

OREGON LAW COMMISSION PROJECT PROPOSAL

Probate Modernization Proposal

For Submission to Oregon Law Commission's Program Committee

The Oregon State Bar Estate Planning and Administration Section's Executive Committee requests that the Commission's Program Committee recommend to the full Commission the formation of a Work Group to consider modernizing Oregon's probate code.

PROBLEM

Although "probate" is undefined by the Oregon Revised Statutes¹, it is commonly known as "the legal procedure [occurring after a person dies] through which the court settles claims and taxes and determines who gets the decedent's property."² Not all decedents' estates go through the probate; small estates can even avoid the probate system despite containing some property subject to probate.³ For estates that *are* probated in Oregon, it is estimated that the system requires "a dozen filings with the court over a period usually ranging from six months to two years."⁴ Many consider this process too slow for the timely transfer of assets, wasteful of estates' resources, and a frequently ineffective means for creditors to collect on their claims. Additionally, Oregon courts in the present era continually struggle to stretch modest budgetary resources far enough to carry out their essential functions. It is time to reevaluate whether the current court-intensive process is still the most appropriate paradigm for handling probate in Oregon. Finally, Oregon's Probate Code has not undergone a comprehensive revision since 1969 and improvements can be made.

While the Estate Planning Section is open to review and recommending reform of provisions throughout the entire Oregon Probate Code (ORS Chapters 111-118)⁵ as necessary, the following four subsections highlight some areas of the probate statutes that the section is particularly interested in and see as ripe for reform.

A. *Options for Simplification*

One cost-saving option for probate administration is the non-intervention route that Washington State (and Texas) has offered for several decades.⁶ Washington's successful non-intervention route allows testators to give the designated personal representative non-intervention power to handle the administration of the estate with only minimal court involvement. If a will is

¹ See generally, Oregon Revised Statutes (ORS) Chapters 111-118.

² David C. Streicher, *Alternatives to Probate*, in ADMINISTERING OREGON ESTATES, Ch 1, §1 at 1-3 (Oregon CLE 2004).

³ *Id.* at 1-10; ORS 114.505-114.560: Small Estate Procedure

⁴ *Id.* at 1-3.

⁵ Chapter 118 is the Estate Tax Chapter and since the Commission addressed that Chapter in 2011, it should not be included in this project.

⁶ In Washington State, Revised Code of Washington (RCW) Chapter 11.68, "Settlement of Estates Without Administration." Texas also has a different version of non-intervention administration: See Probate Code Title VI Sec. 145B "Independent Executors May Act Without Court Approval."

silent on non-intervention powers, a personal representative may petition the court for powers.⁷ The non-intervention process significantly reduces the involvement of the court until the closing of the estate and other limited situations where interested parties can petition the court for an accounting of the personal representative's actions and expenditures. If during the administration of an estate, a beneficiary decides that court supervision is necessary, the beneficiary can petition for supervision and the court will supervise administration of the estate. Many other states offer a simplified court procedure and/or affidavit procedure (no court required); dollar value limitations are common to qualify for the simplified procedure.⁸

Oregon's small estate proceedings under ORS 114.505-560 do offer a simplified form of probate administration in some cases. The small estate proceeding allows an expedited process if the estate value is less than \$275,000, but it is unavailable for many estates. See ORS 114.515(2)(a). In addition, personal property must be less than \$75,000 and real property must be less than \$200,000. The Section would suggest reviewing the present process with an eye towards expansion.

Washington State's model for non-intervention estate administration is not confined to estates of particular sizes and also offers other forms of flexibility for the personal representative that are not present under current Oregon law. The administration process under non-intervention estate administration is informal and collaborative. The personal representative is authorized to take any action immediately and without prior court approval as long as the beneficiaries are in agreement. If the beneficiaries do not agree, the estate will go through the usual supervised probate process. Under non-intervention estate administration, the expenses of administration, including attorney and accounting fees, is reduced significantly because the rigid, and often unnecessary, procedural and documentation requirements of a formal probate do not exist. Only those estates requiring the more complex process receive it. Another benefit is that the nonintervention estate administration process is confidential. The opening and closing documentation reveal very little about the substance of the estate and the actions taken during its administration, thus preserving the privacy of the decedent and the beneficiaries.

B. *Updating the Probate Pleading Process*

The probate pleadings process is an area that would benefit from a structural update that would streamline the process and thus promote judicial economy. ORS 111.205 currently governs pleadings in probate court, and although it has undergone changes since its original adoption in 1969, the language remains unnecessarily vague. ORS 111.205 states "[n]o particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts." That flexibility does not enhance the process. The probate process is a hybrid and unique unto itself, taking on the formalistic appearances of an adversarial proceeding that requires substantial judicial oversight in routine and non-controversial issues. As such, the process often lacks substance and does not advance the cause for efficiently settling the estate. When a real conflict does arise, unlike proceedings under the ORCP, the language of probate and general litigation are not the same. Experienced civil litigators are often confused and frustrated with the lack of direction in the probate code. The rules of discovery, subpoena, motions, responses, etc. are materially different or unknown in the probate practice. In many cases, local court rules play a large role in setting the parameters of the pleadings.

⁷ See RCW 11.68.021.

⁸ See summary of state law exceptions to normal probate in [Plan Your Estate](#) (2010, NOLO)_

C. *Creditor Claim Resolutions* As the chapter meant to cover creditor claims against the estate, ORS Chapter 115 does not offer an effective and efficient process for resolving the claims. In fact, the various sections of the creditor claim process dealing with secured and unsecured claims, along with claims due and not due, contradict one another and do not lead to a consistent resolution among comparable cases. For example, ORS 115.065 deals with claims on secured debts due. Section (1) appears to give a secured creditor a choice of procedure: the right to file a claim and be paid immediately, thus extinguishing the security interest, or continuing to rely on its security interest without filing a claim and being paid on the original indebtedness. On the other hand, sections (5) and (6) suggest the creditor has the right to submit the claim and still retain its security interest. Allowance of a claim on secured debts not due (ORS 115.075) is based on the “value of the debt on the date of the allowance.” Presumably, that is the present value of the debt, but the statute does not mention that result, whereas ORS 115.065(3) clearly states that the allowed claim is the “amount of the debt remaining unpaid on the date of the allowance.” These are the kinds of inconsistencies that make the claims process in probate very difficult to resolve without court intervention.

D. *‘Cross-border’ Administrations*

The heightened mobility now common in our society increases the complexity of probate. Cross-border administration of assets was not contemplated at the adoption of Oregon’s probate code in 1969. As a result, the code lacks differentiation between domicile administrations and ancillary administrations. Ancillary administration connotes the administration of property in a state which was not the decedent’s domicile at death; the purpose is to collect assets and pay debts of the decedent in that state. New York, among other states, dealt with this area of law by codifying the rules surrounding ancillary administrations.⁹ The Uniform Probate Code also addresses this issue.¹⁰ For example, statutes can provide authority for Oregon courts to refuse to authorize ancillary administration where there are no creditors to be protected and the assets are minimal. Likewise, Oregon statutes could be revised to not always require formal probate for ancillary administration if conditions are met. Oregon’s present failure to address this circumstance leads to bizarre and costly cases-- resulting in clients involved in cases spanning several states. This lack of nuance and sophistication creates an additional drain on judicial resources. For example, an ancillary proceeding in Oregon for a single piece of real estate follows the same process as a primary proceeding in Oregon. Notice to creditors requires notification and publication in Oregon even if no heirs or creditors exist in Oregon. The notice starts another four-month claim period in Oregon for creditors whose claims may already be barred in the primary proceeding. The annual and final accountings do not limit themselves to the activities of the Oregon assets. There is no mechanism to delegate control over the ancillary assets to the administrator of the primary estate prior to an entry of an order of final distribution since distributions may only be made to the ultimate “heirs and devisees.” An abbreviated or summary proceeding in Oregon is not possible and produces a redundancy of effort and expense that serves no useful purpose.

⁹ NY SURR. CT. PROC. ACT ART. 16 §1601-1616.

¹⁰ See Part IV of Uniform Probate Code (2008), addressing ancillary administration. Note that the Uniform Ancillary Administration of Estates Act is no longer being advanced by the Uniform Laws Commission as it is incorporated into the Uniform Probate Code now.

HISTORY OF REFORM EFFORTS

Oregon's probate code was first adopted in 1969 and now exists as ORS Title 12, Chapters 111 through 118. Oregon adopted its probate code shortly before the Uniform Law Commission's Uniform Probate Code was finished (it was based on an earlier draft of the uniform code). There are both policy differences¹¹ and omitted topics¹² that are covered in the uniform act that a Work Group could review. Oregon also hasn't updated its chapters with the more recent recommended revisions by the Uniform Commission, including the 2008 Act.¹³ Various sections of the chapters have undergone isolated changes since then, but there has not been a holistic effort to update Oregon's probate laws since their passage in 1969. The Executive Committee has initiated or has assisted the Oregon Law Commission with several recent efforts to overhaul specific parts of the Probate Code, i.e., spousal election (ORS 114.600 et. seq.), small estate affidavit (ORS 114.505, et., seq.), Uniform Simultaneous Death Act (ORS 112.570 et. seq.), but the vast majority of changes to the code have been confined to single sections. No comprehensive review and analysis of the code has been undertaken even as the uniform law on which it is based has been substantially modified during the same period.

SCOPE OF PROJECT

The proposed Work Group would evaluate the procedures, legal mechanisms and policy goals of the probate code in light of current practice and best practices from outside the state. Much as the original drafters of Oregon's probate statutes looked to other states and national sources for uniform laws, the Work Group will seek out statutory models consistent with Oregon's larger statutory framework. The Work Group will review Chapters 111 to 117, analyze existing Oregon law by using the most recent version of the Uniform Probate Code as a comparative model, and then, in addition, look to other states for ideas. The timeline for proposing bills for statutory changes would be to submit a bill for the 2015 or 2017 legislative session.

LAW COMMISSION INVOLVEMENT

A central aspect of the Commission's statutory purpose is for it to review Oregon's statutes and offer legislation for modernization and reform. ORS 173.338(1)(a). The Executive Committee of the Oregon State Bar Estate Planning and Administration requests that the Commission facilitate the task of modernizing Oregon's probate statutes. The Commission's statutory mission makes it uniquely positioned as a structured, non-partisan forum that brings together the public and private bars, the courts, stakeholders, and academic representatives to build a consensus when reforms are necessary.

¹¹ For example, the uniform act permits holographic wills and allows revival of revoked wills.

¹² For example, foreign and ancillary proceedings are covered.

¹³ See 2008 Act at http://www.uniformlaws.org/shared/docs/probate_code_2008/upcamends_final_08.pdf

PROJECT PARTICIPANTS

The Commission regularly involves both voting and advisory (non-voting) members on Work Groups. Several individuals have already been involved with the effort to have the Commission review this proposal, and therefore their continued participation should be considered for helping to populate the prospective Work Group: D. Charles Mauritz (Duffy Kekel/Chair of Estate Planning and Administration Section), Commissioner Susan Gary (University of Oregon School of Law), Marsha Murray-Lusby (Dunn Carney) and Jeff Cheyne (Samuels Yoelin and Kantor). The Commission should also invite participation from representatives of the following known stakeholders: circuit court judges (especially probate judges – Judge Lauren Holland has already expressed interest in this project) and county court judges (there are 6 counties that maintain county court judges that handle probate), the Oregon Department State Lands Estate Program, DHS, and DOJ., Oregon State Legislature’s Legislative Counsel’s Office, the Oregon State Bar Debtor/Creditor and Elder Law Sections, consumer and elder interest groups, the Oregon State Legislature, the Office of the State Court Administrator, and the Governor’s office all may be interested. Any other individual or group that regularly participates in or is directly affected by the probate system should be considered when assembling the Work Group.