OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: Technical Corrections to ORS 112.105, Proof of Parentage; ORS 112.238, Exception to Will Formalities; ORS 114.510(1), Simple Estate Affidavit

Submitted by: Oregon State Bar Estate Planning and Administration Section

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1. Does this amend current law or program?
Yes. The proposed bill will make technical corrections to ORS 112.105, 112.238, and 114.510.

2. PROBLEMS PRESENTED AND SOLUTIONS

A. ORS 112.105. This statute was amended several times and there was an error in the last amendment. In a situation where a person's parents were unmarried, the person claiming to be a child of the decedent must prove that parentage was established under ORS 109.065 during the person's lifetime **and** the parent had to have acknowledged the parentage in a writing signed by the parent during the child's lifetime. This creates an undue burden on a child of unmarried parents to meet both of these requirements, especially when the parentage for family law purposes is established under ORS 109.065. For intestate succession purposes, the child should only have to meet one of these requirements, rather than both.

SOLUTION: Amend the statute to allow parentage to be proven by either requirement.

B. ORS 114.510. In 2023, Oregon adopted a provision to allow for a simple estate affidavit procedure for a decedent who had a revocable trust and a will that designates the decedent's trust as the beneficiary. The statute provides a simple estate affidavit is not available for such an estate if more than $75,000 of personal property and more than $200,000 of real property is be attributable to one or more specific devisees. However, if the decedent's Will contains a specific devise to the decedent's trust of more than these amounts, then the simple estate affidavit cannot be used, even if the specific devisee and the residuary devisee are the decedent's trust. The intent of the statute was to allow the use of the simple estate affidavit when the decedent's will directs that the assets will be distributed to the decedent's trust.

SOLUTIONS: Clarify that the provisions regarding specifically devised personal and real property do not apply if the decedent's trust is the specific devisee.

C. ORS 112.238

1. ORS 112.238 was added to the Oregon Revised Statutes in 2015 as part of SB 379-1. This statute appears in the Uniform Probate Code and is called the harmless error statute. Eleven U.S. states have adopted a harmless error statute. The Oregon Law Commission (OLC) introduced that bill, which was developed by the Probate Modernization Work Group of the OLC. The Work Group Report prepared in connection with SB 379-1 was submitted at the hearing on the bill and thus became legislative history. That Report describes the rationale behind the decision to add ORS 112.238 to the Oregon statutes. Emphasis has been added to the following excerpt from the Report:

Section 29: This section adopts the doctrine of harmless error. This doctrine was developed to address the problems that occur when a person's testamentary wishes are thwarted due to **mistakes in the execution of a will, a codicil, or a written revocation of a will**. Harmless error requires a determination by the court, based on a clear and convincing evidence standard, that **the decedent intended a writing to be a will, codicil or document revoking a will.**

Harmless error does not require a particular level of compliance with the execution formalities (i.e., it does not require a "near miss"), and instead focuses on proof of the decedent's intent. **The doctrine will be used in situations in which a decedent thought she had executed her will but made a mistake in doing so.** A person trying to prepare a will without a lawyer might have the document signed by only one witness, have two witnesses observe her sign but fail to ask the witnesses to sign the document, or have the will notarized but not witnessed. A person might write out her will and sign it but not realize that she needed witnesses.

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The advantage of adopting the harmless error rule rather than relaxing the execution requirements directly or authorizing holographic wills is that a court will oversee the determination of whether a document should be admitted to probate as a will. **The harmless error rule permits the court to fix a number of the problems that occur with will execution,** but because the proponent must produce clear and convincing evidence, the change should not lead to a significant number of additional hearings.

The purpose of the harmless error statute was to allow a court to address mistakes in execution. That is, the statute was intended to address the problem that occurred when a testator attempted to execute a will but failed to comply with all of the required formalities. The statute requires proof that the decedent considered the writing itself to be a will. The statute does not directly require that the decedent attempted to execute the writing as a will, but the statute assumes that it is the execution requirements that are lacking. The goal is to apply the statute in situations in which decedent thought the writing would be treated as a will and either did not understand the need for execution requirements or failed to comply with all of them.

The goal of ORS 112.238 is not to allow the court to determine a decedent's testamentary wishes based on written evidence. Rather, the court must determine whether the decedent considered a particular writing to be the decedent's will.

The statute clearly requires proof that the decedent considered the writing to be a will, and the legislative history focuses on a failed execution. Nonetheless, lawyers have attempted to use the statute to treat as wills writings that express a decedent's testamentary ideas, wishes, or plans, but that were not considered by the decedent to be the decedent's will. For example, a decedent might have sent instructions to a lawyer, and the lawyer might have written a draft, but the decedent would not have considered the instructions or even the draft to be the decedent's will. There is no writing that the decedent viewed as the final will.

2. ORS 112.235 provides that to be considered a will a writing cannot be an electronic record, document, or image. Reading ORS 112.238 together with ORS 112.235, it appears that an electronic record could not be considered a will under ORS 112.238. However, the statutes are not clear, because 112.235 says that the provision excluding electronic records applies to the word writing as used in "this section," meaning ORS 112.235. An amendment clarifying whether an electronic record can be given effect as a will would be useful.

3. The Work Group discussed whether to limit the application of the harmless error doctrine to writings prepared after the date of the statute. The legislative history does not address the

transition rule for SB 379, but the Reporter for the Work Group recalls the intention to make the statute apply only to estates whose administration commenced after the effective date of the act, in order to avoid unexpected change in the identity of beneficiaries in probates that were in process. The transition rule unfortunately focused unnecessarily on the date of the writing, and states that the changes "apply to decedents dying and wills and writings executed after the effective date of this 2015 Act." The intention was that any writing created, but not executed with will formalities, could be probated under ORS 112.238, but the text does not make that clear. This proposal adds a subsection to ORS 112.238 to clarify the application of the statute to a writing whenever created if the requirements of the statute are met.

SOLUTIONS:

1. Require the signature of the testator. The testator's signature on a writing provides evidence that a testator intended the writing to be something important. For this reason, and to avoid clogging the courts with attempts to probate writings that may reflect a decedent's testamentary wishes but do not have the finality of a will, four states (California, Colorado, Ohio, and Virginia) have included a signature requirement in their harmless error statutes. Colorado permits proof that the decedent acknowledged the document as the decedent's will in lieu of the decedent's signature. In total today, eleven states have adopted some form of harmless error statute. When a person signs a document, the signature indicates that the person signing views the document as final. Until a document is signed, it may be a draft. The addition of a signature requirement does not obviate the need for clear and convincing evidence that the decedent intended the writing to be a will, but the requirement should reduce the number of far-fetched cases that take the courts' time and cost estates money.

2. Clarify that for purposes of ORS 112.238, a writing does not include an electronic record, document, or image.

3. Make ORS 112.238 applicable to writings created at any time, before or after the effective date of SB 379, in probate proceedings opened after the effective date of SB 379.

D. ORS 111.200(3)(b). In 2021, the Oregon legislature passed SB 728, which adopted numerous changes recommended by the Oregon Law Commission's Probate Modernization Task Force. The changes to ORS 111.200(3)(b) in that bill appear to have contained a drafting error, that left ORCP 45 out of a lengthy list of rules that are to apply in contested probate proceedings.

SOLUTION: Amend ORS 111.200(3)(b) to add ORCP 45 to the statute.

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Part II – Legislative Language

SECTION 1. ORS 112.105 is amended to read:

112.105 Succession where parents not married. (1) For all purposes of intestate succession, full effect shall be given to all relationships as described in ORS 109.060, except as otherwise provided by law in case of adoption.

(2) For all purposes of intestate succession and for those purposes only, before the relationship of parent and child and other relationships dependent upon the establishment of parentage shall be given effect under subsection (1) of this section:

(a) The parentage of the child shall have been established under ORS 109.065 during the lifetime of the child; ~~and~~ or
(b) The parent must have acknowledged being the parent of the child in writing, signed by the parent during the lifetime of the child.

SECTION 2. ORS 112.235(4) is amended to read:

(4) As used in this section and in ORS 112.238, "writing" does not include an electronic record, document or image.

SECTION 3. ORS 112.238 is amended to read:

112.238 Exception to will execution formalities; petition; notice; written objections; hearing; fee. (1) Although a writing was not executed in compliance with ORS 112.235, the writing may be treated as if it had been executed in compliance with ORS 112.235 if the proponent of the writing establishes by clear and convincing evidence:

(a) that the decedent intended the writing to constitute:
(a) The decedent's will;
(b) A partial or complete revocation of the decedent's will; or
(c) An addition to or an alteration of the decedent's will.
(b) that the decedent,
(A) Signed the writing or acknowledged it to be their will;
(B) Directed some other person to sign the name of the testator and the signer's own name on the writing; or
(C) Acknowledged the signature previously made on the writing by the testator or at the testator's direction.

(2) A writing described in subsection (1) of this section may be filed with the court for administration as the decedent's will pursuant to ORS 113.035. The proponent of the writing shall give notice of the filing of the petition under ORS 113.035 to those persons identified in ORS 113.035 (5), (7), (8) and (9). Persons receiving notice under this subsection shall have 20 days after the notice was given to file written objections to the petition. The court may make a determination regarding the decedent's intent after a hearing or on the basis of affidavits.

(3) The proponent of a writing described in subsection (1) of this section may file a petition with the court to establish the decedent's intent that the writing was to be a partial or complete revocation of the decedent's will or an addition to or an alteration of the decedent's will. The proponent shall give notice of the filing to any personal representative appointed by the court, the devisees named in any will admitted to probate and those persons identified in ORS 113.035 (5). Persons receiving notice under this subsection shall have 20 days after the notice was given to file written objections to the petition. The court may make a determination regarding the decedent's intent after a hearing or on the basis of affidavits.

(4)(a) If the court determines that clear and convincing evidence exists showing that a writing meets the requirements of subsection (1) of this section and was intended by the decedent to accomplish one of the purposes set forth in subsection (1) of this section, the court shall:

(A) Prepare written findings of fact in support of the determination; and

(B) Enter a limited judgment that admits the writing for probate as the decedent's will or otherwise acknowledges the validity and intent of the writing.

(b) A determination under this subsection does not preclude the filing of a will contest under ORS 113.075, except that the will may not be contested on the grounds that the will was not executed in compliance with ORS 112.235.

(5) The fee imposed and collected by the court for the filing of a petition under this section shall be in accordance with ORS 21.135. [2015 c.387 §29; 2016 c.42 §17; 2019 c.165 §32; 2021 c.390 §1]

(6) ORS 112.238 is appliable to all decedents whose estates are first submitted to probate after the date of the adoption of ORS 112.238. A writing described in subsection (1) may be a writing created before or after the adoption of ORS 112.238.

SECTION 4. ORS 114.510 is amended to read:

114.510 Simple estate criteria.

(1) A person who meets the requirements of ORS 114.515 may file a simple estate affidavit only with regard to an estate in which:

(a)(A) Not more than $75,000 of the fair market value of the estate is attributable to personal property; and

(B) Not more than $200,000 of the fair market value of the estate is attributable to real property; or

(b) The decedent died testate and:

(A) Not more than $75,000 of the fair market value of the estate is attributable to specifically devised personal property;

(B) Not more than $200,000 of the fair market value of the estate is attributable to specifically devised real property; and

(C) The balance of the fair market value of the estate is attributable to property that is devised to the trustee of a trust of which the decedent was a settlor, as defined in ORS 130.010, and which came into existence prior to the decedent's date of death. However, the limits set forth in subsections (A) and (B) shall not apply if the specific devisee of such property is the trust described in this subsection (C).

(2)(a) The fair market value of the estate under subsection (1) of this section shall be determined:

(A) As of the date of death; or

(B) If the date of death is more than one year before the date of filing of the affidavit, as of a date within 45 days before the filing of the affidavit.

(b) In determining fair market value under this subsection, the fair market value of the entire interest in the property included in the estate shall be used without reduction for liens or other debts.

SECTION 5. ORS 111.200(3)(b) is amended to read:

(b) ORCP 9, 10 A, 16 B, 16 D, 17, 18, 19, 21, 22, 23, 25, 27, 29, 30, 31, 33, 34 A to F, 36 to 43, 44 A, B, D and E, **45,** 46, 47, 53, 55, 62, 64 A and C to G, 65, 67, 68, 71, 72 and 78 apply to a contested issue in a probate proceeding.