wording of this section is in general the same as Senate Bill 197, introduced in the 1963 Legislature as an Oregon State Bar Bill by the Probate Law and Procedure Committee. The bill failed to pass the 1963 Legislature and was introduced as Senate Bill 305 in the 1965 Legislature where it passed without amendment by the Senate, but was amended in the House as indicated in the comment on Section 10.

Your committees have adopted the wording to cover the situation of revocation by divorce and annulment substantially as outlined in the original Oregon State Bar Committee Bill. The amendment by the 1965 legislature which in effect would provide for an automatic revocation in the case of a subsequent divorce or annulment unless the will expressly declares the intention otherwise of the testator, is not realistic. It is difficult to visualize a situation where a testator would provide in his will that the will not be

revoked by his divorce or annulment of his marriage. Actually, this would not express the usual intention of the testator. The intention of the testator in such case would be that, after having made provision for his wife and appointed her executrix of his will in addition to numerous bequests and provisions for his children and friends and relatives, the will itself, the bequests to his children and to his friends and relatives and perhaps to charities should not be affected by the divorce of his wife, but that all of the provisions in the will providing for his former spouse would be revoked. Thus, your committees feel that the present proposed section which would revoke all provisions in the will for the divorced spouse but preserve the remainder of the will would carry out the actual intention of the testator in these cases.

Section 12. Contract of sale of property devised not a revocation. This section is identical with ORS 114.140 with purely editorial changes. A similar provision is found in the 1965 Washington Code, Section 11.12.060. The section is discussed in Section 377, Jaureguy and Love. The discussion there makes clear that, but for the statute referred to, ORS 114.140, under the doctrine of equitable conversion the proceeds of the sale of devised property sold on contract would go to those entitled to the testator's personal property and not to his devisee. The section is necessary to provide that in these cases the proceeds of the contract go

to the devisee of the real property.

Section 13. Encumbrance or disposition of property after making will. Section 13 covers ORS 114.230 (3) and ORS 114.150. These sections are also considered in Section 377, Jaureguy and Love, Oregon Probate Law and Practice.

Section 14. Devise of life estate. This section is identical in content with ORS 114.220, with merely editorial changes.

Section 15. Devise passes all interest of testator. Section 15 is identical in content with ORS 114.230 (1), with purely editorial changes.

Section 16. Property acquired after making will. This section embodies ORS 114.230 (2). Your committee, however, felt that the language of the proposed section, which is taken from Section 269 of the 1963 Iowa Probate Code, is preferable to the present ORS section. The Iowa section is adopted from Section 56 of the Model Probate Code.

Section 17. Non-ademption of specific devises in certain cases. This section is taken from Section 853.35 of the Proposed Wisconsin Probate Code. We quote the editorial comment on this section as contained in the Proposed Wisconsin Probate Code, which we consider is equally applicable to the situation in this state:

This section is new and changes the law. At common law, if real or personal property were specifically given by will to a named person, and the property were destroyed or sold between the time of execution of the

will and the testator's death, the devise or bequest failed; the reason was that there was no property in the estate to satisfy the specific gift. This doctrine, known as ademption by extinction, worked without regard to the testator's intent. It was ameliorated to some extent by various judicial approaches. Thus if testator devised "my residence" to his wife, and sold the residence he owned at the time the will was drafted and subsequently purchased another residence, the court would apply the time-of-death construction; by relating the phrase "my residence" to the residence testator owned at death, ademption was avoided. But if testator sold one residence and died pending negotiations to purchase another residence, the wife was out of luck. If the testator sold on a land contract, our Supreme Court has held that the devisee is entitled to the unpaid balance on the land contract. Estate of Atkinson 19 Wis. 2d 272, 120 N.W. 2d 109 (1963). Apparently the result would be different if the testator had sold and taken a mortgage back, however. The same kind of problem arises if the house burns down before the testator's death. Is the devisee entitled to the fire insurance proceeds? In a somewhat analogous case our Supreme Court again prevented hardship by giving the insurance proceeds to the surviving joint tenant. Rock County Savings & Trust Co. v. London Assurance Co., 17 Wis. 2d 618, 117 N.W. 2d 676 (1962). The existing law not only involves uncertainty but requires costly litigation to reach a decision in each new case. This section is intended to settle the law.

The Committee decided that specific kinds of situations should be covered by the statute, rather than a broad statute abolishing the doctrine entirely. The resulting statute is only partly drawn from legislation in other states. The need for an anti-ademption statute was considered as great as the need for the anti-lapse statute which has been on the books for many years. The statute is intended to carry out the normal intent of the testator.

Section 19. When estate passes to issue of devise or legatee anti-lapse. The proposed section 19 is identical in content with ORS 114.240, except for purely editorial changes. The proposed section does, however, include relatives by adoption, which presumably would be understood by the present ORS section, and provides that the descendants

of the deceased devisee would take by representation, which also seems inherent in the present section. For comparative legislation, see Section 11.12.110 of the 1965 Washington Code and Sections 273 and 274 of the 1963 Iowa Probate Code.

Section 20. Children born or adopted after execution of will (pretermitted children). This section would replace ORS 114.250. The proposed section is taken from Section 5-3.2, 1966 New York Revision "Estates, Powers and Trusts Law."

The committees were in agreement that they did not wish to perpetuate the problems and the palpable injustices inherent in the present ORS statute. A cursory examination of the litigation involved in this provision would be sufficient reason for adopting a different approach. It may be said that from this starting point probably no other one of the proposed sections in the code resulted in more extended discussion than this problem of pretermitted children. The committees were agreed that such a provision should, so far as possible, try to carry out the desires of a testator. Obviously, a present situation where a testator makes a \$10,000 bequest to a living child named in his will, makes no provision for after-born children, and a posthumous child would take one-half of a \$200,000 estate, does not carry out what would seem the obvious desires of the testator.

Attention is called to the changes in the proposed section. The section spells out that the same provisions apply to an after-adopted child as would apply to an after-born child. If the will makes no provision for a child

living at the time of the execution of the will, the after-born child does not take a share of the estate. This provision is contrary to the present ORS statute which provides for children living at the time of execution of the will if they are not provided for by the will. Your committees believe that the proposed provision would carry out the intention of the testator. In other words, if he purposely made no provision for living children who obviously were known to him when he made his will, the ordinary implication would be that he purposely did not provide in his will for these children. Similarly, if he did not provide for the children he knew of, he may be assumed to not desire to make provision for after-born children. Your committees feel that the present ORS provision, where the testator had knowledge of his living children and did not provide for them, would enforce a provision directly contrary to the obvious desires of the testator.

On the other hand, if the will does provide for the children living at the time of the execution of the will, the after-born child is provided for from the provision made to the living children. The share of the after-born child is arrived at by taking the amount of the will provision for the children and dividing it by the number of children provided for and the number of after-born children so that the after-born child would take an equal share of the total

provision. For example, if provision is made in the will to child A with a legacy of \$10,000, child B with a legacy of \$20,000, and after-born child C is not provided for, child C would take one-third of the total provision of \$30,000, or \$10,000, and the legacies to children A and B would be reduced proportionately by one-third.

If the testator had no child living when he made his will, the after-born or after-adopted child would take by intestate succession.

It should be explained that contrary to the present ORS section, if the testator has three living children when he made his will and makes provision for two children, but none for the third, the proposed statute would not make any provision for the omitted child. Your committees feel that this approach is actually in accord with what would seem the obvious intention of the testator in failing to provide for a child of which he had knowledge.

The comment by the New York Temporary State Commission on Estates attached to the bill as submitted to the 1966 Session of the New York Legislature is as follows:

Comments: This section substantially revises DEL Sec. 26 to eliminate a serious defect in the policy underpinning of that statute by which an after-born child who qualifies for an elective share of his parent's estate will receive a substantial portion of such estate although the parent has made no provision for other children living at the time the will was executed. The new section undertakes to correct this distortion of the reasonably presumable intention of the normal parent.

No change has been effected in the principle underlying DEN Sec. 26, embodied in paragraph (a) of the new section, which disqualifies an after-born child from taking an elective share where the testator has given some concrete evidence that the after-born child was not inadvertently or unintentionally disinherited (see, McLean v. McLean, 207 N.Y. 365).

Section 21. Delivery of will by custodian, liability.

This section embodies the provisions of ORS 115.110 and 115.130.

The civil liability to persons injured by failure to deliver the will is preserved as now provided in ORS 115.110. ORS 115.990, providing a criminal penalty for such failure, is repealed by the proposed new code. In the opinion of the committee, apparently the criminal penalty is never invoked. The committees agreed that the civil liability gives sufficient protection.

Section 22. Disposition of wills deposited with county clerk. This section would replace and supersede ORS 114.410, 114.420, 114.430, and 114.440, covering deposit of wills with county clerk. As will be noted, this proposed section would terminate the provisions for depositing wills with the county clerk and would provide that, so far as possible, all wills now in the possession of the county clerks under the present provisions, would be returned to the testator or to the persons to whom the will is to be delivered following the death of the testator. It would provide for eventual destruction of all wills which the county clerk had been

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unable to dispose of 40 years after the effective date of the new code.

When this matter was being studied by the two committees, data was submitted to the committees by the committee members on the number of wills deposited and the procedures followed in the following counties: Multnomah County, Union County, Lane County, Jackson County, and Clackamas County. Following the detailed reports on these counties and general suggestions from members from a number of additional counties, the consensus can perhaps be best summed up by quoting from one of the reports as follows: "I believe all of this matter should be repealed. The clerk states that it is a nuisance, the courthouse is full, and her office is understaffed and quite busy with other matters. Moreover, the state should not perform this rather non-important service. It isn't used, and a will being ambulatory, it is likely that many of them will have been revoked."

It was apparent from the discussion, participated in of course by members representing a substantial number of counties in central, eastern, and southern Oregon, that no attempt was made by the county clerk's office to check on whether the persons depositing the wills were living or were in fact deceased. Apparently, there is no widespread practice of the county clerks in checking as to whether intestate proceedings have been instituted for parties for whom wills

were on deposit. As an example of the problem, since 1945, when this present act became effective, in Multnomah County 1339 wills had been deposited, 430 of these had been withdrawn, and 909 were on deposit as of January 14, 1966, when the most recent deposit was made. Your committees were strongly of the opinion that there is much greater probability of a will being found after a decease of the testator if the will is in the safe deposit box. It is felt that the present statute had its tendency in many cases to provide a depository for wills and no factual provisions for notification of such deposit to the executor named therein following the death of the testator. It was felt strongly, also, that this service is not a proper function of the county clerks and from the reports received it obviously is one which for many practical reasons has not resulted in proper notification, following the death of the testator in every case.

It should be noted also that the present provision of ORS 115.110 for delivery of will by a custodian is preserved in the preceding Section 21.

Section 23. Evidence to prove a will. It was necessary to amend ORS 41.520 to eliminate the exception of soldiers' and sailors' wills, pursuant to ORS 114.050, since under the proposed code, ORS 114.050 would be repealed, and no provision would be made for oral or holographic wills of mariners at sea or soldiers in the military service.

CORRESPONDING SECTIONS - CHAPTER ON WILLS AND ORS CHAPTER

ON WILLS

<u>SECTION</u>	<u>ORS SECTIONS</u>
1	114.010
2	114.020
3	114.030, 114.040, 114.050
4	114.310, 114.320, 114.330, 114.340
5	114.060
6	114.070
7	
8	114.110
9	114.120
10	114.130
11	114.130
12	114.140
13	114.150, 114.230(3)
14	114.220
15	114.230(1)
16	114.230(2)
17	
18	
19	114.240
20	114.250
21	115.110, 115.130, 115.990
22	114.410, 114.420, 114.430, 114.440

Proposed revised Oregon probate code
WILLS
1st Draft
January 30, 1967

This draft is based primarily on a draft distributed by Mr. Mapp and Mr. Riddiesbarger at the November 1965 meeting, and the action taken by the committees at the meetings in November 1965, December 1965, January 1966 and March 1966. See also the appendix to the November and December 1965 minutes.

EXECUTION

Section 1. Who may make a will. Any person who is 18 years of age or older or who has been lawfully married, and who is of sound mind, may dispose of his property by will.

References: Advisory Committee Minutes:
11/19,20/65 p. 5
4/15,16/66 p. 2

ORS 114.020

Comment: The present plan is to define a will, either at the beginning of the probate code, or in the section on wills, or in both. The definition will be that a will includes a codicil or other instrument executed with the same formalities as a will.

ORS 114.010 is repealed by the repealing section at the end of these sections.

Section 2. Execution of will. A will shall be in writing and shall be executed by the signatures of the testator and of at least two attesting witnesses as follows:

(1) The testator, in the presence of each of the witnesses shall:

(a) Sign the will;

(b) Acknowledge his signature previously made on the will; or

(c) At the direction of the testator and in his presence have another person sign thereon the name of the testator. Any witness who so signs the name of the testator shall sign his own name as a witness to the will and write on the will that he signed the name of the testator at the direction of the testator.

(2) The witnesses shall each sign the will in the presence of the testator.

References: Advisory Committee Minutes:
11/19,20/65 p. 5; and Appendix
3/18,19/66 pp. 10 to 12; and Appendix (Report
March 16, 1966)
4/15,16/65 p. 2

Comment: The draftsman changed the word "subscribe" to "sign" in section 2. Should section 2 provide that any person otherwise qualified to be a witness in court may be a witness to a will?

Section 3. Witness as beneficiary. A will attested by an interested witness is not thereby invalidated. If an interested witness attests a will and the will is not attested also by two disinterested witnesses, the interested witness may take under the will only so much of the provision made for him therein as in the aggregate equals in value, on the date of death of the testator, the part of the estate of the testator that would have passed to him had the testator died intestate. A witness is interested only if a personal and beneficial interest in the estate of the testator is bequeathed or devised to him by the will.

References: Advisory Committee Minutes:
12/17, 18/65 p. 19; and Appendix
11/19, 20/65 pp. 5 and 6; and Appendix
3/18, 19/66 pp. 10 to 12; and Appendix (Report
March 16, 1966)

ORS 114.310, 114.320, 114.330 and 114.340

Section 4. Validity of a will. A will is lawfully executed if it is in writing, signed by the testator and otherwise executed in accordance with the law of:

(1) This state at the time of execution or at the time of death of the testator;

(2) The domicile of the testator at the time of execution or at the time of his death; or

(3) The place of execution at the time of execution.

References: Advisory Committee Minutes:
12/17, 18/65 Appendix A
3/18, 19/66 pp. 10 pp. 12 and 13; and Appendix
(Report dated March 16, 1966)

ORS 114.050 and 114.060

Comment: The draftsman changed "legally executed" to "lawfully executed."

Could this section be drafted to provide "A will that is not executed as provided in section 2 shall be admitted to probate provided: etc."?

TESTAMENTARY ADDITIONS TO TRUSTS

Section 5. Testamentary additions to trusts. (1) A devise or bequest may be made by a will to the trustee or trustees of a trust, regardless of the existence, size or character of the corpus of the trust, if:

(a) The trust is established or will be established by the testator, or by the testator and some other person or persons, or by some other person or persons;

(b) The trust is identified in the testator's will; and

(c) The terms of the trust are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator.

(2) The trust may be a funded or unfunded life insurance trust, although the trustor has reserved any or all of the rights of ownership of the insurance contracts.

(3) The devise or bequest shall not be invalid because the trust:

(a) Is amendable or revocable, or both; or

(b) Was amended after the execution of the testator's will or after the death of the testator.

(4) Unless the testator's will provides otherwise, the property so devised or bequeathed:

(a) Shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given; and

(b) Shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.

(5) A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

(6) This section shall not be construed as providing an exclusive method for making devisees or bequests to the trustee or trustees of a trust established otherwise than by the will of the testator making the devise or bequest.

(7) This section shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this section.

(8) This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the same or similar provisions.

(9) This section may be cited as the Uniform Testamentary Additions to Trusts Act.

References: Advisory Committee Minutes:
12/17,18/65 pp. 4 to 6; and Appendix A
3/18,19/66 pp. 6 and 7

ORS 114.070

Comment: These sections of the draft were combined by the draftsman into one section.

REVOCATION AND ALTERATION

Section 6. Manner of revocation or alteration exclusive.

A will may be revoked or altered only as provided in sections 6 to 10 of this Act.

Section 7. Express revocation or alteration. (1) A will may be revoked or altered by another will.

(2) A will may be revoked by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator or by another person at the direction of the testator and in the presence

of the testator. Such injury or destruction by a person other than the testator at the direction and in the presence of the testator shall be proved by at least two witnesses.

Section 8. Revocation by marriage. A will is revoked by the marriage of the testator after the execution of the will, unless:

(1) The spouse of the testator does not survive the testator;

(2) Provision is made for the surviving spouse by a written antenuptial agreement or marriage settlement; or

(3) The will evidences the intent of the testator that the will not be revoked by the marriage.

Section 9. Revocation by divorce or annulment. Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former spouse of the testator and any provision therein naming the former spouse as executor, and the effect of the will is the same as though the former spouse did not survive the testator.

Section 10. Revocation not revive prior will. If, after making a will, the testator makes a subsequent will, the revocation of the subsequent will does not revive the earlier will.

References: Advisory Committee Minutes:
11/19,20/66 pp. 6 to 8
12/17,18/66 Appendix A

ORS 114.110, 114.120, 114.130, 114.140 and 114.150

Comment: The section concerning exoneration will be in a later draft.

DEVICES AND LEGACIES

Section 11. Devise of life estate. A devise or bequest of property to any person for the term of the life of the person, and after his death, to his children or heirs, vests an estate or interest for life only in the devisee or legatee, and remainder in the children or heirs.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 7 to 9; and Appendix

ORS 114.220

Section 12. Devise passes all interest of testator. A devise or bequest of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to dispose of a lesser estate or interest.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 10 and 11; and Appendix

ORS 114.230

Section 13. Property acquired after making will. An estate or interest in property acquired by a testator after he makes his will passes as provided by the will, unless the will evidences the intent of the testator to dispose of a lesser estate or interest.

References: Advisory Committee Minutes:
12/17, 18/65 p. 18; and Appendix

ORS 114.230

Section 14. Encumbrance or disposition of property after making will. An encumbrance or disposition of property by a

testator after he makes his will shall not affect the operation of the will upon a remaining estate or interest therein which is subject to the disposal of the testator at the time of his death.

References: Advisory Committee Minutes:
12/17,18/65 p. 10; and Appendix

ORS 114.230

Section 15. When estate passes to issue of devisee or legatee, anti-lapse. When property is devised or bequeathed to any person who is related by blood or adoption to the testator and who dies before the testator leaving lineal descendants, the descendants take the property the devisee or legatee would have taken if he had survived the testator. If the descendants are all in the same degree of kinship to the predeceased devisee or legatee, they take equally, or if of unequal degree, they take by representation.

References: Advisory Committee Minutes:
12/17,18/65 pp. 11 and 12

ORS 114.240

PRETERMITTED CHILDREN

Section 16. Children born or adopted after execution of will (Pretermitted children). (1) If a testator, during his lifetime or after his death, has a child born after the execution of his will or adopts a child, whether in this state or elsewhere, after that execution, and dies leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for nor in any way mentioned in the will,

a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

(2) If the testator has one or more children living when he executes his will and:

(a) No provision is made in the will for any such living child, an after-born or after-adopted child shall not take a share of the estate.

(b) Provision is made in the will for one or more of such living children, an after-born or after-adopted child shall take a share of the estate as follows:

(A) The share of the estate that the after-born or after-adopted child takes is limited to the part passing to the living children under the will.

(B) The after-born or after-adopted child shall take the share of the estate, as limited by subparagraph (A) of this paragraph, he would have taken had the testator included all after-born and after-adopted children with the living children for whom provision is made in the will, and had the testator given an equal part of the estate to each living, after-born and after-adopted child by the will.

(C) To the extent feasible, the interest of an after-born or after-adopted child in the estate shall be of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(3) If the testator has no child living when he executes

his will, an after-born or after-adopted child shall take a share of the estate as though the testator had died intestate as to the estate.

(4) An after-born or after-adopted child may recover the share of the estate that passes to him as provided in this section either from the other children under paragraph (b) of subsection (2) of this section or from the testamentary beneficiaries under subsection (3) of this section, ratably, out of the shares of the estate passing to those persons under the will. In abating the interests of those beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

References: Advisory Committee Minutes:
3/18,19/66 p. 18; and Appendix

ORS 114.250

CUSTODIANS

Section 17. Delivery of will by custodian; liability. (1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to a court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to a court having jurisdiction of the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

References: Advisory Committee Minutes:
3/18,19/66 pp. 9 and 10; and Appendix

ORS 115.110, 115.130 and 115.190

Section 18. Disposition of wills deposited with county clerk. The county clerk of each county shall make all reasonable effort to deliver each will deposited in his office as provided in ORS 114.410 before the effective date of this Act and on deposit in his office on that date to the testator or person to whom the will is to be delivered after the death of the testator. Any such will not so delivered before January 1, 2010, may be destroyed by the county clerk.

References: This was drafted by the Legislative Counsel.

Section 19. ORS 41.520 is amended to read:

41.520. Evidence to prove a will. Evidence of a last will and testament [, except when made pursuant to ORS 114.050, shall not be received, other than] shall be the written instrument itself, or secondary evidence of [its contents] the contents of the will, in the cases prescribed by law.

Section 20. ORS 107.110 is amended to read:

107.110 Annulment or divorce decree ends marriage; when effective; appeal; content of decree. (1) A decree declaring a marriage void or dissolved at the suit or claim of either party shall give the court jurisdiction to award, to be

effective immediately, the relief provided by ORS 107.100. The decree shall revoke any will pursuant to the provisions of [ORS 114.130] section 9 of this Act, but the decree shall not be effective in so far as it affects the marital status of the parties until the expiration of 60 days from the date of the decree or, if an appeal is taken, until the suit is determined on appeal, whichever is later. However, the right of one party to cohabit with the other shall cease on the date of the decree.

(2) In case either party dies within the 60-day period specified in subsection (1) of this section, the decree shall be considered to have entirely terminated the marriage relationship immediately before such death, unless an appeal is pending.

(3) (a) The Supreme Court shall continue to have jurisdiction of such an appeal pending at the time of death of either party, the estate of the decedent being the nominal party therefor. The attorney of record on the appeal, for the deceased party, may be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on appeal may not be awarded to either party.

(b) The Supreme Court shall have the power to determine finally all matters presented on such appeal. Before making final disposition, the Supreme Court may refer the proceeding back to the trial court for such additional findings of fact as are required.

(4) The marriage relationship is terminated in all respects at the expiration of the 60-day period specified in subsection (1) of this section or, if an appeal is taken, when the suit is determined on appeal, whichever is later, without any further action by either party. However, at any time within the 60-day period or while an appeal is pending, the court may set aside the decree upon the motion of both parties.

(5) A decree declaring a marriage void or dissolved shall include the substance of subsections (1) to (4) of this section and shall specify the date on which the decree becomes finally effective to terminate the marital status of the parties.

Section 21. Act not to effect wills made prior to Act.
This Act does not apply to wills made prior to the effective date of this Act as provided by ORS Chapter 114.

Section 22. Repeal of existing statutes. ORS 114.010, 114.020, 114.030, 114.040, 114.050, 114.060, 114.070, 114.110, 114.120, 114.130, 114.140, 114.150, 114.210, 114.220, 114.230, 114.240, 114.250, 114.260, 114.270, 114.310, 114.320, 114.330, 114.340, 114.410, 114.420, 114.430, 114.440, 115.110, 115.130 and 115.990 are repealed.

Note: Mr. Riddlesbarger had a note made in the minutes that he would like to discuss ORS 114.270 again when the committees considered the first drafts.