BIENNIAL REPORT

of the

OREGON LAW COMMISSION

2015-2017

The Oregon Law Commission operates through a public-private partnership between the State of Oregon and Willamette University. The Commission is housed at the Willamette University College of Law in the Oregon Civic Justice Center, adjacent to the Oregon State Capitol at 790 State Street, Salem, Oregon.

DEDICATION TO HARDY *coming soon*

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Staff of the Oregon Law Commission

Willamette University College of Law Staff

Jeffrey C. Dobbins
Executive Director and
Associate Professor of Law

Laura H. Handzel
Deputy Director

Jenna Jones
Legal Assistant
Summer 2016 – Fall 2016

Christianne Strum
Administrative Assistant
September 2014 – May 2016

State of Oregon Staff

We recognize and thank all of the Legislative Counsel attorneys, staff, and editors who worked tirelessly with the Commission, enabling us to complete our recommended legislation. We also recognize and thank all of the Judiciary Committee counsel and staff who assisted the Commission throughout the legislative session.

Dexter Johnson
Legislative Counsel

Law Student Staff

One of the goals of the Law Commission is to bring the legal academic community into the law reform process together with legislators, lawyers, judges, and other interested parties. Law students assist the Commission in a variety of ways, including researching new law reform projects, writing legal memoranda, attending Law Commission meetings, and writing final reports. The following law students, from Willamette University College of Law, served the Oregon Law Commission this biennium:

Caitlynn Dahlquist – Law Clerk
Winter 2015 – Fall 2015

Cody Hack – Extern
Spring 2016

Nita Kumar – Extern
Spring 2016

Paul Charas – Extern
Summer 2016

Nita Kumar – Law Clerk
Summer 2016 – Fall 2016

McKenzie Zook – Extern
Spring 2017

Tyler Skidmore – Law Clerk
Spring 2017 – Summer 2017

Undergraduate Student Staff

The following students, from Willamette University College of Liberal Arts, served the Oregon Law Commission this biennium. These students assisted in a variety of ways, focusing on clerical work:

Jenna Jones – Office Assistant
Fall 2013 – Spring 2016

Thao Tran – Office Assistant
Spring 2017

Commission History and Membership

The Legislative Assembly created the Oregon Law Commission in 1997 to conduct a "continuous program" of law revision, reform, and improvement. ORS 173.315. The Commission's predecessor, the Law Improvement Committee, had fallen inactive, and the State wisely perceived the need for an impartial entity that would address gaps in the law and areas of the law that were confusing, conflicting, inefficient, or otherwise meriting law reform or improvement.

Legislative appropriations supporting the Commission's work began on July 1, 2000. At that time, the State, through the Office of Legislative Counsel, entered into a public-private partnership with Willamette University's College of Law. Since 2000, Willamette has served as the physical and administrative home for the staff of the Law Commission. Willamette provides a wide range of support to the Commission, supplementing the state's appropriation by providing office space, administrative and legal support, an executive director, and legal research support for the Commission and its Work Groups. The College of Law also facilitates law student and faculty participation in support of the Commission's work. With the aid of matching funds, office space, and other support from Willamette, the State is able to leverage Commission funding in order to provide a substantial service to the State. The Commission has been housed in the Oregon Civic Justice Center since 2009.

To carry out its purposes, the Commission is made up of fifteen Commissioners pulled from a unique combination of entities within the state of Oregon. The Commission includes four individuals appointed by legislative leadership, including two current legislators; three representatives from the judicial branch including the Chief Justice, Chief Judge of the Court of Appeals, and a trial court judge; the Attorney General; a governor's appointee; the deans (or their representatives) from each of the three law schools in Oregon; and three representatives from the Oregon State Bar. These Commissioners lead the Commission's various law projects each biennium by chairing work groups composed of experts in the given area of law reform.

Commission Law Reform Project Selection and Reform Process

The Commission serves the citizens of Oregon and the legislature, executive agencies, and judiciary by keeping the law up to date through proposed law reform bills, administrative rules, and written policy analysis. It accomplishes this by identifying appropriate law reform projects through suggestions gathered from the citizens of Oregon, each branch of government, and the academic community. By remaining in close personal contact with the people who know and use Oregon law, the commissioners and staff are able to identify areas of the law generally considered as "broken" and in need of repair.

Once potential projects are identified, the Commission researches the areas of law at issue, with a particular emphasis on gathering input from impartial experts and those who may be affected by proposed reforms. Staff works with project proponents in order to identify and draft a formal proposal for the Commission.

Formal proposals for commission projects are initially presented to the Commission's Program Committee. Relying on written guidelines governing the selection process, the Program Committee reviews written law reform project proposals and makes recommendations to the full Commission regarding which proposals should be studied and developed by the Commission. Along with commission staff, the Program Committee helps to manage the workload of the Commission and identify a reasonable scope for projects to be recommended to the Commission.

In considering the Program Committee recommendations, the Commission uses several factors to select law reform project proposals for action. Priority is given to private law issues that affect large numbers of Oregonians and public law issues that are not within the scope of an existing agency. The Commission also considers the resource demands of a particular project, the length of time required for study and development of proposed legislation, the presence of existing rules or written policy analysis, and the probability of approval of the proposed legislation by the Legislative Assembly and the Governor.

Once a law reform project has been approved by the full Commission for study and development, a Work Group is formed. Over 200 volunteers serve on Commission Work Groups each biennium, well over 2000 hours of professional time to law reform. The Work Groups are generally chaired by a Commissioner and often have a designated Reporter to assist with the project. Work Group members are selected by the Commission based on their recognized expertise, with Work Group advisors and interested parties invited by the Commission to present the views and experience of those affected by the areas of law in question. The Commission works to produce reform solutions of the highest quality and general usefulness by drawing on a wide range of experience and expertise, and by placing an emphasis on consensus decision-making, rather than by placing reliance on specific interest-driven policy making. This is hard to do, but constant vigilance over the process by the Commissioners and staff, with heavy reliance on the expertise of technically disinterested Work Group members, has tended to minimize the influence of personal or professional self-interest on the recommendations of the Commission.

The Law Commission is unique in that it "shows its work" through its stock in trade: written reports that detail each law reform project's objectives, the decision-making process, and the substance of the proposed legislation. The reports work to identify any points of disagreement on specific policy choices, and set out the reasons for and against those choices. When there is dissent or uncertainty within the work group, the report makes an effort to identify the reason for that conflict and to explain why the Work Group chose to resolve it the way that it did. The Legislative Assembly is then able to identify and resolve any necessary policy choices embedded in the recommended legislation.

A Work Group's deliberations result in the presentation of proposed legislation and the accompanying written report to the full Commission. The Commission reviews the product of each work group in detail before making its final recommendations to the Legislative Assembly. Those recommendations, in the form of proposed legislation and the accompanying report, are distributed during Session at the time each bill is proposed in Committee and then followed throughout the legislative process. Whether the proposed bills are adopted in full, adopted with amendments, or ultimately fail, the Commission's commitment to thoughtful public policy formation, and the value of memorializing the decisions made in developing the laws, cannot be overstated.

Oregon Law Commission Meetings *coming soon*

2016 and 2017 Sessions Bill Summary:

Bills Presented by the Oregon Law Commission to the Legislative Assembly

During the 2016 and 2017 Legislative Sessions, the Oregon Law Commission recommended 5 bills to the Legislative Assembly. The following is a brief summary of the recommendations:

1. **HB 4074 (2016)** The bill is a continuation of the Juvenile Court Records Work Group's multi-year efforts to update and clarify provisions authorizing disclosure of some juvenile court records. The bill also addresses procedural issues related to hearings on the issue of reporting as a sex offender for juveniles found to be within the jurisdiction of the juvenile court.

2. **HB 4102 (2016)** The bill amends provisions of Oregon's Probate Code contained in ORS Chapter 111 to address definitions and in ORS Chapter 112 to clean up technical issues that relate to making the rules governing intestacy and wills more likely to carry out the intent of decedents, and to clarify provisions where the language in the current statutes is unclear.

3. **HB 2986 (2017)** The bill is a continuation of the Probate Modernization Work Group's efforts to update Oregon's Probate Code. The focus of the bill addresses ORS Chapters 113-116, expanding provisions for special administrators to handle an estate prior to the appointment of a personal representative and addressing jurisdictional issues by codifying existing common law.

4. **SB 896 (2017)** The bill is a rewrite of ORS Chapter 138 to address the complicated nature of criminal appeals, including the time and valuable tax-based resources used in litigating issues like what is appealable versus reviewable. The bill also makes explicit the basis for appeal by a defendant as well as the basis for appeal by the State.

5. **SB 899 (2017)** The bill creates a comprehensive code of receivership statutes in Oregon, building from ORCP 80, and defines how a receivership is operated. The bill defines the basis for the appointment of a receiver and makes explicit the authority and power of a receiver.

Agenda for future sessions *coming soon*

Amendments to the Juvenile Court Records Statutes

Report of the Juvenile Court Records Work Group on House Bill 4074A (2016)

Prepared by:
Caitlynn (Dahlquist) Knopp, Law Clerk,

Oregon Law Commission

From the Offices of:
Executive Director Jeffrey C. Dobbins
&
Deputy Director Laura H. Handzel

I. Introductory Summary

The Oregon Law Commission ("OLC" and "Commission") previously undertook a comprehensive review of Oregon law pertaining to juvenile court records at the request of the Oregon Judicial Department's ("OJD") Law and Policy Work Group created as part of OJD's eCourt Program. The OLC's Juvenile Court Records Work Group ("Work Group") developed legislative proposals to make juvenile court records amenable to the eCourt process. These proposals were approved by the OLC Commissioners, submitted to the Legislative Assembly, and enacted into law via Senate Bill 622 (2013).

In brief summary, the bill defined two types of juvenile court files: the record of the case and the supplemental confidential file. Under current law, the two types of files containing juvenile court records must be separately maintained by juvenile courts. Current law also details who is entitled to inspect and who is entitled to receive copies of the two types of files. Senate Bill 622 (2013) continued the long-standing state policy that juvenile case records are to be treated differently than other civil and criminal case records. Consequently, both types of juvenile court records, the record of the case and the supplemental confidential file, are generally confidential.

To be entitled to inspect or copy the record of the case or the supplemental confidential file, an individual must be included in the list of persons entitled to access in the statute. There are four such lists set out in the statutes related to inspection of the record of the case, copying of the record of the case, inspection of the supplemental confidential file, and copying of the supplemental confidential file. At the end of each statutory provision setting out the list of persons entitled to access the records, Senate Bill 622 (2013) included a catch-all provision authorizing juvenile courts to allow access to "any other person allowed by the court." These provisions were added by the Commission just before it gave final approval of the bill and sent it to the Legislative Assembly. These catch-all provisions were intended to explicitly grant the court authority and discretion to allow inspection and/or copying of those records by other non-listed persons on a case-by-case basis.

At the time this addition was being considered by the Commission, litigation - including a mandamus petition seeking to have a trial judge involved in a pending proceeding ordered to provide records to the press - had been filed. Several members of the OLC and the Work Group were involved in the litigation and therefore recused themselves from any discussion of the catch-all provisions. This eliminated any opportunity for a full and meaningful discussion of those provisions in Work Group meetings or before the Commissioners. Consequently, a delayed operative date was sought. Senate Bill 622 (2013) passed with a delayed operative date of July 1, 2014, with respect to the catch-all "any other person allowed by the court" provisions.

During the 2014 Legislative Session, additional modifications were made to the juvenile records laws primarily at the request of the Oregon Judicial Department. Those changes were made through Senate Bill 1536 (2014). During the 2014 Legislative Session, the operative date for the "any other person allowed by the court" provisions was pushed back a second time until September 30, 2015. This delay was requested due to the fact that the pending litigation had not yet been resolved. That litigation concluded in December 2014, with denial of the mandamus petition but without any written opinion issued by the Oregon Supreme Court (Or. Sup. Ct. Case No. S062069).

Senate Bill 405 (2015) delayed the "any other person allowed by the court" language a third time, this time until September 2016, in order to allow the Work Group ample time to formulate a sound solution. Senate Bill 405 (2015) additionally made other minor changes to address unattended consequences of past bills, such as allowing the Oregon Youth Authority to disclose information that is not confidential and not exempt from disclosure.

II. History of the current project

The Oregon Law Commission submits House Bill 4074 to the 2016 Legislative Assembly to address the "any other person allowed by the court" provision and make other minor changes. The Work Group has met three times and has put in many additional hours to draft the language addressing "any other person allowed by the court," as well as make other needed changes brought to the Work Group's attention by various stakeholders.

The Juvenile Court Records Work Group voting members are: Julie McFarlane, Chair of the Work Group, OLC Commissioner and Attorney; Laura Handzel, Deputy Director of the OLC; BeaLisa Sydlik, Deputy Legislative Counsel; Susan Amesbury, Department of Justice Government Services & Education Section; Amanda Austin, Department of Justice Civil Enforcement Child Advocacy; Brad Berry, Yamhill County District Attorney's Office; Office of Public Defense Services; Carmen Brady-Wright, Nancy Cozine, Office of Public Defense Services; Greg Engebretson, Juvenile Director in Clatsop County; Prof. Leslie Harris, Dorothy Kliks Fones Professor of Law at the University of Oregon; Megan Hassen, Oregon Judicial Department; Judge Norman Hill, Polk County; Neal Japport, Deputy Trial Court Administrator for Oregon Judicial Department; Christine Kirk, Oregon Youth Authority; Leola Mckenzie, Oregon Judicial Department; Judge Maureen Mcknight, Multnomah County Circuit Court; Tahra Sinks, Attorney; Shannon Storey, Department of Justice; and Jason Walling, Department of Human Services.

III. Statement of the problem areas and objectives of the proposal

The Work Group was tasked with determining the standard for "any other person allowed by the court." Juvenile court judges requested that there be guidelines and standards given in the statute for them to follow when asked by individuals or entities not explicitly listed for access to juvenile records. Other Work Group members proposed different language and standards. After much deliberation of the different options, the Work Group agreed to the standard presented in section 9 of the bill. The goal in reaching a standard was to balance the best interest of juveniles with the constitutional requirement for open courts while also giving juvenile court judges sufficient guidance when considering requests for access to juvenile records.

IV. The proposal

Section 7:

This section amends ORS 419A.255.

It adds "or entity" to the "any other person allowed by the court" language ("any other person or entity allowed by the court") and specifies application of section 9 of the Act in order to make determinations required in subsections (1)(b)(Q); (1)(c)(E); (2)(b)(O); and (2)(c)(J).

The Work Group recognizes the important public service functions certain organizations play that require access to juvenile court records. As such, subsection (16) contains a juvenile court record access provision for the Office of Public Defense Services for the purposes of performing their statutory duties to audit attorney appointments and investigate representation of parties in a juvenile court proceeding. Subsection (17) contains a record of the case access provision for the Oregon State Bar for the purpose of performing their statutory duties to investigate attorney representation of a party in a juvenile court proceeding. The Oregon State Bar has agreed that an agreement between OSB and OJD regarding access to juvenile court records will include language that the OSB will not access exhibits that are part of the record of the case. A small sub-sect of the larger Work Group came together to craft these two provisions carefully to ensure compliance with confidentiality requirements imposed by Title IV-E of the Social Security Act. The language for both subsections (16) and (17) was approved as meeting that threshold by Region X.

Subsection (18)(a) clarifies that a child, ward, youth or youth offender or a parent or guardian of such who is entitled to inspect or copy the record of the case pursuant to subsections (1)(b) and (c) continues to enjoy inspection or copy rights after jurisdiction is terminated and after the child, ward, youth or youth offender reaches the age of majority. *Please see infra* on page 6 for additional discussion regarding the term "parties" used in this section.

Subsection (18)(b) states that parents who have had their parental rights terminated maintain the inspection or copy rights that existed up until the time their rights were terminated by entry of judgment. It also allows parents to obtain a copy of the judgment terminating their parental rights.

Subsection (19) clarifies that there is no requirement to redact names of or information about siblings or other persons contained in the record of the case or the supplement confidential file. This is current practice, but there was some question as to whether redaction was required. This subsection clarifies that indeed it is not required.

Section 8:

States section 9 is added to and part of ORS Chapter 419A.

Section 9:

Details the requirements and considers what factors juvenile court judges must balance when a person or entity motions the courts for access to juvenile records under the "any other person or entity" provision. The Work Group considered many approaches before deciding on that contained in the bill. The Work Group agreed to the process as outlined to provide an approach that balances adequate guidance for juvenile court judges while still providing them with meaningful discretion. At the same time, the process aims to provide a clear mechanism to allow persons or entities to petition the Court for access to juvenile court records. The Work Group felt that this standard would withstand any constitutional challenges regarding open courts because it strikes the appropriate balance between open courts and protecting juvenile interests.

The process requires any person or entity not included in ORS 419A.255 as a person or entity entitled to inspect or copy the record of the case or the supplemental confidential file to motion the court to inspect or copy the record of the case or the supplemental confidential file. The motion must include a sworn affidavit or declaration under penalty of perjury that includes: 1) A statement detailing the reasons why the person or entity would like to inspect or copy the record; 2) Any relevancy of the inspection or copying to the juvenile proceeding; and 3) How the inspection or copying will serve the balancing of the interests in subsection (6) of this bill. The Work Group did not want to require relevancy but wanted to make sure it was included in the motion if the person or entity had reason for requesting inspection or copy of the record that was relevant to the juvenile proceeding. If the person or entity does not have any relevant reason, they should simply state that.

Subsection (2)(a) outlines the notice requirements. It states that the person or entity filing the motion must serve all parties to the juvenile court proceeding with a copy of the motion and affidavit or declaration no later than 14 days before the court considers the motion. ORS 174.120 and ORS 419B.854 (addressing dependency cases) contain details regarding the computation of time. This section also requires that the person or entity filing the motion must provide all parties and the attorney of record to the juvenile court proceeding with written notice that the party or attorney of record has until 14 days after the date of service to file a response or objection to the motion, unless the court provides an alternative timeline pursuant to subsection (2)(c).

Subsection (2)(b) requires the court to mail notice of the time to respond or object to a party or the attorney of record at their last known address and also note the date the notice was mailed if the person or entity filing the motion states that they do not know the identity or address of the party or attorney of record, which could very well be the case. This subsection further requires the court to mail the notice at least 14 days before the court considers the motion, unless otherwise specified pursuant to subsection (2)(c).

Subsection (2)(c) allows the court to reduce or extend the time for service on its own motion or upon application of the person or entity filing the motion for good cause shown.

Subsection (3) allows the court to summarily deny the motion if the requirements contained in subsections (1) and (2) are not met.

Subsection (4) permits the court to set a hearing to consider the motion but requires them to send notice of the time and place to all parties.

Subsection (5) requires the court to conduct an *in camera* review, taking into account any responses or objections made by a party.

The list of four factors the court must weigh in determining whether to allow inspection or copying of the record of the case or supplemental confidential file are found in subsection (6). The Work Group spent several hours deliberating these factors before deciding on the following four. They are: 1) The privacy interest of the child, ward, youth, or youth offender or his or her family members; 2) The interests of the other parties of the proceeding or the victims in the proceeding; 3) The interests of the person or entity filing the motion; and 4) The interests of the public. The Work Group wanted the courts to consider the privacy interests of the juveniles and their family members that are a part of these proceedings because the records often contain information that is extremely private and would serve little purpose outside of the proceeding. The Work Group felt it necessary for the courts to include in its balancing of factors the interests of all parties of the proceedings as well as any victims involved in the proceedings.

"Parties" when referenced in the bill refers to persons conferred party status by ORS 419B.875 in dependency cases and ORS 419C.285 in delinquency cases. Once a person or entity has attained party status, that status continues, even after the case is closed. This is important to note because access to inspect and copy the record of the case and/or the supplemental confidential file is sometimes dependent on party status. It should be noted that a child, ward, youth, or youth offender maintains inspection and copy rights after reaching the age of majority and after jurisdiction is terminated. Some practitioners and courts use the term "former youth," to reference the status of the child, ward, youth, or youth offender after they have reached the age of majority or after jurisdiction is terminated. The Work Group considered using this term in the statute, but decided against it because "youth offender" is clearly defined at ORS 419A.004 (37) to include individuals even after they reach the age of majority.

Subsection (7) outlines court requirements should they grant a motion made under section 9. This includes the requirements that they allow inspection or copying only as necessary and that they make protective orders governing the use of the materials inspected or copied. Additionally, subsection (7) allows the court to limit inspection or copying to particular parts of the record of the case or the supplemental confidential file. It also states that the court may specify the timing and procedure for allowing inspection or copying.

Section 11:

Subsection (1) states application of section 9, and the amendments to ORS 419A.255 by section 7, to juvenile court proceedings pending or commenced on or after September 30, 2016. Subsection (2) declares an operative date of September 30, 2016 to sections 8 and 9 as well as the amendments to ORS 419A.255 by section 7. The Work Group decided the date of September 30, 2016, would result in the least amount of confusion when individuals requesting access to records need to determine whether they fall under the new or old law.

V. Conclusion

Thank you to the House Interim Committee on Judiciary, specifically Chair Jeff Barker, for graciously introducing this bill on behalf of the Oregon Law Commission and its Juvenile Court Records Work Group.

The Work Group's end product is contained in a single bill along with another juvenile law fix needed to correct unintended consequences from House Bill 2320 (2015), a bill unrelated to the Commission. Neither the Work Group nor the OLC is addressing House Bill 2320 (2015). Similarly, neither the Work Group nor the OLC take any position on the contents of House Bill 4074 (2016) falling outside the scope of the Juvenile Court Records Work Group's breadth. The work of the Commission's Juvenile Court Records Work Group is contained at section 7, 8, 9, 11 and 12.

Amendments to the Oregon Probate Code

Report of the Probate Modernization Work Group on House Bill 4102 (2016)

Prepared by:
Professor Susan N. Gary,
University of Oregon School of Law,
Oregon Law Commissioner

From the Offices of:
Executive Director Jeffrey C. Dobbins
&
Deputy Director Laura H. Handzel

I. Introductory summary

Oregon adopted its probate statutes in 1969. Although the legislature has amended the statutes through the years, amendments have been piecemeal and the probate statutes have not undergone a thorough review since 1969. Some sections need updating due to changes in society, some sections need clarification because lawyers working with these sections report uncertainty about their meanings, and the statutes may benefit in general from a careful review of all sections. The goals of the project have been to clarify and modernize statutory sections as appropriate, while leaving intact the parts of the probate statutes that work well.

II. History of the project

In October 2013, the Oregon Law Commission ("OLC" and "Commission") appointed the Probate Modernization Work Group ("Work Group") to review and recommend changes to the Oregon probate statutes. Members of the Work Group came from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice (the Charitable Activities and Civil Recovery Sections of the Civil Enforcement Division), and the Circuit Courts (both probate judges and staff). The Work Group began with Chapter 112 and based on the Work Group's recommendations, the Commission approved Senate Bill 379 for the 2015 Legislative Session. The Legislature enacted that bill, making changes to Chapter 112 effective January 1, 2016. In October 2015, the Work Group resumed its work, turning to Chapter 111. In addition, the Work Group reviewed a few technical problems related to the changes made to Chapter 112 in 2015.

The voting Work Group members are: Lane Shetterly, Chair of the Work Group, OLC Commissioner and Attorney; Laura H. Handzel, Deputy Director of the OLC; Susan N. Gary, Reporter for the Work Group, OLC Commissioner and Professor at University of Oregon School of Law; BeaLisa Sydlik, Deputy Legislative Counsel; Cleve Abbe, Lawyers Title of Oregon LLC; Kathy Belcher, Attorney; Susan Bower, Department of Justice Charitable Activities Section; Jeff Cheyne, Attorney; Retired Judge Rita Cobb, Washington County; Mark Comstock, OLC Commissioner and Attorney; Judge Claudia Burton, Marion County; John Draneas, Attorney; Heather Gilmore, Attorney; Robin Huntting, Clerk in the Civil Case Unit for Clackamas County; Gretchen Merrill, Department of Justice Government Services & Education Section; Marsha Murray-Lusby, Attorney; Ken Sherman, Attorney; Jennifer Todd, Attorney; Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School; and Judge Donald Hull, Samuels Yoelin Kantor LLP.

This bill amends sections in Chapter 111 and includes some technical corrections to Chapter 112.

III. Statement of the problem area and objectives of the proposal

Technological and social changes have affected the way people manage and dispose of their property. The proposal amends Chapter 111 to modernize the statutes and clarify provisions where the language in the current statutes is unclear. The proposal also makes a few technical corrections to Chapter 112 to fix small problems in Senate Bill 379, enacted in 2015.

IV. Review of legal solutions existing or proposed elsewhere

The Work Group approached the project by using the ORS provisions as the baseline. The Work Group was provided with a copy of the sections of the Uniform Probate Code ("UPC") that correspond to the topics being discussed. The UPC had been annotated to indicate where the UPC differs from the ORS, so the Work Group could discuss those differences and decide whether to recommend something similar to the UPC for a particular provision. In addition, the Work Group considered statutes from other states where appropriate.

V. The proposal

Section 1: This section amends ORS 111.005, the definitions section. A number of definitions are changed:

Advancement. In the common law, the doctrine of "advancement" developed to indicate when a gift received during life would reduce the share the donee would otherwise receive in intestacy. The terms "satisfaction" and "ademption by satisfaction" were used for a similar situation when the decedent died testate. The ORS has codified these doctrines, with Chapter 111 using the term advancement for intestate situations and Chapter 112 using the term satisfaction for testate situations.

Increasingly the term advancement has come to be used, by practitioners and others, to cover both situations. The Work Group decided to change the terminology in the statutes to conform to common usage. The amended definition applies the term to testate and intestate situations. Other sections of this proposal make corresponding changes in the sections that provide the substantive rules for advancement and satisfaction.

Decedent. The Work Group deleted the limitation that a "decedent" refers to a person who has died "leaving property that is subject to administration." In most situations covered by the statutes the decedent will have left property subject to administration, but a probate proceeding might be opened in a wrongful death action for a decedent who left no probate property. The term should be clear in context without the limiting language.

Descendant. The Work Group decided to replace the term "issue" with the term "descendant" throughout the statutes. Descendant is the word more commonly used in modern documents. The Work Group left the definition of issue in the statutes, because many older documents will continue to use the term. The definition of descendant tracks the language that had been in the definition of issue to clarify that for purposes of determining intestate shares, a descendant of a living descendant will not be included in the term. The word "lineal" was deleted from the definition because it is unnecessary and confusing. Legal documents use the term descendant to mean someone lineally descended from an ancestor, and that is how it is intended under this definition.

The term "lineal descendant" has been used in the statute to distinguish lineal descendants from collateral descendants. "Collateral descendant" is a term that means descendants of collateral relatives. Using that definition, a niece of a decedent would be the decedent's collateral descendant. The Work Group members agreed that distinguishing between lineal and collateral descendants is confusing. None of the practitioner members of the Work Group used the term "collateral descendant" in their practices; they would refer to the niece of a decedent as a "collateral relative" rather than a collateral descendant. Given that the term collateral descendant is no longer used, the term lineal descendant seems to be a relic of an earlier era. The UPC does not use the word lineal.

Devise (as a noun), devise (as a verb), and devisee. These definitions were changed to delete references to "legacy," "bequest," "bequeath," "legatee" and "beneficiary." The Work Group does not intend to change the meaning of the definition. Rather, the extra words were deemed unnecessary.

Funeral. The Work Group discussed the fact that most people and their lawyers think that the word "funeral" includes a memorial service and not just the disposition of remains. The definition now makes that clear.

The Work Group discussed at length the problem of differing views of the appropriate amount to spend on a funeral. Family members may disagree on expenses associated with a memorial service, especially if the costs of the service reduce the shares of the estate they will receive. Further, if the estate has creditors, a lavish memorial service might reduce the amount available to pay creditors.

The Work Group concluded that limitations in other sections were sufficient to address these potential problems and did not add limitations to the definition. ORS 113.005, ORS 113.242, and ORS 114.305 limit the amount that can be spent to a funeral "in a manner suitable to the condition in life of the decedent." ORS 114.305 further provides that if the estate lacks sufficient assets to pay government claims for assistance given to the decedent during life, only expenses "necessary for a plain and decent funeral" can be paid. Similarly, under ORS 115.125 if the estate lacks sufficient assets to pay all creditors and expenses, only the expenses of a plain and decent funeral are entitled to priority in payment, and then only after support of spouse and children and expenses of administration are paid.

The definition says a funeral "includes" the disposition of remains and a memorial service, so the definition is not exclusive and does not try to specify exactly what types of expenses are covered. The Work Group concluded that additional limitations in the definition section were unnecessary.

Generation. In 2015, Senate Bill 379 added a definition of "generation." The Work Group concluded that the definition was not necessary, because the general meaning of generation is commonly understood and a concern that someone would read generation in a statute to mean an era of time (such as the Baby Boomers or Millennial Generations) or a period of years was not sufficient reason to add a definition. The UPC does not include a definition of generation.

Heir. The definition was amended to clarify that an "heir" can be determined whether a person is living or deceased. A living person's heirs do not take property, of course, but may be identified for other purposes. The clause confirming that the term heir can include a surviving spouse was removed as unnecessary. The clause may have been included in the statute to remind a reader that the terms heir and descendant have different meanings. The term heir clearly includes a surviving spouse, and no change is intended by the removal of the unnecessary words.

Issue. The Work Group decided to replace the term "issue" with the term "descendant" throughout the statutes but left the definition of issue in the statutes, because many older documents continue to use the term.

A few other changes were made to improve the language of the definitions.

Sections 2 – 5: ORS 112.025 through ORS 112.058, the intestacy provisions, were amended to change the term "issue" to "descendant" and to make language in the provisions parallel.

Section 4 made a technical correction to ORS 112.045(4)(a) to clarify the way representation works when the descendants of grandparents are considered. The changes are intended to make clear that if a grandparent predeceases the decedent and leaves no descendants who survive the decedent, the decedent's property will be distributed among the other grandparents who are living and the descendants of any grandparent who predeceased the decedent, leaving descendants who survive the decedent. Property will not escheat unless no grandparent or descendant of a grandparent survives the decedent.

If at least one but not all of the grandparents survive the descendant, the share of any deceased grandparent will go to that grandparent's descendants. If the descendants of that grandparent are all of the same generation, they take equally.

> **Example:** Paternal Grandmother (PGM) and Paternal Grandfather (PGF) both predeceased the decedent leaving one child who survived the decedent. The child will take one-half of the decedent's estate (PGM's one-quarter and PGF's one-quarter). Maternal Grandmother survived the decedent and will take one-quarter of the estate. Maternal Grandfather did not survive the decedent. His two children also predeceased the decedent. Six of Maternal Grandfather's grandchildren survived the decedent. Two of the grandchildren are descended from one child and four grandchildren are descended from the other child. The six grandchildren will share equally.

Section 6: ORS 112.065 defines "representation" as a method of determining how intestate shares are distributed among different generations. The language was rewritten to provide a better explanation of the concept, and the definition was changed so that the term representation can be used for any person. The statute being changed defined representation in the context of the decedent, which limited its usefulness in the intestacy provisions where representation may be used to distribute shares to descendants of collateral relatives of the decedent. (*See infra* the discussion under Sections 2-5.)

Section 7: This section repeals ORS 112.390, a provision added by section 28 of Senate Bill 379 (2015) to apply the advancement rules to testate situations. section 8 of the proposal moves the substance of ORS 112.390 to ORS 112.135.

Section 8: This section amends ORS 112.135, the section that provides for advancements. As explained in connection with the definition of advancement, the Work Group decided to apply the term advancement to testate as well as intestate situations. Subsection (1) of section 8 provides the rules for intestate situations, subsection (2) for testate situations, and subsection (3) extends the rules on advancements to property transferred through nonprobate means.

The current statute applies the advancement rules only if the decedent died intestate as to the entire estate. The Work Group eliminated the "wholly intestate" requirement for an advancement in an intestate situation. The UPC advancement provision changed in 1990 to apply to a decedent who died intestate as to “all or part” of his or her estate. This bill adopts the approach of the UPC in applying advancement in a partially intestate situation. Further, the intent of the new provision is that the reduction to a donee’s share will apply to both intestate and testate property. In ORS 112.145, the section describing how the reduction is made, “estate” means both intestate and testate property.

The Work Group noted that a person might make a gift intended as an advancement through a nonprobate means (a pay-on-death designation, a beneficiary designation on an insurance policy, etc.). If the donor indicated, in writing, that the transfer was intended to be taken as part of the donee’s share of the estate, then the statute should give effect to that intent through the provisions governing advancement. The treatment of nonprobate transfers within the advancement rules extends those rules beyond current statutes and beyond the common law, but is in keeping with the policy of trying to give effect to the intent of decedents. The rules require a written indication of the intent, either a writing by the decedent or an acknowledgment by the donee, and that requirement should limit difficulties in proving advancements. In some cases a decedent may have intended a gift as an advancement without saying so in writing. The statutes will not treat that situation as an advancement, because the challenges of proof are too great. The requirement of a written statement or acknowledgment has been in Oregon law since 1969 and is standard around the country.

Another change to the advancement provisions is that a decedent can provide, in writing, for an alternative time or method of valuing the advancement. If the decedent does not direct valuation, the statute provides, as it has since 1969, that the property will be valued as of the time the donee came into possession or enjoyment of the property or as of the time of the decedent’s death, whichever occurs first. For nonprobate transfers, property will be valued as of the decedent’s death, unless the decedent provides otherwise in writing. The Work Group acknowledged that parties might argue about the time of possession or enjoyment, but decided not to change the existing statute because circumstances will vary too much for statutory specificity to improve results.

In discussing the valuation provisions, the Work Group noted that an advancement made by a gift of real estate in joint tenancy would be valued at two different times. When a donor adds a donee to title of real property as a joint tenant, the donor makes a current gift of one-half of the property. That half of the property would be valued at the time of the gift. When the donee receives the other half of the property on the donor’s death, that half would be valued at that time. If the donor wanted to reach a different result, the donor could provide in writing for a different valuation time or process.

Section 9: This section amends ORS 112.145, which provides the calculation for reducing an heir or devisee’s share if the person received an advancement. The changes extend the provisions to cover testate situations. The word "share" is used to mean the portion of the estate to which the heir or devisee is entitled. The shares of heirs and devisees may not be equal.

Sections 10-11: ORS 112.155 and ORS 112.175 are amended to replace the term "issue" with the term "descendant."

Section 12: ORS 111.015 provided transitional rules when the probate statutes were enacted in 1969. Many of these rules are now obsolete and can be removed.

Sections 13-14: In Oregon, jurisdiction over probate matters lies in the circuit court in most counties and in the county court in six counties. In those six counties, a county court can transfer an estate proceeding to a circuit court. These sections amend ORS 111.095 and ORS 111.115 to clarify and modernize the language. These sections do not make substantive changes.

Sections 15-16: These sections amend ORS 111.175 and ORS 111.185 governing delegation by a judge to a probate commissioner or deputy probate commissioner. The Work Group heard from probate judges and probate staff who described how probate courts operate in different counties in Oregon. The Work Group also heard from practitioners who wanted to be able to ask the judge to review decisions made by a probate commissioner or deputy.

The Work Group concluded that authority to appoint a probate commissioner and deputy commissioners should lie with the probate judge. Section 15 amends ORS 111.175 to require that any deputy commissioners be appointed by the judge, and not by the probate commissioner as under current law. The Work Group wanted the statute to require that the judge prescribe the duties and responsibilities of the probate commissioner and any deputies, by rule or order, to avoid uncertainty about the authority of the probate commissioner.

ORS 111.185 provides for several things a probate commissioner or deputy may do, if authorized by the judge, and section 16 adds the authority to appoint court visitors to the list.

Further revisions to ORS 111.185 clarify the rule that a judge can set aside or modify any order or judgment made by a probate commissioner or deputy within 30 days. The judge can act on his or her own or in response to an objection. The bill adds a subsection clarifying that any interested person may object to an order or judgment within 30 days, without going through a full-scale appeals process.

Section 17: This section amends ORS 112.238, a statute added by Senate Bill 379 (2015). ORS 112.238 provides that a court can admit a writing to probate as a decedent's will if the proponent of the writing establishes, by clear and convincing evidence, that the decedent intended the writing to be a will or a revocation of a will. Technical corrections have been made to the provisions that indicate who should receive notice of a petition and now provide better coordination with the notice provisions of Chapter 113. Also, a subsection that was included in this section in error (*former* subsection (4)) is deleted. In addition, a new subsection clarifies that after a will is admitted to probate under ORS 112.238, an interested person can still challenge the will under any ground for a will contest provided under ORS 113.075, other than ineffective execution, within the time provided by ORS 113.075.

Section 18: This section amends ORS 111.275 by adding to the list of decisions for which a court may enter a limited judgment, a decision based on admitting or acknowledging the validity of a writing under ORS 112.238.

Section 19: This section makes a conforming amendment needed because the subsection of a definition changed.

Section 20-23: These sections make conforming amendments to ORS 113.005, ORS 113.242, ORS 114.305, and ORS 115.125. Words included in the definition of funeral are deleted in each of these sections as unnecessary and potentially confusing, given that funeral is now defined with additional language.

Section 24: This section makes the amendments to Sections 1 to 3, 5, 6, 8 to 16, 18 to 23, and the repeal of ORS 112.390 by section 7 operative on January 1, 2017. The amendments to ORS 112.045 and ORS 112.238 by sections 4 and 17 will become effective immediately upon signature pursuant to the emergency clause in section 26.

Section 25: Subsection (1) of this section states that the amendments to sections 1 to 3, 5, 6, 8 to 16, 18 to 23, and the repeal of ORS 112.390 apply to estates of decedents dying after the delayed operative date of January 1, 2017.

Subsection (2) of this section provides that the amendments to sections 4 and 17 apply to estates of decedents dying after the effective date of the bill, which will be the date that the bill is signed by the Governor pursuant to the emergency clause in section 26.

Section 26: This section declares the bill an emergency and makes it effective on its passage. However, all sections of the bill except for sections 4 and 17 have a delayed operative date of January 1, 2017. This is because sections 4 and 17 contain necessary corrections and cleanups from Senate Bill 379 (2015). The Work Group did not feel the same urgency was necessary with respect to other sections.

VI. Conclusion

The Commission thanks Representative Brent Barton for graciously sponsoring this measure on behalf of the Oregon Law Commission and its Probate Modernization Work Group.

These amendments to Chapters 111 and 112 will improve the statutory law that provides rules for intestacy and wills.

Oregon Probate Code

Report of the Probate Modernization Work Group on HB 2986A (2017)

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I. Introductory summary

Oregon adopted its probate statutes in 1969. The probate statutes had not undergone a thorough review until the Oregon Law Commission's Probate Modernization Work Group began its efforts in 2013. In two recent sessions, the Oregon Legislature has recognized the importance of the Oregon Law Commission's work recommending changes to the Probate Code by enacting them. The current bill contains additional amendments to improve the probate statutes. The Work Group's goal continues to be to clarify and modernize the probate statutes, while leaving intact the parts of the statutes that work well.

II. History of the project

In October 2013, the Oregon Law Commission ("OLC" and "Commission") appointed the Probate Modernization Work Group ("Work Group") to review and recommend changes to the Oregon probate statutes. Members of the Work Group came from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice (the Charitable Activities and Civil Recovery Sections of the Civil Enforcement Division), and the Circuit Courts (both probate judges and staff). The Work Group began with Chapter 112 and based on the Work Group's recommendations, the Commission approved Senate Bill 379 for the 2015 Legislative Session. The Legislature enacted that bill, making changes to Chapter 112 effective January 1, 2016.

Beginning in October 2015, the Work Group reviewed and modernized Chapter 111, while also adjusting some technical issues in Chapter 112. The Commission approved House Bill 4102 for the 2016 Legislative Session. The Legislature enacted that bill, making changes effective in January 1, 2017, with an emergency clause for technical corrections to Chapter 112 effective immediately.

In April 2016, the Work Group resumed its efforts by reviewing Chapters 111, 113, 114, 115, and 116, and related Chapters 18 and 125. HB 2986A amends sections in those chapters and makes conforming amendments to other affected chapters.

The voting Work Group members are:

Lane Shetterly, Chair of the Work Group and OLC Commissioner
Prof. Susan Gary, OLC Commissioner, Work Group Reporter & Professor at University of Oregon School of Law
Cleve Abbe, Lawyers Title of Oregon LLC
Kathy Belcher, McGinty & Belcher Attorneys PC
Victoria Blachly, Samuels Yoelin Kantor LLP
Susan Bower, Department of Justice, Charitable Activities Section
Judge Claudia Burton, Marion County Circuit Court
Judge Rita Cobb, Washington County Circuit Court
Mark Comstock, OLC Commissioner and Attorney
John Draneas, Draneas & Huglin PC
Heather Gilmore, Heather O. Gilmore PC
Judge Donald Hull, Samuel's Law
Robin Huntting, Clerk in the Civil Case Unit for Clackamas County Courthouse
Gretchen Merrill, Department of Justice, Civil Recovery Section

Marsha Murray-Lusby, Dunn Carney Allen Higgins & Tongue LLP
Professor Scott Shepard, Willamette University College of Law
Ken Sherman, Sherman Sherman Johnnie & Hoyt LLP
Jennifer Todd, Private Attorney
Prof. Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School

The Staff Members are:
Laura Handzel, Deputy Director, Oregon Law Commission
Nita Kumar, Law Clerk, Oregon Law Commission
Marisa James, Deputy Legislative Counsel

Attorney Jeff Cheyne was a valued member of the Work Group until he passed away in July of 2016. This Work Group also benefited from the contributions of many Interested Persons who regularly attended meetings.

III. Statement of the problem area and objectives of the measure

Technological and social changes have affected the way people manage and dispose of their property. The bill amends Chapters 111, 113, 114, 115, and 116 to modernize the statutes and clarify provisions where language is currently unclear. A few related chapters are amended for consistency.

IV. Review of legal solutions existing or proposed elsewhere

The Work Group approached the project by using the ORS provisions as the baseline. The Work Group reviewed the legislative history of the current ORS provisions, considered sections of the Uniform Probate Code ("UPC") that corresponded to the topics being discussed, and discussed statutes from other states where appropriate.

V. The measure

Section 1: This section amends ORS 111.005(15), the definition of "estate." A new subsection is added to the definition of "estate" to clarify that personal property of a decedent is included in the estate, even if the property is located outside Oregon. This provision simply confirms the common law rule. The Work Group recognizes that it will not be binding on a court of another state but hopes it will serve as a general reminder of the common law rules.

Section 2: This section adds two new subsections to ORS 111.085, providing that when someone takes a distribution from an Oregon estate, the person submits to personal jurisdiction in Oregon for any matter involving the estate. The new provision does not preclude other methods of obtaining jurisdiction over a distributee.

Section 3: ORS 111.215 addresses notice of a hearing when an order or judgment is sought. The amendments provide that the court may authorize notice by electronic means and that the Department of Human Services or the Oregon Health Authority may adopt rules permitting the acceptance of electronic notice.

Sections 4-6: ORS 113.005 provides for the appointment of a special administrator to protect property of a decedent before a personal representative is appointed. The Work Group wanted to balance the need for a bond to protect the persons interested in an estate with the concern that in some situations a bond could create an unnecessary expense. The Work Group considered providing a minimum in the statute but concluded that a minimum was not necessary. The amendments to ORS 113.005 emphasize the importance of a bond and provide additional guidance to the court in setting the bond. The amendments clarify how a special administrator is appointed and how the bond is set. A new section (Section 6 of the bill) provides that a court can waive the bond under circumstances in which the property will be protected. Section 41 of the bill amends ORS 22.020 to remove a restriction on the use of letters of credit in lieu of a bond in probate matters. This is because in some cases a letter of credit will provide both sufficient protection and greater flexibility.

Section 7: The requirement in ORS 113.035 that the decedent's social security number or taxpayer identification number be included on a petition for appointment of a personal representative was removed. The term "executor" was changed to "personal representative." (This updating change in language was made throughout the statutory sections affected by this bill.)

Sections 8: Section 8 adds a new section to Chapter 113, set forth in Section 9. The new section creates an alternative compensation scheme for the personal representative.

The Work Group heard concerns from the probate judges that finding someone willing to serve as a personal representative for an estate with modest assets and complicated property issues can be difficult. If no family member is available to serve, a professional fiduciary may be unwilling to serve if compensation is based on a percentage of the value of the estate under ORS 116.173(3). The new provision allows a personal representative to request that compensation be determined in a different manner, presumably on an hourly basis. The personal representative must request the alternative means of determining compensation in the petition to be appointed, and cannot make the request after the appointment. The petition must include "specific facts" demonstrating that compensation determined in the usual way will likely be inadequate. The court then has discretion to grant the request, but only if the court finds that the usual method for determining compensation would be inadequate.

The Work Group discussed whether to permit a request for an alternative form of compensation later in the administration of the estate. A personal representative may agree to appointment and then later learn about problems with the property of the estate that will severely reduce the fees the personal representative will receive. The Work Group concluded that it needed to balance a variety of interests and that requiring the request in the petition was the best solution. Although a variety of concerns were raised, the goal is to make it possible to find a personal representative willing to serve.

The Work Group noted that a reason for fees based on a percentage of the assets of an estate is that hourly fees do not compensate a personal representative for the liability that comes with administering a large estate.

The Work Group discussed the possibility that someone might petition for the alternative compensation as a way to drain money from an insolvent estate. Of particular concern was the worry that if the estate was required to pay estate recovery of government benefits provided by the Department of Human Services, a family member might try to inflate the fees of the personal representative in order to obtain more money from the estate. The Work Group concluded that the judges will properly exercise discretion to prevent abusive use of this new provision. The new provision requires notice to the Department of Human Services and the Oregon Health Authority so that they have both notice and time to object.

A personal representative who has been appointed subject to this alternative compensation provision can later elect to be compensated as provided in ORS 116.173(3).

Section 9: The amendments appearing on page six at lines 14, 19 and 27 delete "differently" or "different compensation" and instead insert "a different method of compensation." The intent is to make it clear that the request for different compensation that is included in the petition for appointment is only a request for a different method of determining the personal representative's compensation; it is not a request for approval of a specific amount of compensation up front.

The amendments appearing on page six at line 30 adds language to clarify that if the Department of Human Services, the Oregon Health Authority, or anyone with a right to object to a request for different compensation, does not object to the request for the different *method* of compensation up front, they still can object to the *amount* of compensation that the personal representative actually requests in the final account.

Section 10: This section modernizes the language in ORS 113.045.

Section 11: ORS 113.055(1) now states that a court will consider an affidavit of an attesting witness at the "*ex parte* review," and not the "*ex parte* hearing" of a petition for probate. The bill amends the notice period in ORS 113.055(2) to provide that a motion contesting an attesting witness must be filed 30 days after the personal representative delivers or mails notice, rather than 30 days after the will is admitted to probate. This change makes it more likely that an interested party will get notice in time to respond.

Section 12: ORS 113.075 provides rules related to the filing of a will contest but in its current form does not require someone contesting a will to provide notice to the people who may be affected. A new subsection requires someone filing a will contest to give notice to the heirs and devisees identified in the petition for probate. Although some other persons might be interested in the estate, the Work Group concluded that requiring notice to the people named in the petition for probate of the will was sufficient. The Work Group did not want to create undue hurdles to the filing of a contest, given the benefits of getting the will contest filed quickly.

If the personal representative has provided notice to the Department of State Lands, the contestant must also provide notice to that department. Further, if any devisee under the contested will is a charity, the contestant must give notice to the Attorney General.

Section 13: This section adjusts the order of priority set forth in ORS 113.085 for naming a personal representative. One adjustment is that the surviving spouse of the decedent takes priority over everyone other than someone named in the will only if the surviving spouse is a distributee of the estate. Other relatives of the decedent had fallen in the category of "nearest of kin" and that provision is changed to give priority (after a surviving spouse who is a distributee) first to a person who is both a distributee and an intestate heir, followed by a person who is a distributee but not an intestate heir. The amended statute does not create priority based on degree of kinship of persons who are distributees, but the Work Group concluded that the court would consider the suitability of any person as a personal representative in making the appointment. A new subsection states that the court may require a person asking to be appointed as personal representative to attempt to notify other people with higher priority.

Section 14: ORS 113.095 is amended to replace the term "incompetent," with "incapacitated or financially incapable," which corresponds with the terminology under ORS Chapter 125.

Section 15: The Work Group discussed the problems faced by Oregonians of limited means in obtaining bonds. Sometimes the family member who would be the best choice as personal representative cannot be considered because the person cannot meet the bonding requirement. The countervailing concern, however, is the importance of a bond in some circumstances. The Work Group concluded that the statute could provide more flexibility to the court for limiting the bond but also should clarify that a court can require a bond even a will waives a bond.

Much of ORS 113.105 is rewritten, to modernize and clarify the language. One substantive change is that the amendment removes the authority of the court to waive a bond if all devisees and heirs agree to the waiver. The Work Group concluded that the general discretion in the court regarding waiver was preferable. The amended language says that the court may waive or reduce the bond if the personal representative states the reasons for the waiver and describes known creditors of the estate. Further, the court may waive or reduce the bond if the personal representative provides written confirmation from a financial institution that the institution holds property of the estate that can be withdrawn only with an order of the court. Also, the court may waive or reduce the bond if the sale or other disposition of property is restricted.

Section 16: ORS 113.125 is amended to replace the words "executor" and "administrator" with "personal representative."

Section 17: An amendment to ORS 113.165 extends the time period for filing the inventory from 60 days to 90 days. The Work Group noted that extensions for time are frequently requested. In listing property the personal representative provides estimates of value, and the statute is clarified by changing the term "true cash value" to "fair market value."

Section 18: ORS 113.185 is amended to modernize the language (changing "appraisement" to "appraisal").

Section 19: This section amends ORS 113.195 to create a new section (4), which allows a court to remove a personal representative "for other good cause shown." The Work Group discussed the need that sometimes arises when a personal representative is not unqualified for the position but if left in the position could harm the estate. The goal of the amendment is to give the court discretion to remove a personal representative before the problems become too great. The Work Group does not intend this provision to suggest that the court compare family members with each other to determine the "best" or "most suitable" person for the position. The testator's nomination of a personal representative should be honored in most cases, and after a personal representative is appointed, the appointment creates a presumption of suitability. Only if serious problems arise should a court use the new subsection to remove the personal representative. The fact that another family member might be more suitable should not be considered “good cause” for purposes of this subsection.

Section 20: Language in ORS 113.205 is modernized.

Section 22: Language in ORS 113.215 is modernized.

Section 23: A cross-reference in ORS 113.238 is updated.

Section 24: ORS 114.005 provides that a surviving spouse and dependent children of a decedent can continue to live in the house for a year after the death of the decedent. If the spouse is not paying the mortgage, this situation can create a liquidity problem for the estate. The Work Group decided to leave the provision in the statutes but to add a new subsection that permits the court, for good cause shown, to waive or alter the right to stay in the house.

This section makes three clarifying changes that are not substantive changes. The limit that applies if the decedent has less than a fee interest is intended to encompass month-to-month rentals as well as an estate for the lifetime of another (the language that was removed). New language clarifies that the occupants of the dwelling must not only insure the dwelling but also pay the cost for the insurance. A new subsection clarifies that the dwelling is subject to the rights of anyone with a security interest in the dwelling.

Section 24 also modernizes language in ORS 114.005, changing “mechanic’s” and “materialman’s” liens to “construction” liens and “abode” to “dwelling.”

Section 25: This section adds a cross-reference in ORS 114.325(1). The ability of the personal representative to sell property may have been restricted as a way to limit the size of the bond under ORS 113.105.

Section 26: ORS 114.630 is updated by removing a reference to inheritance taxes.

Section 27: The revisions to ORS 115.005 provide guidance on what constitutes presentment of a claim.

The amended language recognizes that a creditor may file a claim with the court, but makes clear that doing so does not constitute presentment to the personal representative. Filing with the court does not provide special status over any other claim. Some creditors, particularly the Department of Human Services, like to file their claims with the court to provide information the court can consider when reviewing the final accounts. However, filing with the court creates no obligation on the court.

To present a claim a creditor must mail or personally deliver the claim to the personal representative at the address in the petition, the address provided for presentation of claims, or the address for presentation of claims provided in the published notice, as specified in the statute. The personal representative may also authorize presentment by electronic mail or facsimile transmittal.

The time for barring claims is expanded to 45 days from 30 days for creditors to whom the personal representative was required to deliver or mail a notice.

Section 28: ORS 115.065 is revised to address the ambiguity regarding a creditor with a claim secured by a security interest in property. ORS 115.056(1) is amended to clarify the creditor's continued right to foreclose on the security interest. Presentment to the personal representative does not waive the security interest in the property.

Section 29: The Work Group wanted to clarify the effect of a money judgment that creates a judgment lien against real property owned by a decedent. The bill amends the provisions in ORS 115.070 to clarify the treatment of a creditor with a judgment. Additional changes are made to ORS 18.312 in Section 42 of the bill.

In ORS 115.070, if the judgment was not a lien against property at the date of the decedent's death, the creditor will present the claim in the usual manner but with a copy of the judgment attached. If the judgment was a lien against property on the date of the decedent's death, then the lien shall be treated as a claim for which the creditor holds security, under ORS 115.065.

Section 30: ORS 115.125 provides for the priority of claims when an estate is insolvent. The bill adds, as a priority item, expenses of administration of a protective proceeding for the decedent before the decedent's death, placing those expenses at the level of priority of expenses of administration of the probate estate. The Work Group concluded that expenses related to a protective proceeding should be given a high level of priority when the protected person dies.

Medical expenses of the last illness of the decedent receive priority and include compensation of persons attending the decedent. These expenses receive priority above claims by other creditors of the estate, including the Department of Human Services for reimbursement of assistance paid to the decedent. In an insolvent estate family members may try to avoid payments to creditors by requesting compensation for "attending the decedent" in the last illness. Family members may inflate the time spent and include compensation for visiting the decedent during the last illness. The amendment limits compensation to that "which the persons are otherwise entitled by law." The intent of ORS 115.125 is to compensate a caregiver who is entitled to wages but not a family member who visits a grandparent in the hospital. The amendment is not intended to change presumptions created under case law, for example a presumption that a family member visiting a decedent did not expect compensation.

Section 31: ORS 115.135 provides for the disallowance of claims. The Work Group heard from probate judges that the courts see across-the-board denials of claims. The Work Group considered imposing a good faith requirement for denial of a claim, but concluded that determining what constitutes good faith for denial was problematic. The considerations included worries that adding a good faith would heighten conflict and increase litigation. Under existing law the court can surcharge a personal representative if the court finds that the personal representative denied a claim in bad faith. Those provisions, ORS 114.265, 114.395, are sufficient to cover potential misbehavior related to claims.

In order to limit the across-the-board denials, Section 31 amends ORS 115.135 to require that a notice of disallowance of a claim include a statement of the reason for a disallowance. To protect against matters that the statement of a reason will unfairly limit the personal representative, additional language clarifies that the statement of a reason does not constitute an admission by the personal representative and does not preclude the assertion of other defenses to the claim.

Work Group members thought that in some cases disallowance results from a lack of understanding of the meaning of disallowance. A personal representative may conclude that in an insolvent estate claims should be disallowed because they cannot be paid. Section 31 adds a new subsection to ORS 115.135 clarifying that a claim will be paid only if there are assets in the estate to pay the claim. Allowance of a claim is an admission of liability but does not ensure payment.

Section 32: This section amends ORS 115.145 to clarify that if a claimant wants to challenge the disallowance of a claim in the estate proceeding, the claimant must file the request with the court.

Section 33: ORS 116.083 is amended to change references to "voucher" to "evidence of disbursement." The statute was also updated to include irrevocable letter of credit.

The Work Group noted that the final account must include a statement that taxes have been paid, but often taxes are not yet due. Section 33 amends ORS 116.083(3)(a) to provide that the statement concerning taxes must say that taxes due have been paid, that tax returns due have been filed, and that any estate tax return that is required to be filed has been filed.

The Work Group discussed the need to request a reserve for remaining fees and expenses. Section 33 adds to ORS 116.083 a requirement that the final account include any request to retain a reserve for the payment of taxes and related expenses as a way to signal the authority to request such a reserve. The Work Group discussed whether the statute should explicitly mention the court's authority to require a supplemental accounting when a reserve has been created. The Work Group concluded that the need for a supplemental accounting rarely arises, given the limited nature of reserves, so the court can use its existing authority to require a supplemental accounting in cases where that would be appropriate.

Section 33 also adds a requirement that the final account include a statement describing the determination of compensation of the personal representative.

The provisions related to a statement in lieu of final account are amended to require a statement describing a request for a reserve. In addition, the requirement that all distributees of an estate consent to the filing of a statement in lieu of final account is changed to limit the necessary consents to distributees other than distributees who receive a specific bequest or a cash bequest and have been paid in full.

Section 34: ORS 116.093 provides for notice when the personal representative files the final account and petition for a judgment of distribution. Section 34 adds a requirement that notice be given to the Attorney General if a charity is a residual beneficiary or if the will provides a specific devise for a charity and the charity will not receive the full amount of that specific devise. A charity named as a devisee may not be able to protect its interests, and the Attorney General needs information about the estate to determine whether excessive fees or other problems have unfairly reduced the charity's interest in the estate. Note that this requirement of notice to the Attorney General applies to final accounts under ORS 116.093, and not to statements in lieu of final account, which are governed by ORS 116.083.

Section 34 deletes subsection (1)(d) of ORS 116.093 because the other categories capture everyone who would have an interest in the estate. Additional changes in Section 34 modernize the language of ORS 116.093.

Section 35: Under ORS 116.113, when a final account or statement in lieu of final account is filed, the court will issue a judgment of final distribution. Only one document—one judgment—is needed to approve the final account and authorize distributions. Section 35 adds to the list of the findings that appear in the judgment findings concerning any reserve requested and attorney fees. Section 35 also clarifies that under ORS 116.113 the court can approve a statement in lieu of final account as well as a final account.

Section 36: ORS 116.173 provides the rules for determining compensation for the personal representative. In general, fees are based on a percentage of the value of the estate "subject to the jurisdiction of the court," with the percentage decreasing as the value of the estate increases. Section 36 amends ORS 116.173 to provide better guidance in determining how the value of the estate should be determined.

The amendments address the changes in the value of the estate that may occur during administration. The goal is to capture the initial value of the estate plus increases during administration from income and capital gains. The amendments also provide that each asset should be valued at its highest value, determined by considering the inventory, any amended or supplemental inventory, any interim or final account, and any statement in lieu of final account.

A new subsection provides that despite a provision in the will authorizing fees at a particular level, if the estate is insolvent, the compensation of the personal representative cannot exceed the amounts specified in the statute.

This section adds a cross-reference to the alternative determination of compensation under the new provision added in Section 9 of this bill.

Section 37: This section amends ORS 116.183 to allow an attorney an opportunity to create a record, if the court reduces the attorney fees requested. A new subsection provides that an attorney can submit additional information in support of the reasonableness of the fee and then let the judge make the decision. A new subsection (2)(c) is also added, which states that ORCP 68 (requiring that requests be in a particular form) does not apply to requests for attorney fees under this section.

Section 38: Language in ORS 116.223 is modernized.

Section 39: This section amends ORS 116.263 to change "chose in action" to "right to sue" and to require that if a foreign personal representative submits an affidavit the affidavit be accompanied by proof of the foreign personal representative's authority.

Section 40: Language in ORS 116.343 is modernized.

Section 41: ORS 22.020 states that an irrevocable letter of credit cannot be used lieu of a bond in connection with various court proceedings. Section 41 amends ORS 22.020 so that the prohibition on letters of credit no longer applies to probate proceedings. In some estates providing a letter of credit will be an appropriate alternative to a bond, and the Work Group wanted to make a letter of credit an option.

Section 42: ORS 18.312 provides that a lienholder cannot collect a judgment against a decedent except by making a claim against the estate or by meeting the requirements of ORS 18.312(2). A new subsection to ORS 18.312 provides that when the property subject to the lien ceases to be property of the estate, the stay imposed by ORS 18.312(1) no longer applies. The new subsection makes clear that when property subject to a lien is distributed, the lien continues with the property and the lienholder may execute the lien after the property is no longer property of the estate. If the claim is not satisfied during the administration of the estate, when the property subject to a lien is transferred out of the estate, the lienholder can enforce the lien against the property.

Sections 43 – 61. These sections modernize language or conform language to other changes made in this bill in the following statutes: ORS 86.809, 111.025, 111.205, 111.245, 111.255, 112.315, 113.065, 113.145, 113. 242, 114.385, 114.525, 115.003, 115.025, 115.105, 116.043, 116.243, 125.525, 316.387, and 406.100.

Sections 62-77: These sections relate to effective dates and applicability of the amendments.

Section 78: This section explains that unit captions are provided only for the convenience of the reader.

VI. Conclusion

This measure should be adopted because it furthers the work of the Oregon Law Commission's Probate Modernization Work Group, which has put forth successful measures in the last several sessions in an effort to update Oregon's Probate Code. The Work Group is informed by some of the best legal minds in the state on the topic. It includes a wide range of private practitioners, judges, court clerks, agency representatives, as well as academics who have come together to provide well-tailored solutions to practical questions.

Direct Criminal Appeals Report Cover *coming soon*

I. Introductory Summary

In February 2015, the Appellate Commissioner for the Oregon Court of Appeals requested the Oregon Law Commission to sponsor a Work Group to overhaul the procedural law governing appeals in criminal cases.

The Oregon appellate courts are courts of limited jurisdiction, yet, over the last several years the criteria for determining whether the appellate courts have jurisdiction of appeals in criminal cases have become increasingly complex and to some extent obscure. Attorneys, parties, and the appellate courts also have struggled over determining whether appellate courts have authority to review and decide particular issues on appeal in criminal cases.

As a result, the Office of Public Defense Services, the Department of Justice, the Court of Appeals, and the Supreme Court, all tax-supported institutions, increasingly have expended their limited resources sorting out whether the appellate courts have jurisdiction to decide certain appeals in criminal cases and authority to decide certain issues.

Some of the statutes governing appeals in criminal cases have not been amended since the Deady Code, compiled in 1864. From time to time since adoption of the Deady Code, the Legislature has amended the statutes governing appeals in criminal cases. Over the years, the appellate courts have interpreted and applied those statutes in individual cases. Deciding individual cases makes it difficult to always apply a statutory scheme amended piecemeal over the years in a cohesive way. As a result, despite the best efforts of all the participants (the Legislature, the appellate courts, and appellate practitioners), the pieces do not always fit well together. For example, in *State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011), the court examined the historical evolution of the various statutes pertaining to jurisdiction found in ORS Chapter 138 and ultimately concluded that there were differences in the way that misdemeanor and felony cases could be appealed; those differences, however, are not clear from the text of the relevant statutes. The *Cloutier* decision and others led the Appellate Commissioner and numerous appellate practitioners to conclude that reorganizing ORS Chapter 138 to clarify and simplify the criminal appeal process would be a worthwhile endeavor.

Determining whether an appellate court has jurisdiction to entertain an appeal in a criminal case, and the authority to review and decide particular issues that arise on appeal, should be a relatively quick and easy process, freeing up resources to argue and decide the merits of appeals. The rules and standards governing appealability and reviewability should be as clear, simple, and straightforward as practicable. They also should be easy to find; interested persons should not need to engage in extensive legal research just to determine whether an appellate court will decide an appeal.

The Oregon Law Commission ("Commission") charged the Direct Criminal Appeals Work Group with the task of comprehensively reviewing the statutes and case law governing procedures on appeal in criminal cases -- especially the rules for determining appealability and reviewability. The task focused on reorganizing, streamlining, and clarifying existing statutory provisions. In addition, the Work Group proposes to codify some case law, to modernize some older statutory provisions, and to make a few substantive changes to the law, as outlined in this Legislative Report. LC 2740 is the result of the Work Group's efforts.

When reviewing this bill, practitioners should keep in mind that the Work Group left untouched ORS 138.010, 138.012, 138.020, 138.030, 138.057, and 138.090; likewise, many existing statutory provisions have been retained, even if recodified in a different section of ORS Chapter 138. The bill does not render existing appellate court decisions immaterial. Cases interpreting retained provisions remain significant, and other appellate decisions may provide context for amendments to this bill.

II. The Work Group Membership & Activities

The Commission selected the membership for the Work Group to reflect the major participants in the appellate-court part of the criminal justice system, including representatives of the Office of the Attorney General and the Appellate Division of the Office of Public Defense Services, the appellate courts, trial courts, private practitioners, and the victims of crimes. The voting members of the Work Group are:

- Judge Stephen Bushong, Multnomah County Circuit Court Judge, Work Group Chair
- Judge Erika Hadlock, Chief Judge, Oregon Court of Appeals
- Judge David Leith, Marion County Circuit Court Judge
- Andrew Lavin, Assistant Attorney General, Department of Justice
- Michael Salvas, Deputy District Attorney for Clackamas County, Oregon District Attorneys Association
- Laura Graser, Appellate Attorney in Private Practice, Oregon Criminal Defense Lawyers Association
- Eleanor Wallace, Staff Attorney, Oregon Supreme Court
- Ernest Lannet, Chief Defender, Criminal Appellate Division, Office of Public Defense Services

Support for the Work Group was provided by:

- Jessica Minifie, Assistant Legislative Counsel
- James W. Nass, Appellate Commissioner for the Oregon Court of Appeals, Work Group Reporter

The Work Group also was supported by the following Commission staff:

- Prof. Jeff Dobbins, Executive Director of the Commission
- Laura Handzel, Deputy Director of the Commission
- Jenna Jones, Legal Assistant
- Hanh-Thao Tran, Student Office Assistant
- Paul Charas, Commission Extern
- Tyler Skidmore, Commission Extern
- Mackenzie Zook, Commission Extern

The following persons regularly attended Work Group meetings and provided invaluable input:

- Eric Deitrick, Attorney, Multnomah Defenders, Inc.
- Melissa Franz, Legislative Analyst, Oregon Judicial Department
- Kimberly Dailey, Criminal Law Staff Counsel, Office of the State Court Administrator

- Matt Shields, Office of Public Affairs, Oregon State Bar
- Matt Shoop, Law Clerk, Office of Appellate Commissioner[1]
- Julie Smith, Staff Attorney, Oregon Court of Appeals (attended meetings in place of Judge Hadlock and provided input in her absence)
- Jennifer Lloyd, Assistant Attorney General, Office of the Attorney General (attended meeting in place of Andrew Lavin)
- Marc Brown, Deputy Public Defender, Office of Public Defense Services (attended meetings in place of Ernest Lannet)

Other interested persons include:

- Kimberly McCullough, American Civil Liberties Union of Oregon
- Bobbin Singh, Criminal Justice Resources Center
- Channa Newell, Judiciary Analyst, Legislative Policy & Research Office
- Lane Shetterly, Chair, Oregon Law Commission.

The Work Group met 24 times, beginning on April 29, 2016, through March 3, 2017.

Work Group product includes legal research memoranda on various topics the Work Group addressed. *See* the list at the end of this report. The memoranda reflect the views of the respective authors of the memoranda and do not necessarily reflect the view of all Work Group members or the Work Group collectively.

III. Recommendation to Form Work Group to Review Law Relating to Appeals from Justice & Municipal Courts

Historically, appeals from justice courts created by counties and municipal courts created by cities were taken to the circuit court in which the justice or municipal courts were located. A party dissatisfied with the decision of the circuit court then could appeal to the Court of Appeals.

In 1999, the Legislature enacted statutes authorizing any justice or municipal court to become a "court of record," and, if a justice or municipal court chose to become a court of record, an appeal from such a court would be taken directly to the Court of Appeals. Oregon Laws 1999, ch 682, § 11, amending ORS 138.057. When the Work Group undertook to review those provisions, the work group discovered that the statutory framework governing appeals from justice and municipal courts were complex, perhaps bordering on labyrinthine. *See* Appendix I, memorandum entitled "Appeal Provisions Relating to Justice and Municipal Courts" dated October 10, 2016.

That the statutes governing appeals from justice and municipal courts are so complex is particularly unfortunate because many, if not most, private parties appearing in such courts are not represented by counsel and are proceeding without the advice or assistance of attorneys.

Apart from the amount of time and effort it likely would take to master appeals from justice and municipal courts, the membership of the Work Group did not include

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[1] The Work Group acknowledges Matt Shoop's yeoman services engaging in legal research and preparing memoranda on various legal issues as requested by the Work Group. On occasion, in Mr. Nass's absence, Mr. Shoop also served as Reporter.

representatives of affected parties, such as judges of justice or municipal courts, city attorneys, county counsels, or attorneys who practice in those courts.

The Work Group determined that the scope of the problem of appeals from justice and municipal courts and the absence of participants by persons who would be most affected by changing the law respecting those courts required a separate Work Group devoted to that topic. Therefore, the Work Group recommends that the Commission consider forming a Work Group to review the statutory and case law relating to appeals from justice and municipal courts.

IV. Recommendation to Continue Work Group to Focus on "Special Statutory Proceedings"

The appellate courts have held that a trial court's disposition of certain statutory proceedings that take place within or related to a criminal case, but are not appealable under the statute creating the proceeding or under ORS chapter 138 generally, may be appealable under ORS 19.205(5). ORS chapter 19 governs appeals in civil cases and ORS 19.205(5) authorizes appeals from the trial court disposition of "special statutory proceedings."

When the Work Group was formed, its charge included addressing the appealability of circuit court disposition of "special statutory proceedings" in criminal cases. However, after addressing and resolving other important topics, the Work Group determined it could not do justice to the complex policy considerations relating to appealability, reviewability, appellate procedures, and scope of review on appeal of "special statutory proceedings" in a proposed bill for the 2017 legislative session. *See generally* the "Special Statutory Proceedings" memorandum dated June 7, 2016. The Work Group recommends that the Commission authorize the Work Group to continue meeting to address those issues with the goal of proposing legislation for the 2018 Legislation Session.

Note that the bill recommends including at Section 12 a "sign post" to alert practitioners in a summary manner of the effect of current case law: The disposition of a "special statutory proceeding," as that term is used in ORS 19.250(5), in a criminal case may be appealable under ORS 19.205(5).

V. Bill Organization

The Commission submits LC 2740 to the 2017 Legislative Assembly to clarify the procedural law governing appeals by defendants and the State from circuit court to the Court of Appeals or Supreme Court in criminal cases.

Generally, the bill and the remainder of this report are organized as follows:

Section 1	Definitions
Sections 2 & 3	Appeal by the Defendant
Sections 4 & 5	Appeal by the State
Sections 6 to 12	Appellate Procedures

Sections 13 & 14	Reviewability
Sections 15 to 17	Determination on Appeal
Sections 18 to 20	Supplemental, Corrected, & Amended Judgments
Sections 21 to 25	Conforming Amendments
Sections 26 & 27	Miscellaneous Provisions
Section 28	Applicability

SECTION 1. DEFINITIONS

"Appealability" & "Reviewability"

As suggested above, one of the most perplexing features of current law is that the current statutory scheme (and case law) does not always clearly distinguish between appealability and reviewability. Section 1(2) and (4) define those terms.

"Appealability" refers to a circuit court decision that the Legislature has authorized the State or the defendant to appeal, such as a judgment of conviction and sentence (typically appealable by the defendant) or a pre-trial order suppressing evidence (appealable by the State).

"Reviewability" refers to whether the appellate court may consider and decide requests to review the validity of any of the myriad decisions a trial court may make along the way to rendering an appealable judgment or order. Examples: A trial court's ruling on an evidentiary issue at trial, or a trial court's failure to impose a period of post-prison supervision at sentencing.

Some may wonder why appealability and reviewability are not congruent. These are some of the reasons:

- With limited exceptions, appeals are taken only after the trial court has decided all matters in the trial court. It would hamper the administration of justice if either the State or the defendant could appeal every time either was unhappy with a trial court decision. Defendants' appeals generally are taken only after the trial court has decided all matters in the trial court, and the Legislature has authorized the State to appeal from a limited group of pre-trial orders, such as an order dismissing the case or an order suppressing evidence.

- Often the attorneys who represent the State and the defendant in the trial court are not the same attorneys who represent the State and the defendant on appeal. Generally, there is a 30-day time limit to file an appeal. The attorney who will be representing the appellant on appeal will likely not yet be familiar with the case or the trial court record and must decide whether to appeal without a sufficient degree of certainty regarding the trial court decisions that might need to be challenged on appeal. Only after the appeal is filed will a transcript be prepared and the appellate attorney will have a chance to review the transcript and other parts of the trial court record.

- The Legislature has imposed limits on review of certain trial court decisions. For instance, if the defendant has pled guilty or no contest to a crime, the Legislature has disallowed appellate court review of the trial court's decision to enter a judgment of conviction for that crime. Nor may the State get appellate review of a jury's decision not to convict a defendant of a crime. The Legislature has disallowed appellate court review of the sentence imposed by the trial court when the defendant and the State have stipulated to the sentence, and has limited review when the trial court has imposed a sentence consistent with the Sentencing Guidelines.

- Consequently, often the appellate attorney will need to file a notice of appeal before knowing whether particular decisions of the trial court are reviewable. Separating appealability and reviewability allows for more efficient operation of the justice system.

Having ORS Chapter 138 clearly distinguish between appealability and reviewability is important for these reasons: When the criteria for whether a party may appeal a trial court decision are clear, attorneys and self-represented parties can more easily decide whether to file a notice of appeal at all. When the criteria are not clear, attorneys and self-represented parties may end up filing notices of appeal that, sooner or later, are dismissed by the appellate court, but sometimes not until after substantial tax-supported resources are expended.

Clear statements of whether an appellate court may review and decide particular trial court decisions may be even more important, because the appellate courts do not confront reviewability until after the transcript is prepared, the trial court has submitted the trial court record, the parties have prepared briefs, and the appellate court has held oral argument. All of these activities consume time and, for the most part, taxpayer resources.[2] When it is clear that an appellate court will have no authority to review and decide the only issues the appellant wants to raise on appeal, the appellant may not file the appeal at all, or may dismiss the appeal sooner, on realizing that the appeal will serve no useful purpose.

Although case law is replete with references to "appealability" and "reviewability," there are no statutory definitions for those terms. One of the main goals of the Work Group was to produce a bill that clearly distinguishes between appealability and reviewability; therefore, the Work Group thought it prudent to define those terms.

A defendant or attorney for a defendant considering whether to appeal a trial court decision should closely review Section 3 to determine if the trial court, as yet, has rendered a judgment or order the defendant may appeal. Then, the defendant, or the defendant's attorney, should review Section 13 to determine if the appellate court may review the particular trial court decision the defendant is considering challenging on appeal.

Likewise, if the State disagrees with a trial court decision, the prosecutor should review ORS 138.060 as amended by this bill to determine whether the trial court has rendered a judgment or order from which the State may appeal, then review Section 14 to determine if the appellate court may review the particular trial court decision.

[2] Or consume the resources of a defendant whose has retained counsel.

“Colorable Claim of Error”

Under current law, the following statutes include the phrase “colorable claim of error” or some variant of that wording as one of the criteria for determining whether a defendant may appeal or get review of certain trial court decisions:

- ORS 138.050(1) (requiring a “colorable showing” of certain sentencing errors, applicable to a defendant’s appeal following a plea of guilty or no contest)

- ORS 138.053(3) and 138.222(7) (requiring a “colorable claim of error,” applicable to a defendant’s opportunity to appeal various post-judgment orders or trial court judgments on remand from a prior appeal or pursuant to a decision of a court exercising post-conviction relief authority)

- ORS 138.071(5)(a)(B) (requiring a showing of “colorable claim of error,” applicable to a defendant’s opportunity to proceed with an otherwise untimely appeal under certain circumstances)

But, ORS Chapter 138 does not define the phrase “colorable claim of error.”

The appellate courts have interpreted the phrase “colorable claim of error” in other contexts, including ORS 419A.200(5), which is applicable to juvenile court cases and which, like ORS 138.071(5), is part of the standard for determining whether the appellate court may allow an otherwise untimely appeal to go forward: *E.g.*, *State ex rel Dept. of Human Services v. Rardin*, 338 Or 399, 408, 110 P3d 580 (2005) ("colorable claim of error" “ * * * [describes] a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law).”). The Court of Appeals has acknowledged the applicability of the holdings of those cases to use of the phrase “colorable claim of error” in ORS 138.222(7), applicable to criminal appeals: *State v. Brewer,* 260 Or App 607, 614-15,fn 2, 320 P3d 620 (2014) (“* * * Oregon courts have held that the colorable claim of error standard requires a party to present a claim that may reasonably be asserted under current law and that is plausible given the facts and the current law, or a reasonable extension or modification of current law” and citing to *Rardin*, among other cases).

Section 1(3) includes a definition of “colorable claim of error” that the Work Group intends to be consistent with *Rardin* and *Brewer*.

The bill changes somewhat the role of the required showing of “colorable claim of error.” Under Section 6 of the bill, a defendant must include a showing of colorable claim of error in the notice of appeal essentially under the same circumstances as current law, but the requirement is non-jurisdictional. The failure of the defendant to make a “colorable claim of error” after notice and opportunity to cure is a ground on which the appellate court may, but is not required to, dismiss.

“Sentence”

Current law, at various places, uses the terms "sentence," "disposition," and "legal consequences" of a conviction -- compare ORS 138.040(1)(b) ("disposition), ORS 138.050(1) and (4) ("disposition"); ORS 138.053 ("disposition" and "sentence"); ORS 138.222(7) ("sentence"); *see also* ORS 137.071 (addressing requirements for judgments in criminal cases and using the terms "legal consequences," "disposition," and "sentence") – but does not define those terms. "Disposition" appears to be the broader term that includes not only the legal consequences imposed by the trial court for a conviction, but also acquittals and dismissals of charges, as well as post-judgment events such as revocation of probation.[3] The bill strives to avoid using the term "disposition" and defines "sentence" to mean all of the legal consequences a court may impose based on a conviction, including post-judgment events such as probation revocation. Section 1(5)(a) is derived from the list of legal consequences described in ORS 137.071(1)(g) that a judge may impose and, if so imposed, must be in the judgment of conviction; Section 1(5)(b) is derived from the list of "dispositions" presently found in ORS 138.053(1).

For the most part, ORS 137.071(1)(g) and ORS 138.053 use different terms, but the concept that a "sentence" includes suspension of imposition of sentence is found in both ORS 137.071(1)(g) and ORS 138.053(3); its omission from paragraph (a) and its inclusion in paragraph (b) has no significance other than a decision to only mention it once.

In adopting a definition of "sentence," the Work Group does not intend to effect any substantive change in the law respecting appealability or reviewability of sentences or consequences of a conviction that fall within the new definition of "sentence."[4]

SECTONS 2 & 3. APPEAL BY THE DEFENDANT
Section 2

Section 2 adopts Section 3 as a part of ORS 138.010 to 138.310, relating to appeals in criminal cases.[5]

Section 3

Under current law, references to trial court judgments and orders that the defendant in a criminal case may appeal are found in many places, including ORS 138.040, ORS 138.050(1), ORS 138.053(1), ORS 138.083, and ORS 138.222(7). Section 3 is intended to consolidate all of those provisions into a single, easy to find, easy to read, place.

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3 *See* the memorandum in Appendix I entitled "Dispositions and Sentences," dated July 11, 2016.

4 Unrelated to defining "sentence," the Work Group does intend to change the scope of review on appeal of sentences for misdemeanor convictions. *See* the discussion in this Legislative Report of Section 13, subsection (7).

5 The remainder of ORS Chapter 138 addresses such topics as appointed counsel on appeal, post-conviction relief proceedings, and post-conviction motions for DNA testing.

Subsection 3 recognizes the usual practice of appeals being taken from judgments and orders of the circuit court, but also recognizes that the legislature has authorized justice courts and municipal courts to become courts of record and, if a justice or municipal court chooses to become a court of record, the appeal is to the Court of Appeals.[6] The wording is similar to that in current ORS 138.060(1) relating to State's appeals.[7]

Subsection 3(1)(a) is intended to reflect the long-standing principle of appellate law that a defendant may take an appeal only from a "final" judgment; that is, a judgment that conclusively disposes of all charges in the accusatory instrument. *See also* ORS 137.071(1)(g) (requiring judgment to include disposition of all counts and the sentence imposed on each conviction); *see also* the memorandum in Appendix I entitled "Finality of Criminal Judgments and Appealability," dated June 20, 2016. The Work Group does not intend to change the import of ORS 138.071(1), which provides that the remedy for a judgment that does not conclusively dispose of all counts is not to dismiss the appeal, but, rather, to give the trial court leave to enter one or more additional judgments or a corrected judgment disposing of all counts.

However, in cases in which the defendant is charged with multiple counts, a trial court may sever one or more counts for disposition ahead of other counts. The phrase "conclusively disposing of all counts severed from other counts" in Section 3(1)(a)(A), together with (B) and (C), is intended to codify the holding of *State v. Smith,* 100 Or App 284, 785 P2d 1081 (1990): If a trial court conclusively disposes of the severed counts, the judgment of conviction and sentence as to the severed counts is appealable notwithstanding that the trial court has not yet disposed of other counts.

Section 3(1)(b) is a new statutory provision reflecting case law articulating the principle that when a trial court merges determinations that a defendant is guilty of two or more counts into a single conviction and imposes a single sentence, the trial court conclusively disposes of the merged counts.

Section 3(2) is intended to restate ORS 138.083(2)(a): A judgment that includes a provision stating the defendant will pay restitution to the victim is conclusive and appealable notwithstanding that the judgment does not specify the amount of restitution. Typically, the determination of the amount of restitution to be imposed takes place after the trial court renders the judgment of conviction and sentence itself. A corollary to the defendant's opportunity to appeal a judgment providing for restitution but not specifying the amount thereof is that the decision to order restitution is not reviewable by an appellate court until entry of a supplemental judgment specifying the amount of restitution. *See* Section 13(6) of the bill. Section 3(2)(b) explicitly states that which is implicit in current ORS 138.083(2) and (3): A defendant may appeal from a supplemental judgment awarding restitution in a specific amount.

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[6] Most justice and municipal courts have not chosen to become courts of record; therefore, appeals from those courts are taken to the circuit court for the county in the justice or municipal court is located.

[7] *See also* ORS 138.057 addressing appeals from convictions of violations prosecuted in justice and municipal courts of record.

Section 3(3) is intended to restate the provisions of ORS 138.053(1)(b) through (e) authorizing a defendant's appeal from various post-judgment decisions, such as revocation of probation or modification of conditions of probation.

Section 3(4) makes explicit that which is implied in current ORS 138.083(1): A defendant may appeal from a corrected judgment entered by the trial court.

The Work Group included a reference to "amended" judgments in Section 3(4) in part because ORS 137.107 authorizes entry of an "amended" judgment awarding restitution to comply with ORS 19.048, relating to money awards imposing a monetary obligation. However, the reference to both "corrected" and "amended" also recognizes that trial courts do not always use the terms "amended judgment" or "corrected judgment" consistently with statutory provisions. In recommending adoption of Section 3(4), the Work Group intends that a defendant may appeal from a judgment that changes the previous iteration of the judgment, regardless of whether it is labeled "amended" or "corrected."

Note that Section 13(10) imposes limits on the reviewability of a defendant's appeal from a corrected or amended judgment.

Section 3(5) restates the provision of ORS 138.040 that a defendant may cross-appeal when the State appeals from pretrial orders suppressing evidence or dismissing or setting aside an accusatory instrument. Note the limits on reviewability imposed by Section 13(11).

SECTIONS 4 & 5. APPEAL BY THE STATE

Section 4

Section 4 amends ORS 138.060, addressing appeals by the State.

The amendment to ORS 138.060(1)(a) clarifies that a trial court need not dismiss the entire accusatory instrument; rather, the State may appeal the trial court's pre-trial dismissal of one or more counts in the accusatory instrument.

The amendment that will become ORS 138.060(1)(b) clarifies that the State may appeal from a trial court order sustaining a demurrer. A defendant may demur to a charging instrument on a variety of grounds identified in ORS 135.630; if the trial court sustains a defendant's demurrer, the State cannot prosecute the offense demurred to. Current law does not expressly say whether the State has the right to appeal a trial court order sustaining a demurrer.[8] However, sustaining a demurrer can be tantamount to dismissing an accusatory instrument, which the State may appeal under current ORS 138.060(1)(b). The proposed new (1)(b) makes clear that the State may take an appeal from a trial court order sustaining a demurrer.

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[8] In *State v. Cervantes*, 232 Or App 567, 223 P3d 425 (2009), the court decided a State's appeal from a trial court's order sustaining defendant's demurrer without comment on whether the State may appeal from such an order.

Existing ORS 138.060(1)(e) is an example of how current law mixes concepts of appealability and reviewability.[9] Subsection (1)(e) addresses judgments entered since adoption of the Sentencing Guidelines in 1989, and, in effect, authorizes the State to appeal from a judgment of conviction for an offense committed after the effective date of that legislation – November 1, 1989 – but subject to the limits on reviewability found in ORS 138.222 relating to sentences imposed under the Sentencing Guidelines.

Consistently with one of the Work Group's goals to separately state principles of appealability and reviewability, the Work Group proposes to delete the reference to ORS 138.222 in ORS 138.060(1)(e) – paragraph (f) in the bill – but to restate the limits on reviewability in a separate statutory provision governing limits on reviewability in a State's appeal. *See* Section 14 of the bill, particularly subsections (5), (6), and (7). The proposed amendment to existing ORS 138.060(1)(e) – (1)(f) in the bill – is not intended as a substantive change of law.

Proposed new ORS 138.060(1)(g) is intended to clarify that the State has the right to take an appeal from a trial court judgment or order that either denies the State's request for restitution or awards less restitution than the State sought.

The Work Group proposes to delete existing ORS 138.060(1)(i). Existing ORS 138.060(1)(i) authorizes appeals from orders dismissing charges when the prosecution appears for trial and is not ready to proceed. ORS 138.060(1)(a) authorizes appeal from any order "prior to trial" dismissing charges for any reason. The Work Group agreed that ORS 138.060(1)(a) subsumes existing ORS 138.060(1)(i), as they both relate to dismissal of charges prior to trial—when the prosecution is not ready to proceed and the court dismisses charges, no trial has occurred and the order dismissing those charges occurs "prior to trial." The Work Group proposes the deletion to eliminate that redundancy.

Existing ORS 138.060(2) authorizes direct State's appeals to the Supreme Court when the trial court enters certain pre-trial orders in murder and aggravated murder cases. The Work Group proposes to clarify that the two types of orders described in ORS 138.060(2) are the same as the orders described in ORS 138.060(1)(a) and (d), and to clarify that a State's appeal of a trial court order sustaining a demurrer under (1)(b) in a murder or aggravated murder case also would be taken to the Supreme Court.

Existing ORS 138.060(3) has nothing to do with appealability, but rather imposes a time limit on the Supreme Court for deciding a State's appeal of pretrial orders in murder and aggravated murder cases under ORS 138.060(2). The Work Group proposes to recodify ORS 138.060(3) as new subsection (6) in ORS 138.261, which addresses other time limits for deciding appeals in criminal cases. *See* Section 17 of the bill.

Section 5

ORS 136.120 and 136.130 address those cases in which the trial court dismisses the accusatory instrument when a case is scheduled for trial, the State is unable to proceed, and the trial court determines that the State does not have good cause for postponing

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[9] *See* generally *State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011), which tracks the history of appealability and reviewability in criminal cases; *see also* the memorandum in the Appendix entitled "Reviewability of Misdemeanors and Felonies Post-*Cloutier*," dated September 7, 2016.

trial.[10] ORS 136.120 and 136.130 give the trial court discretion whether "in the public interest" to dismiss the accusatory instrument, and provide that, if the defendant is charged with a felony or Class A misdemeanor, the trial court has discretion whether to bar the State from filing another action for the same offense by entering a "judgment of acquittal."[11] Use of the term "judgment of *acquittal*" in ORS 136.130 is problematic because it suggests an adjudication of the merits of the charges, rather than the actual disposition, which is dismissal of the charges because of the prosecutor's inability to proceed to trial. *See State v. Shaw*, 338 Or 586, 113 P3d 898 (2005).

Section 5 amends ORS 136.120(1), adds a new subsection incorporating the relevant provisions of ORS 136.130, and modernizes the wording of ORS 136.120 and 136.130.

Lastly, ORS 136.140, in effect, required the trial court, if it dismissed the accusatory instrument under ORS 136.120 and 136.130, to determine whether to remand the defendant to custody pending the State filing a new action (in those felony and Class A misdemeanor cases where the trial court ordered that the dismissal was not a bar to filing of a new action) or to release the defendant on own recognizance or on security, or to discharge the defendant from custody altogether. However, ORS 136.140 contained archaic wording that the Work Group saw no need to retain because ORS 135.680 already contains essentially the same provisions and is more clearly worded. Section 5 also amends ORS 136.120 to add a new subsection (3) to accomplish the same ends as ORS 136.140.

Because ORS 136.120 would subsume the material provisions of ORS 136.130 and 136.140, the bill would repeal those statutes. *See* Section 26 of the bill.

The Work Group does not intend the repeal of ORS 136.130 and 136.140 or the amendments to ORS 136.120 to effect any substantive change in the law.

SECTIONS 6 - 12. APPELLATE PROCEDURES

Sections 6 through 12 address some of the mechanics of filing, serving, and administering an appeal.

Section 6

Historically, Oregon law has imposed limits on a defendant's opportunity to appeal when a conviction is based on a plea of guilty or no contest. However, there are exceptions. ORS 138.050(1) currently allows a defendant to appeal from a judgment of conviction based on a guilty or no contest plea if, under ORS 135.335, as a part of the defendant's plea, the defendant has reserved in writing an adverse pre-trial court ruling for appeal. ORS 138.050(1) also allows an appeal where the defendant wishes to take issue with the sentence imposed by the trial court.

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[10] *See* the memorandum in Appendix I entitled "ORS 136.120 and 136.130," dated August 4, 2016.

[11] ORS 136.130 also provides that dismissal of any other offense type (Class B or C misdemeanor or a violation) is a bar to the State filing another action for the same offense.

As noted above, under current law, certain statutes condition a defendant's opportunity to appeal or get review of certain trial court decisions dependent on the defendant showing of "colorable claim of error" or a "colorable showing" of error. As phrased in ORS 138.050(1) and ORS 138.222(7), the requirement appears to be jurisdictional, and the failure to make the required showing results in dismissal of the appeal. Those requirements are awkward for appellate counsel for both the defendant and the State, and the appellate court, to administer because they are unlikely to have access to the trial court record during and immediately following the 30-day appeal period when jurisdictional determinations are made.

With respect to the requirement that a defendant make a "colorable" showing to proceed with an appeal in certain circumstances, the bill does three things.

First, the bill generally requires the defendant to make the showing in the same circumstances in which the defendant is required to make the showing under current law. Thus, when the trial court has convicted and sentenced a defendant based on the defendant's guilty or no contest plea, Section 6(1)(a) carries forward the provision of ORS 138.050(1) that a defendant may appeal the trial court's adverse pretrial ruling if, pursuant to ORS 135.335, the defendant has reserved the ruling for appeal. Section 6(1)(b) is intended to carry forward the requirement in ORS 138.050(1) and ORS 138.222(7)(a) that the defendant make a "showing of colorable claim of error" respecting sentencing errors. Section 6(2)(a) is intended to carry forward the requirement of ORS 138.053(2) and ORS 138.222(7)(b) that the defendant make a showing of colorable claim of error on appeal from probation revocation and similar judgments and orders. Section 6(2)(b) is intended to carry forward the requirement currently found in ORS 138.222(7)(c). The Work Group intends to make the requirement to show colorable claim of error applicable to all judgments and orders described in Section 6, regardless of whether the judgment or order relates to a misdemeanor or a felony and regardless of whether the felony was committed before or after November 1, 1989.

Second, to address the challenges that appellate counsel may face in identifying a "colorable claim of error" within the 30-day appeal period, Section 6(3) changes current law by making the need to show "colorable claim of error" a non-jurisdictional requirement. Under the bill, the defendant can cure the failure to make any showing or a sufficient showing in the notice of appeal, and the appellate court may dismiss the appeal for lack of a sufficient showing only after giving the defendant notice of the deficiency and the opportunity to correct it.

Third, Sections 6(1) and (2) change current law by adding a requirement that, in circumstances where the defendant must identify a "colorable claim of error," that claimed error must also be one that is reviewable under Section 13 of the bill.[12] As a result, the appellate court will have authority to dismiss an appeal in which the only claim of error that the defendant identifies is one that the appellate court would not be able to review, if the appeal were to proceed.

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[12] The concept of "colorable claim of error" does not, itself, encompass a requirement that the claim be reviewable on appeal. *State v. Silsby*, 282 Or App 104, 108 (2016), *rev den*, 360 Or 752 (2017).

The Work Group anticipates that the non-jurisdictional requirement to identify a claim of error that is colorable *and* reviewable will serve a gatekeeping function. The requirement discourages the filing of meritless appeals and streamlines resolution of other appeals by permitting early dismissal when the defendant is not able to make the required showing.

Section 7

Section 7 amends ORS 138.071(2) to clarify that a motion for new trial or in arrest of judgment extends the time to appeal from a judgment only if the defendant *timely* filed the motion for new trial or in arrest of judgment.

Current ORS 138.071(4) and (6), and ORS 138.083(3) and (4), contain overlapping provisions relating to corrected and supplemental judgments entered in criminal cases during the pendency of an appeal. The bill would repeal ORS 138.083 in its entirety, including subsections (3) and (4), and combine the overlapping provisions into a new ORS 138.071(4).

Section 7 further amends ORS 138.071(4) to clarify that the provisions of existing law pertaining to the time within which to file notice of appeal following entry of a corrected judgment also apply to an “amended” judgment (and to an amended or corrected order, where the defendant has appealed from the prior order).

It also amends (4)(b), consistent with what will be former ORS 138.083(3)(b), to clarify that, where an appeal already is pending and the appellant does not intend to assign error to the amended, corrected, or supplemental judgment or order, the requirement to file notice of intent to proceed with the pending appeal is not jurisdictional.

Section (7) repeals ORS 138.071(6), which defines “parties,” a term used in what will become former subsection (4), and enacts (4)(b), defining “appellant,” a term used in new subsection (4), derived from what will become former ORS 138.083(4).

Section 7 also amends ORS 138.071(5)(b) to conform its provisions to the amendments made to ORS 138.060 respecting a State’s appeal from pre-trial rulings.

The Work Group does not intend the amendments to ORS 138.071 to make any substantive change in the law.

Section 8

Section 8 amends ORS 138.081, pertaining to service of a copy of the notice of appeal on the adverse party. Section 8 rearranges the wording of ORS 138.081(1)(a)(A) and (B) solely to make the provisions, the Work Group hopes, more readily understandable.

Section 8 modifies ORS 138.081(1)(c) to replace the older phrase “clerk of the trial court” with the more accurate term “trial court administrator.”

ORS 138.110 and 138.120 pertain to service, by alternative means, of notice of appeal filed by the State when the defendant cannot be located for traditional service. The bill would repeal ORS 138.110 and 138.120 and incorporate their essential provisions into new subsection (2) of ORS 138.081. Section 8 also amends ORS 138.081 to incorporate by reference the application of ORCP 7 D(6) to criminal cases. ORCP 7 D deals comprehensively with alternative means of serving a party and could be useful if, during the period in which the State could appeal, the defendant may have absconded.

Current ORS 138.081(2) would become subsection (3) and conforms the wording to modern practice.

Although ORS 138.081, 138.110, and 138.120 are consolidated and some of the wording is changed, the Work Group does not intend to make any substantive change in the law governing service of notice of appeal in criminal cases.

Section 9

Section 9 amends ORS 138.185, which generally makes many provisions of ORS Chapter 19, pertaining to appeals in civil cases, applicable to appeals in criminal cases, such as the title of the case, identifying the parties, designating the record on appeal, filing notice of appeal by mail or commercial carrier, defining when appellate court jurisdiction begins and ends, identifying jurisdictional filing and service requirements, authorizing the court to decide appeals by memorandum opinion, issuance of the appellate judgment terminating an appeal, and the authority of successor judges.

Section 9 proposes to amend ORS 138.185(2) to add references to those statutes in ORS Chapter 19 governing preparation and filing of the transcript, including extensions of time to accomplish those tasks. Adoption of those amendments would render ORS 138.185(1) obsolete; therefore, subsection (1) should be deleted.[13]

In addition to the parts of ORS 138.185(2) pertaining to the trial court record, the statute as currently worded also addresses an entirely different topic, which is the appellate court's scope of review. ORS 138.185(2) makes "the provisions in ORS 19.425 authorizing review of intermediate orders" applicable to criminal cases. In relevant part, ORS 19.425 provides:

> Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from * * *.

That wording differs from ORS 138.040(1)(b), which provides in relevant part as to a *defendant's* appeal:

> (1) The appellate court may review:
>
> * * * * *
>
> (b) Any decision of the court in an intermediate order or proceeding.

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[13] ORS 138.185(1) also is obsolete because, as a matter of practice, trial courts do not forward the trial court record to the appellate court until the appellate court administrator so requests.

Because ORS 138.185(2) on its face applies to both defendants' appeals and the State's appeals, there are conflicting scopes of review for defendants' appeals, but only one scope of review for the State's appeals. The Work Group proposes to resolve the conflict as to defendants' appeals by retaining the wording from ORS 138.040(1) as to defendants' appeals and making the wording from ORS 19.425 applicable only to State's appeals. Compare Section 13(2) (defendant's appeals) and Section 14(2) (State's appeals).

Lastly, Section 9 would amend ORS 138.185(2), consistent with current practice, to provide that all of the specified appellate procedural provisions in ORS Chapter 19 that are applicable to appeals to the Court of Appeals also are applicable to the Supreme Court. That amendment would come into play for State's appeals of certain pre-trial orders in murder and aggravated murder cases that go directly to the Supreme Court.

Section 10

ORS 138.083(1)(b) and (2)(c) currently require the trial court, when it enters either a corrected judgment or a supplemental judgment in a criminal case during the pendency of an appeal from some prior judgment or order of the trial court, to forward a copy of the judgment to the appellate court. The appellate court is obligated, in turn, to notify the parties to the appeal. Receipt of notice of entry of a corrected or supplemental judgment triggers ORS 138.071(4), which states the time within which a party may file a notice of appeal, amended notice of appeal, or notice of intent to proceed with the appeal.

The bill proposes to repeal ORS 138.083; Section 10 extracts concepts from ORS 138.083(1)(b), (2)(c), and (4) and restates them in a freestanding statute addressing the appellate court's duty to forward a copy of a corrected or supplemental judgment received from the trial court to the parties. ORS 138.083(4) in effect provides that, when the defendant is not represented by counsel, the appellant must be provided with notice "personally." The Work Group omitted that word from Section 10 because some might read it as requiring personal service, when the intent is to contrast providing notice to counsel versus to the defendant himself or herself.

Section 11

Section 11 amends ORS 138.210 to reflect current practice and modern usage of words to the end that, if the appellant fails to file a brief, the appellate court will dismiss the appeal.

Section 12

Section 12 is a new provision reflecting current appellate court cases holding that "special statutory proceedings," as that term is used in ORS 19.205(5), can take place in the context of a criminal case. *See* Appendix I, memorandum entitled "'Special Statutory Proceedings' Memo," dated June 7, 2016. Section 12 serves as a sign post to practitioners that whether the trial court's disposition of a special statutory proceeding in a criminal case is appealable may be governed by ORS 19.205(5), relating to civil cases. It is possible that, in a special statutory proceeding that takes place within a criminal case, there could be a third-party who may be able to appeal under ORS 19.205(5). *See State v. Branstetter*, 332 Or 389, 29 P3d 1 (2001) (sheriff and humane society initiated civil forfeiture proceeding against the defendant with pending criminal case).[14]

SECTIONS 13 & 14. REVIEWABILITY

Assuming that the appellate court has jurisdiction to entertain an appeal, under current law, whether the appellate court has authority to review and rule on particular trial court decisions is found in a number of statutes, some of which also address appealability. As stated earlier in this Legislative Report, one of the Work Group's primary goals was to clearly distinguish between the two concepts and separately state principles of reviewability.

In some instances, reviewability standards are the same for both defendants' appeals and State's appeals, but in some instances, the standards differ. The Work Group proposes two sections, one to address reviewability on defendants' appeals (Section 13) and another to address reviewability on State's appeals (Section 14), even though many of the provisions are identical or substantially similar. Where the provisions are identical or substantially similar, the discussion of the provision in Section 14 refers back to the discussion of comparable provision in Section 13.

Section 13. Reviewability on Appeal by Defendant

Subsection (1). In the course of the Work Group addressing the topic of reviewability of intermediate trial court decisions, the issue arose whether there was express statutory authority for an appellate court to review trial court decisions memorialized or reflected in the judgment or order being appealed. It appears that current law does not so expressly state. Work Group members agreed that appellate courts necessarily have that authority and it ought to be stated in statutory form. Subsection (1) so states.

Subsection (2) incorporates the essential provisions of ORS 138.220: Appellate review is limited to questions of law appearing on the record; that is, the appellate court's authority to decide questions of law on appeal is limited to the record as established in the trial court. Generally, in the course of deciding the merits of an appeal, the appellate court has no authority to consider evidence not presented at trial, including evidence of events that may have occurred after trial.[15]

Subsection (3) of Section 13 and Section 14 authorize appellate review of intermediate decisions of the trial court; that is, decisions other than decisions memorialized in the judgment or order being appealed. However, the wording of Section 13(3), and Section 14(3) differ. That difference has its origins in existing law. Section 13(3) restates ORS

[14] *Also see infra* discussion regarding continuation of Work Group to focus on "special statutory proceedings," page 4.

[15] An appellate court does have authority to consider evidence outside the record to determine matters other than the merits of the appeal, for instance, whether an appeal has become moot or whether the defendant has absconded. An appellate court also has authority to take judicial notice of certain facts as provided in OEC (Oregon Evidence Code) 201(a)-(b).

138.040(1)(b), applicable to defendant's appeals, whereas Section 14(3) reflects existing ORS 138.185(2), which makes the part of ORS 19.425 addressing review of intermediate orders on appeal in civil cases applicable to appeals in criminal cases, including State's appeals.

The Work Group determined that the scope of review articulated in ORS 138.040(1) is the more expansive scope of review, consistent with the circumstance that defendants generally have a wider array of trial court decisions of which they can obtain review. Likewise, the scope of review articulated in ORS 19.245 – providing that review is limited to those intermediate decision "involving the merits or necessarily affecting the judgment appealed from" reflected the more narrow range of decisions of which the State may obtain review.

Subsection (3) of both Section 13 and Section 14 include a qualifier – "[e]xcept as provided in this section" – because, under current law, there are limits on the appellate courts' authority to review intermediate trial court decisions, and the bill carries forward those limitations.

Subsection (4)(a) of Section 13 is intended to codify the holding of *State v. Sullens*, 314 Or 436, 939 P2d 708 (1982), that on a defendant's appeal from a judgment of conviction and sentence, the defendant may assign error to the trial court's denial of a motion for new trial under ORS 136.535 based on allegations of newly discovered evidence or events occurring during trial but not discovered until after trial.[16] Subsection (3)(b) clarifies that an appellate court may review the trial court's denial of a defendant's post-trial motion in arrest of judgment under ORS 136.500.[17] Section 14 contains no comparable limitation on the appellate court's authority to review a trial court order *granting* a motion for new trial or an arrest of judgment, because, under ORS 138.060 as amended by this bill, the State may appeal those orders directly and under Section 14(1), the appellate court may review those trial court decisions.

Subsection (5)(a) is intended to restate the principle currently found in ORS 138.050(1)(a) that where the defendant pleaded guilty or no contest to the offense of which the defendant was convicted, on appeal, the appellate court may not review the validity of the plea or the conviction, except when the defendant, under ORS 135.335, has reserved in writing an adverse pre-trial trial court ruling for appeal.

Subsection (5)(b) is new statutory law relating to merger of determinations of guilt. Under ORS 161.067, under certain circumstances, if a defendant is found guilty of multiple counts arising from the same criminal episode, the trial court may convict the defendant of only one offense, so-called "merger." Although trial courts typically decide merger issues after trial (or sometimes after the defendant has pleaded guilty or no

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[16] In *State v. Evans*, 98 Or 214, 193 P 927 (1920), the court explained why a defendant may not appeal the trial court's denial of a motion for new trial on other grounds, namely that those grounds must have been raised before entry of judgment and therefore the denial of relief would be reviewable on appeal from the judgment of conviction and sentence. The Work Group does not intend that the provision would change existing law regarding the limited circumstances under which appellate courts may review a trial court's denial of a motion for a new trial.

[17] *See* the memorandum in the Appendix entitled "The Reviewability of Denials of Motions in Arrest of Judgment," dated September 12, 2016.

contest to multiple offenses), conceptually, merger has to do with whether the defendant is guilty of one or more offenses. Accordingly, under current law, appellate courts may decide a merger issue raised on a defendant's appeal even when the defendant pleaded guilty or no contest to the offenses the defendant asserts should be merged into a single determination of guilt.[18] Subsection (5)(b) reflects that appellate practice and authorizes appellate court review of a merger issue. That authority is subject to a limitation, which is new statutory law, that the appellate court may not review the merger issue if the trial court convicted the defendant of multiple offenses pursuant to a plea agreement in which the defendant agreed to plead guilty or no contest to the convictions in question.

Subsection (6) relates to current ORS 138.083(2)(a) as recodified in Section 3(2)(a), authorizing a defendant to appeal from a judgment determining that the defendant should be liable for restitution, but not specifying the amount of restitution. Subsection (6) states the corollary that on appeal from such a judgment, the appellate court may not review the determination of defendant's liability for restitution.

Subsection (7) addresses the appellate courts' scope of review respecting the sentence imposed on a conviction. Respecting convictions of misdemeanors (and felonies committed before November 1, 1989), subsection (7) represents one of the more significant changes made by this bill. Under current ORS 138.040(1)(b), an appellate court may review the disposition of a misdemeanor (or pre-November 1989 felony) conviction only as to whether the disposition exceeds the maximum allowable by law or is unconstitutionally cruel and unusual.[19] Subsection (7) would do away with those limits and permit review of "whether the trial court failed to comply with requirements of law in imposing or failing to impose a sentence."[20]

Subsection (8)(a) is intended to restate the limits on reviewability of sentences imposed on convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines) currently set forth in ORS 138.222(2)(a) through (c). Subsection (8)(b) is intended to restate the limitations on review currently set forth in ORS 138.222(3). Subsection (8)(c) is intended to restate the limitations on review currently set forth in ORS 138.222(4)(b) and (c).

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[18] *See State v. Summerlin*, 139 Or App 579, 913 P2d 340 (1996), and *State v. Davis*, 265 Or App 425, (2014).

[19] On its face, ORS 138.040(1) is not limited to misdemeanors and pre-November 1, 1989, felonies. But, in *State v. Cloutier,* 351 Or 68, 261 P3d 1234 (2011), the court held that, when the Legislature enacted ORS 138.222, the Legislature intended ORS 138.222 to govern appealability and reviewability of sentences for felonies committed after November 1, 1989. Thus, by default, ORS 138.040(1)(b) currently applies to misdemeanors and felonies committed before that date. Also, in *Cloutier* the court held that the phrase "maximum allowable by law" means the maximum allowable by *statutory* law.

[20] Under current law, that is the scope of review applicable to both defendants' and the State's appeals from judgments of conviction of a felony committed after November 1, 1989. ORS 138.222(4)(a). *See* the memorandum in Appendix I entitled "Endorse a Uniform Scope of Review of Sentences in Criminal Cases," dated December 8, 2016.

Subsection (9) is intended to restate the limits on reviewability currently set forth in ORS 138.222(2)(d). It omits the phrase "which the sentencing court approved on the record," because the important factor is whether the parties stipulated to the sentence, not whether the trial judge approved the stipulation "on the record" somewhere other than as reflected in the judgment of conviction and sentence itself. The addition of the phrase "any part of a" before "sentence" is not intended to change current law. Rather, the Work Group added the phrase to make explicit the conclusion in *State v. Capri*, 248 Or App 391, 395, 273 P3d 290 (2012), and *State v. Davis*, 134 Or App 310, 314, 895 P2d 1374 (1995), that any portion of a sentence not agreed to between the state and a defendant is reviewable; that is, only those parts of the sentence the defendant and the State stipulated to are not subject to review.

Subsection (10)(a) is intended to reflect principles articulated in ORS 18.107(2) and (3) respecting appeals from corrected or amended judgments. Although ORS 18.107(2) and (3) speak in terms of appealability and the time within which notice of appeal must be filed, and subsection (10) speaks in terms of reviewability, the principles are the same. First, if a trial court enters a corrected or amended judgment that restates the prior version of the judgment *in toto* except for the part that is changed within the 30-day appeal period, the corrected or amended judgment in effect supplants the prior judgment and, if the defendant timely appeals from the amended or corrected judgment, the corrected judgment *in toto* is reviewable.[21] Second, if a trial court does not enter a corrected or amended judgment restating the prior judgment *in toto* until after expiration of the 30-day appeal period, the prior judgment is no longer subject to appeal and review; on appeal from the corrected or amended judgment, the appellate court may review only the amended or corrected part of the judgment, any part of the prior judgment affected by the amendment or correction, or the trial court's denial of a request to correct the prior judgment.[22]

The Work Group intends a corollary to the latter principle, albeit not explicitly reflected in the bill itself: After expiration of the appeal period from the prior judgment, if a trial court enters a judgment containing a corrected or amended version of a part of the prior judgment, then only the amendments or corrections are reviewable on appeal from that

[21] However, if an amended or corrected judgment is entered after the 30-day appeal period, a defendant may file a late appeal from the *original* judgment until the 90-day delayed appeal period under ORS 138.071(4) expires. Under those circumstances, in order for the appellate court to review the original and new judgment *in toto*, a defendant must file a late notice of appeal from the original judgment *and* a notice of appeal from the amended or corrected judgment.

[22] There is an important limitation in play here. The appellate court may review the denial of a request to correct a judgment only if the trial court changed or modified the prior judgment in some way such that the judgment is appealable under Section 3 of the bill. The Work Group did not intend to change existing law to the effect that, where the trial court simply denies a motion to correct the judgment, the denial is not appealable. *See, e.g.*, *State v. Hart*, 188 Or App 650, 72 P3d 671 (2003) (no appeal lies from order in criminal case denying post-judgment motion); *State v. Sagar*, 249 Or App 252, 274 P3d 890 (2012) (post-judgment denial of relief for relief under ORS 137.754 relating to eligibility for leave, work release, and post-prison supervision programs not appealable).

judgment (together with any part of the prior judgment affected by the amended or corrected judgment, and the denial of any other request to correct the judgment).

Subsection (10)(c) clarifies that the principles stated in paragraph (b) are applicable regardless of whether the prior trial court decision was a judgment of conviction and sentence, a supplemental judgment awarding restitution, or an order that a defendant may appeal.

Subsection 11(a) relates back to Section (3)(6), which permits a defendant to cross-appeal when the State appeals from pre-trial orders, and is intended to codify the holding of *State v. Shaw*, 338 Or 586, 113 P3d 898 (2005), that the appellate court may limit review of the defendant's cross-assignments of errors to those "inextricably linked to the State's assignments of error. Subsection 11(b) states an important consideration not expressly stated in current law: A defendant who, in reliance on *Shaw*, forgoes assigning error to a trial court ruling not closely linked to the State's assignments of error does not waive the right to seek review of the same trial ruling on appeal following conviction and sentence. Thus, a practitioner representing a defendant on a State's cross-appeal may comfortably forgo briefing an unrelated issue knowing that, if the defendant is convicted and chooses to appeal, the defendant may assign error to the same ruling on the defendant's appeal.

Section 14. Reviewability on State's Appeals

Subsection (1). *See* the discussion of Section 13(1)

Subsection (2). *See* the discussion of Section 13(2).

Subsection (3). *See* the discussion of Section 13(3).

Subsection (4)(a) is new statutory wording, but is necessary because of the manner in which the bill amends ORS 138.060(1)(e) to permit the State to appeal judgments of conviction and sentence as to felonies committed after November 1, 1989. The existing provision, by referring to ORS 138.222, implicitly imports all of the limitations on review found in ORS 138.222; by removing the reference to ORS 138.222 (and repealing ORS 138.222), the limitations on review will be found in Section 14. When the State appeals a judgment of conviction and sentence, review is limited to the sentence imposed by the trial court; the appellate courts will have no authority to review the trial court's determination that the defendant is or is not guilty of an offense. However, that principle is subject to an exception – where merger of determinations of guilt is at issue, as provided in Section (4)(b) – the mirror of the same principle applicable to defendants. *See* the discussion of Section 13(5)(b). (And, like a defendant's appeal, on a State's appeal, the appellate court may not review the trial court's merger decision if it results from a plea agreement between the State and the defendant.)

Subsection (5) is intended to restate a principle of reviewability of sentences currently found in ORS 138.222(4)(a) applicable to convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines). However, subsection (5) also would apply to all felonies, including a felony committed before November 1, 1989, and any felony subject to a sentence other than a Sentencing Guidelines sentence, such as a mandatory sentence.

Subsection (6) is the counterpart to Section 13(9). Subsection(6)(a) is intended to restate limitations on review of sentences imposed under the Sentencing Guidelines for felonies committed after November 1, 1989, as currently set forth in ORS 138.222(2)(a) through (c). Subsection (6)(b) is intended to restate the limitations on review currently set forth in ORS 138.222(3). Subsection (6)(c) is intended to restate the limitations on review currently set forth in ORS 138.222(4)(b) and (c).

Subsection (7) is intended to restate the limits on reviewability of sentences imposed pursuant to stipulated sentencing agreements currently set forth in ORS 138.222(2)(d).

Subsection (8)(a) and (b). *See* the discussion of Section 13(10)(a) and (b).

There is no reviewability counterpart to ORS 138.060, as amended by Section (4), new (1)(g), authorizing a State's appeal from a judgment or orders declining to award restitution or awarding less restitution than sought by the prosecutor because the trial court's decision would be reviewable under Section 14(1).

Section 15 - 17. DETERMINATION ON APPEAL

Sections 15 through 17 address the relief an appellate court may grant on appeal.

Section 15

Subsection (1) restates the provisions of current ORS 138.240 that an appellate court may reverse, affirm or modify the trial court judgment or order being appealed, but clarifies that an appellate court also may vacate the judgment or order. Section 15 also is intended to clarify that the authority to affirm, reverse, vacate, or modify applies to any part of the judgment or order being appealed. Section 15(1) omits the provision in existing ORS 138.240 that the appellate court "shall, if necessary or proper, order a new trial" for two reasons: First, a remand inherently is plenary in nature, and the appellate court does not need to remand specifically for a new trial for the trial court to have the authority to conduct a new trial if the trial court determines, in light of the appellate court decision and the circumstances of the case, that a new trial is appropriate. Second, other potential outcomes may remain available on remand, other than a new trial, including a negotiated plea or other disposition.

Subsection (2). The broad grant of authority stated in subsection (1) is subject to the "harmless error" limitation found in the Oregon Constitution, Article VII (amended), § 3: "If the supreme court shall be of opinion, after consideration of all matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * *." The Work Group intends that subsection (2) would replace current ORS 138.230, which contains a different iteration of the harmless error principle. ORS 138.230 is of ancient vintage and is largely unchanged from the Deady Code. *See* General Laws of Oregon, Crim Code, ch XXIII, § 246 (Deady 1845-1864). ORS 138.230 precedes adoption of the Article VII (amended) in 1910.

The appellate courts have not always relied on ORS 138.230 and, instead, often, have relied on the constitutional provision itself. *See* the memorandum in Appendix I entitled "Relationship of ORS 138.230 to Article VII Section 3," dated August 4, 2016. Confronted with claimed trial court error, the appellate courts have often articulated the harmless error standard as whether there is little, if any, likelihood that the claimed error changed the result of the trial or whether the claimed error as a practical matter affected a substantial right of the appellant.[23] The Work Group determined that the "little likelihood that any error affected the outcome" of the trial court case standard best reflected the appellate cases that have applied the harmless error principle derived from Article VII, Section 3.

Subsection (3) is intended to clarify that, when an appellate court reverses, vacates or modifies the judgment or order being appealed, the court may do so with or without explicitly remanding the case to the trial court and with or without instructions. When an appellate judgment issues after the appellate court has reversed, vacated, or modified the judgment or order, jurisdiction of the matter returns to the trial court as necessary for implementation of the appellate court's decision. *See* ORS 19.270(6). Any subsequent actions by the trial court must comport with the appellate court's decision, including the "tag line" of the opinion, which must be read in the context of the opinion as a whole. *See State v. Barajas*, 262 Or App 364, 366 (2014).

Subsection (4) is intended to restate the essence of existing ORS 138.222(5)(a) and (b) pertaining to resentencing when an appellate court holds that a trial court erred in imposing a sentence or the appellate court reverses a conviction on at least one count and affirms another conviction. The Work Group does not intend subsection (4) to make any substantive change in the law except for this: Unlike current ORS 138.222, which applies only to felonies committed after November 1, 1989, subject to the Sentencing Guidelines, subsection (4) would apply to all misdemeanors and all felonies.

Subsection (5) is intended to carry forward the provisions of current ORS 138.250 regarding whether, when an appellate court reverses a conviction without explicitly remanding for a new trial, the trial court must determine whether the defendant will be discharged, released on own recognizance or on security, or will remain in custody. However, instead of relying on the older wording of ORS 138.250, subsection (5) proposes to refer to ORS 135.680, which addresses release decisions in detail and reflecting modern practices.

Section 16

Section 16 amends ORS 138.227 to clarify that the appellate court's authority, on joint motion of the parties, to vacate and remand to a trial court for reconsideration, includes

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[23] Iterations of a "harmless error" standard also are found in ORS 19.415(2), pertaining to appeals in civil cases ("No judgment shall be reversed or modified except for error substantially affecting the right of a party."), and in the Oregon Evidence Code (OEC) 103(1) ("Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.") and (4) ("Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.").

the authority to remand for reconsideration of an intermediate decision, not just the judgment or order being appealed.

Practitioners should note that the Work Group declined to adopt an amendment that would authorize, on joint motion of the parties, reversal of the trial court judgment or order being appealed and remand with specific instructions. Under ORS 2.570(5), only a department of the court or the court *en banc* may reverse a trial court judgment or order. ORS 2.570(6) authorizes the Chief Judge, or the Appellate Commissioner, only to decide motions and procedural matters.

Practitioners also should note that ORS 138.227 provides a mechanism for implementing an alternative disposition of the case that the defendant and the State have negotiated. A motion to vacate and remand to the trial court, if granted, will give the trial court an opportunity to rule on the proposed alternative disposition. Under those circumstances, vacating and remanding to the trial court to determine whether the trial court will accept the alternative disposition is the better practice rather than having the appellate court remand with specific instructions.

Section 17

Section 17 amends ORS 138.261, which, generally, addresses time limits for the prosecution and decision of State appeals of pre-trial orders. If the defendant is charged with murder or aggravated murder, the appeal is filed in and decided by the Supreme Court; if the defendant is charged with any other offense, the appeal is filed in and decided by the Court of Appeals. The time limit for the Supreme Court to decide such a case currently is found in ORS 138.060(2), which deals with State appeals generally. The Work Group determined that ORS 138.060 should be amended to deal exclusively with appealability by the State, and to move ORS 138.060(2) into ORS 138.261. Proposed new subsection (6) of ORS 138.361(6) would accomplish that.

Subsection (1) also is amended to conform to amendments made to ORS 138.060(1).

SECTIONS 18 - 20. SUPPLEMENTAL, CORRECTED, & AMENDED JUDGMENTS

Section 18(1) would make Section 19 a part of the ORS 137.101 to 137.109 series, relating to trial court determinations whether to require a defendant to pay restitution and the amount thereof, including during the pendency of an appeal from the judgment of conviction and sentence. Section 19 recodifies the essential provisions of ORS 138.083(2)(b) and (c). The Work Group did not incorporate the last sentence of ORS 138.083(2)(c) authorizing the appellate courts to adopt rules for modification of appeals because ORS 138.083(3) adequately addressed that topic. Although this bill also repeals ORS 138.083, Section 10 of the bill recodifies the essential provisions of the last sentence of ORS 138.083(3).

Section 18(2) makes Section 20 part of Chapter 137 relating to sentencing generally. Section 20 recodifies the provisions of ORS 138.083(1)(a) and (b), relating to trial court authority to correct or modify judgments, including during the pendency of an appeal. The Work Group did not incorporate the last sentence of ORS 138.083(1)(c) authorizing the appellate courts to adopt rules for modification of appeals because ORS 138.083(3) adequately addressed that topic. Although this bill also repeals ORS 138.083, Section 10 of the bill recodifies the essential provisions of the last sentence of ORS 138.083(3). Section 20 retains the phase "modify any erroneous term in the judgment" currently found in ORS 138.083(1)(a). The bill does not attempt to define the scope of that authority.

SECTIONS 21 - 25. CONFORMING AMENDMENTS

Sections 21 and 22, respectively, amend ORS 40.460(18a)(b) and ORS 136.434(3) to reflect renumbering of the part of ORS 138.060 relating to State's appeals from pre-trial orders determining the inadmissibility of evidence.

Section 23 amends ORS 137.020(5)(b), which currently requires trial judges, at the time of sentencing of defendants who have pleaded guilty or no contest, to advise such defendants of the limitations on *appealability*. The bill restates those limitations on appealability as limitations on review, as set out in Section 13. Consequently, Section 28 amends ORS 137.020(5)(b) to require trial judges to advise defendants of the limitations on *reviewability* as set out in Section 13 of the bill.

Section 24 amends ORS 137.079(8), which limits review of trial court decisions relating to a defendant's criminal history "[e]xcept as provided in ORS 138.222" to reflect that, under the bill, reviewability would be as provided in Section 13.

Section 25 amends ORS 138.697(3), relating to appeals from trial court decisions in post-judgment proceedings in which the defendant has requested DNA testing, to clarify that the relief that the appellate court may grant is as stated in Section 15 of the bill.

SECTIONS 26 - 27. MISCELLANEOUS PROVISIONS

Section 26 identifies the statutes that the bill would repeal. In most instances, the statutory provisions are being repealed because the bill recodifies the provisions as is or as modified.

Notes about the repeal of ORS 138.083: ORS 138.083 currently addresses the authority of a trial court during the pendency of an appeal to correct a judgment and to enter a supplemental judgment awarding restitution. The presence of those provisions in ORS Chapter 138 makes sense to the extent that the statute makes clear that a trial court may correct a judgment and may enter a supplemental judgment for restitution during the pendency of an appeal.[24] However, having those provisions in ORS Chapter 138 begs the question whether the trial court has authority to enter a corrected or supplemental judgment only when the case is on appeal. The Work Group ultimately determined that the better policy would be for the trial court to have authority to correct a judgment and

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[24] It is important to so state because ORS 19.270(1) – made applicable to criminal cases by ORS 138.185(2) – provides that, when notice of appeal has been filed, the appellate court has jurisdiction of the cause. The appellate courts have interpreted ORS 19.270(1) to mean appellate court jurisdiction is exclusive and, absent some authority providing otherwise, a trial court may not exercise jurisdiction when the case is on appeal from the judgment of conviction and sentence.

to enter a supplemental judgment awarding restitution whether or not an appeal is pending.

Therefore, the Work Group proposes to recodify the provisions of ORS 138.083(1)(a) and (2)(b) in ORS Chapter 137, relating generally to entry of judgments in criminal cases. *See* Sections 19 and 20 of the bill. Those sections make clear that the trial court has authority to enter corrected judgments and supplemental judgments during the pendency of an appeal.

Section 27 states that unit captions in the bill are for the convenience of the reader and do not become part of the statutory law or express legislative intent.

SECTION 28. APPLICABILITY

Section 28 addresses the issue of whether the provisions of the bill should apply retroactively to pending appeals or apply prospectively only. The Work Group intends that the bill would be prospective only, applying to appeals of judgments and orders entered after the effective date of the bill.

The Work Group decided not to include an emergency clause in the bill. Trial and appellate courts and attorney practitioners will need sufficient lead time before the bill goes into effect to inform persons affected of the changes made by the bill, adopt or modify procedures as required by the bill, and otherwise to implement the bill.

TABLE OF STATUTES IN ORS CHAPTERS 40, 136, 137, & 138 AMENDED, RECODIFIED & REPEALED

ORS Chapters 4, 136, 137

40.460	Amended by Section 21.
136.120	Amended by Section 5.
136.130	Repealed; *but see* Section 5.
136.140	Repealed; *but see* Section 5.
136.434	Amended by Section 22.

137.020	Amended by Section 23.
137.079	Amended by Section 24.

ORS Chapter 138

138.005	Amended by Section 1.
138.010	No change.
138.012	No change.
138.020	No change.
138.030	No change.
138.040	Repealed; *but* for subsection (1) *see* Sections 3(1)(a), (3), and (5) as well as Section 13(3) and (7); for subsection (2), no replacement.
138.050	Repealed; *but* for subsection (1), *see* Section 6(1)(a) and (b), and (3); for subsection (2)(a), *see* Section 3(1)(a), and for (2)(b), no replacement (*but see* ORS 157.010 and 221.359); for subsection (3), *see* Section 13(7); for subsection (4), no replacement.
138.053	Repealed; *but* for subsection (1), *see* Section 3(1)(a)(A)-(C) and (3); for subsection (2), no replacement; for subsection (3), *see* Section 6(2)(a).
138.057	No change.
138.060	Amended by Section 4; for subsection (3), *see* amendment to ORS 138.261(6) by Section 17.
138.071	Amended by Section 7.
138.081	Amended by Section 8.
138.083	Repealed
138.090	No change.
138.110	Repealed; *but see* Section 8.
138.120	Repealed; *but see* Section 8.
138.125	No change.
138.135	No change.
138.160	No change.
138.185	Amended by Section 9; *but* for the scope of review provision in subsection (2), *see* Section 13(3).

138.210	Amended by Section 11.
138.220	Repealed; *but see* Sections 13(2) and 14(2).
138.222	Repealed; *but* for subsections (1)-(4) *see* Section 13(7)-(9) and Section 14(5)-(7); for subsection (5), *see* Section 15(4); for subsection (6), no replacement; for subsection (7), *see* Sections 3(3), 4(1)(f), and 6(2).
138.225	No change.
138.227	Amended by Section 16.
138.230	Repealed; *but see* Section 15(2).
138.240	Repealed; *but see* Section 15(1).
138.250	Repealed; for new trial provision, *see* Section 15(3); for release from custody provision, *see* Section 15(5).
138.255	No change.
138.261	Amended by Section 17.
138.300	Repealed; no replacement.
138.310	No change.

Table Correlating Substantive Provisions of SB 896 to Current Statutes

Section 1	Amends ORS 138.005; subsection (1), no change; subsections (2)-(4) new; subsection (5) new, *but see* ORS 138.071(2)(g), 138.053(1)(a)-e), and 138.222(7)(b).
Section 3	Subsection (1) derived in part from ORS 138.050(2)(a) and 138.081(2)(a); subsection (1)(a)(A)-(C) derived in part from ORS 138.040 and 138.053(1)(a); subsection (1)(b) is new; subsection (2)(a) derived from 138.083(2)(a); subsection (2)(b), *see* ORS 138.083(3)(a); subsection (3) derived from ORS 138.053(1)(b)-(e) and 138.222(7)(b); subsection (4), *see* ORS 138.083(1)(b) and (3)(a); subsection (5) derived from ORS 138.040.
Section 4	Amends ORS 138.060; amendment to new subsection (1)(f) derived in part from ORS 138.222(7); provisions of subsection (3) being deleted are recodified at ORS 138.261(6) as amended by Section 17 of the Act.
Section 5	Amends ORS 138.120; new subsection (2) derived from ORS 136.130 and 136.140.
Section 6	Subsection (1)(a) derived from ORS 138.050(1); subsection (1)(b) substantially modifies provisions of ORS 138.050(1)(a) and (b) and

	138.222(7)(a); subsection (2)(a) derived in part from 138.053(3) and 138.222(7)(b); subsection (2)(b) derived from ORS 138.222(7)(c).
Section 7	Amends ORS 138.071; new subsection (4) derived from ORS 138.071(4) and ORS 138.083.
Section 8	Amends ORS 138.081; new subsection (2) derived from ORS 138.110 and 138.120; subsection (3) derived from 138.081(2).
Section 9	Amends ORS 138.185; deleted provisions of subsection (1) are subsumed by the amendments to subsection (2); deleted provision of subsection (2) as applicable to State appeals is recodified at Section 14(3).
Section 10	Derived from ORS 183.083(1)(b), (2)(c), and (4).
Section 11	Amends ORS 138.210; *see* ORS 138.185(2) making ORS 19.270 applicable to criminal appeals, and ORS 19.270(3).
Section 12	Codifies case law applying ORS 19.205(5) to proceedings in criminal cases.
Section 13	Subsection (2) derived from ORS 138.220; subsection (3) derived from ORS 138.040(1)(a); subsection (4) derived from case law; subsection (5)(a), *see* ORS 138.050(1) and 138.222(7)(a); subsection (6) derived from case law; subsection (7), *see* ORS 138.222(4)(a); subsection (8)(a) derived from ORS 138.222(2)(a)-(c); subsection (8)(b) derived from ORS 138.222(3); subsection (8)(c) derived from ORS 138.222(4)(b) and (c); subsection (9) derived from ORS 138.222(2)(d); subsection (10), *see* ORS 18.107; subsection (11)(a) derived from case law.
Section 14	Subsection (2) derived from 138.220; subsection (3) derived from ORS 19.425, made applicable to criminal cases by ORS 138.185(2); subsection (4)(a) derived from ORS 138.060(1)(e) and 138.222(7); subsection (5) derived from ORS 138.222(4)(a); subsection (6)(a) derived from ORS 138.222(2)(a)-(c); subsection (6)(b) derived from ORS 138.222(3); subsection (6)(c) derived from ORS 138.222(4)(b) and (c); subsection (7) derived from ORS 138.222(2)(d); subsection 8, *see* ORS 18.107.
Section 15	Subsection (1) derived from ORS 138.240; subsection (2) replaces ORS 138.230; subsection (4) is derived from ORS 138.222(5); subsection (5) is derived from ORS 138.250.
Section 16	Amends ORS 138.227.
Section 17	Amends ORS 138.261; new subsection (6) derived from ORS 138.060(3).
Section 19	Derived from ORS 138.083(2)(b) and (c).
Section 20	Derived from ORS 138.083(1)(a) and (b).
Section 21	Amends ORS 40.460; amendment to subsection (18a)(b) conforms to the amendment of ORS 138.060 by Section 4 of the Act.

Section 22	Amends ORS 136.434; amendment to subsection (3) conforms to the amendment of ORS 138.060 by Section 4 of the Act.
Section 23	Amends ORS 137.020; amendment to subsection (5)(b) relates to the repeal of ORS 138.050 and 138.222 and the adoption of Section 13 of this Act.
Section 24	Amends ORS 137.079; amendment to subsection (5)(f) relates to the repeal of ORS 138.222 and the adoption of Sections 13 and 14 of this Act.
Section 25	Amends ORS 138.697; relates to the repeal of ORS 138.240 and 138.250 and the adoption of Section 15 of this Act.
Section 26	Repeals ORS 136.130, 136.140, 138.040, 138.050, 138.053, 138.083, 138.110, 138.120, 138.220, 138.222, 138.230, 138.240, 138.250, and 138.300.

APPENDICES

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole, or its members.

APPENDIX I

(memoranda referred to in the report)

"Special Statutory Proceedings" Memo, dated June 7, 2016

Finality of Criminal Judgments and Appealability, dated June 20, 2016

Dispositions and Sentences, dated July 11, 2016

ORS 136.120 and 136.130, dated August 4, 2016

Relationship of ORS 138.230 to Article3 VII Section 3, dated August 23, 2016

Reviewability in Misdemeanors and Felonies Post-*Cloutier*, dated September 7, 2016

The Reviewability of Denials of Motions in Arrest of Judgment, dated September 12, 2016

Endorse a Uniform Scope of Review of Sentences in Criminal Cases, dated December 8, 2016

APPENDIX II

(memoranda considered by the Work Group but not referred to in the report)

Scope of Review of Corrected Judgments, dated September 20, 2016

Revocation of Conditional Release: Appealability and Scope of Review, dated September 20, 2016

Determination on Appeal: "Harmless Error" Standard: *Purdy v. Deere and Company*, dated October 10, 2016

Appeal Provisions Relating to Justice and Municipal Courts, dated October 10, 2016

Development of Sentencing Review in State and Defendant Appeals, dated November 10, 2016

Adams and *Huddleston* Research, dated November 18, 2016

ORS 138.060(1)(e) Legislative History, dated December 5, 2016

Oregon Receivership Code

Report of the Receivership Work Group
on
Senate Bill 899A (2017)

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I. INTRODUCTION & STATEMENT OF THE PROBLEM:

Courts may appoint a receiver to manage the real and/or personal property of a person or business in a variety of contexts. For purposes of the proposed Oregon Receivership Code (the “Code”), the most notable context for appointment of a receiver is at the behest of the property owner’s creditors, for the purpose of administering, collecting, liquidating and distributing the property when the owner is insolvent or there is a deadlock among owners. The powers of a receiver are broad and are rooted in equity, but it is important for lenders, debtors, receivers and courts to have guidance on the manner in which receivership proceedings may be conducted, and on the permissible scope and consequences of the court’s orders and the receiver’s actions.

Oregon currently has a little guidance on these matters, with the result that receivership proceedings have an ad hoc nature that may vary from court to court or from county to county. Existing law is limited to ORCP 80-82 and sparse case law stretching from the 1880’s to an attorney disciplinary opinion in 1985, with little relevance to current commercial practices or statutory enactments. A survey of the Oregon Revised Statutes yields reference to “receivers” or “receiverships’ of over 248 statutory references. Yet there is virtually no statutory or rule guidance to the Courts, attorneys or receivers. Good sources of possible statutory guidelines have, however been developed elsewhere, and Oregon is in a position to benefit from these sources, as well as from a knowledgeable cadre of lawyers, judges and others who are experienced in the field.

II. HISTORY OF THE PROJECT:

The process leading to the proposed Oregon Receivership Code has its indirect roots in the work of the Uniform Law Commission (“ULC”). The ULC’s Joint Editorial Board for Uniform Real Property Acts proposed in 2011 that the ULC study the feasibility of codifying procedures and other matters affecting the receivership of commercial real estate. This study was undertaken, and a drafting committee was subsequently appointed, which led to the ULC's adoption in 2015 of the Uniform Commercial Real Estate Receivership Act (UCRERA).

During this process it also became clear to Oregon Law Commission personnel that there was substantial interest among members of the Oregon State Bar in legislation that would amplify upon the existing Oregon receivership provisions. It was noted at this time that Washington State had a distinctively well-developed set of receivership statutes that had, in fact, been one important source for UCRERA. It was also noted that UCRERA’s limitation to commercial real estate might be less than ideal for an Oregon project, given the importance of receiverships affecting other assets as well.

The Oregon Law Commission Work Group for this project was first convened in March, 2016, for the purpose of evaluating the suitability for Oregon of a substantial set of receivership statutes and, if suitable, preparing a draft bill for legislative introduction. Members of the Work Group were as follows:

John Albert of Sherman Sherman Johnnie & Hoyt, LLP; Michael B. Batlan, a receiver and bankruptcy trustee; the Hon. Stephen Bushong, Circuit Judge (The Commission replaced Judge Bushong early on in the process in order to allow him availability to Chair another Work Group.); the Hon. Frank R. Alley of the U.S. Bankruptcy Court for the District of Oregon; Barry P. Caplan of Sussman Shank LLP; David W. Hercher of Miller Nash Graham & Dunn LLP; Edward Hostmann of Edward Hostmann, Inc., a state and federal receiver; Jeffrey C. Misley of Sussman Shank LLP; Erich M. Paetsch of Saalfeld Griggs PC; Douglas R. Pahl of Perkins Coie LLP; Teresa H. Pearson of Miller Nash Graham & Dunn LLP; James Ray Streinz of Streinz Law Office; and Patrick W. Wade of Hershner Hunter LLP. Statutory drafting was carried out primarily by David Fang-Yen, Deputy Legislative Counsel, but also by Sean Brennan, Deputy Legislative Counsel. Oregon Law Commission support was provided by Laura H. Handzel, Deputy Director; Nita Kumar, Law Clerk; Tyler Skidmore, Extern; and Jenna Jones, Legal Assistant. The Work Group's Chair was Mark B. Comstock of Garrett Hemann Robertson P.C. and a member of the Commission. The Work Group's Reporter was Andrea Coles-Bjerre, Associate Professor and Director of the Business Law Program at the University of Oregon School of Law.

The Work Group considered adopting UCRERA more or less as a whole; adopting the Washington statutes more or less as a whole; and various possibilities for tailoring an Oregon-specific set of statutes. Ultimately the Work Group took the last and most ambitious of these routes. The proposed Oregon Receivership Code brings together important provisions from UCRERA, from the Washington Act, and from the Work Group's own discussions carried out over the course of 16 meetings.

III. SECTION-BY-SECTION ANALYSIS OF SB 899A:

Sections 1 through 3. Short title; Receivership described; Definitions:

Section 1 formally entitles Sections 2 through 41 of the Code as the Oregon Receivership Code.

Section 2 briefly describes "receivership" as the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct. This section is drawn substantially from ORCP 80A.

Some of the more noteworthy definitions include the following:

The term "residential property" is defined as "real property upon which are situated four or fewer residential units, one of which is occupied as a principal residence by the owner, the owner's spouse, or a dependent of the owner; and (b) Where residential use is the primary activity occurring on the real property." This definition is relevant in Section 13 on "turnover of property" and Section 25 on "use of transfer of estate property outside of the ordinary course of business" described below.

The term "executory contract" is defined as: (a) A contract, including an unexpired lease, under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other; or (b) A contract, including an unexpired lease, under which a party has an unexercised option to require its counterparty to perform. The intent was to adopt the broadly recognized definition of the executory nature of such contracts promulgated by Professor Vern Countryman. *See*, e.g., Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973). While recognizing the benefits of the Countryman definition, the Work Group also was mindful of its limitations, namely that certain contracts, like option contracts, do not fit neatly into the narrow confines of the definition (and yet we would want option contracts to be executory so that the receiver could assume beneficial ones and reject burdensome ones). So, the definition also includes option contracts. This definition is relevant chiefly in Section 24 on executory contracts, described below, but is also referenced in Section 11 on the powers of a receiver; Section 18 on when a court order is required;" and Section 35 on submission of claims by creditors.

The term "foreign action" is used to define an action in a federal or state court outside of Oregon. The definition has relevance in Section 6 (appointment of receiver) described below.

The definition of "insolvency" includes both: (i) balance sheet insolvency – the sum of a person's debts exceeds a fair valuation of all of that person's property (excluding property transferred with fraudulent intent and exempt property); and (ii) generally not paying debts as they come due. This definition is relevant in Section 6 on appointment of receiver, described below.

To clarify that a receiver may be an entity, "person" is defined to include an individual, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity, or other entity of any kind or nature.

The term "affiliate" is defined with respect to an individual and with respect to any other person. The definition of affiliate has particular relevance in Section 8 governing required disclosures of conflicts of interest by the person seeking appointment as a receiver. The term "party" is defined in two ways. When used in relation to an action, it means a person named in the caption of the action, and in this way, like the definition of "affiliate", the definition of "party" has particular relevance in Section 8. It is also defined, when used in relation to a contract, to mean the signatory to the contract.

The term "owner" is defined as the person over whose property a receiver is appointed.

Section 4. Applicability

This section provides that this Code will apply in all receiverships commenced in a court of this state except for federal receiverships and receiverships commenced by a state agency pursuant to statutory authority. For receiverships commenced by a state agency, the Code explicitly permits the state agency to opt in – that is, to elect for the receivership to be governed by this Code. To the extent that the provisions of ORCP 80 conflict with this Code, the provisions of this Code will control.

The Code will be applicable to receiverships in which the receiver is appointed after January 1, 2018.

Section 5. Property not subject to receivership:

This section lists the types of property with respect to which a receiver may not be appointed. The effect of the section is generally to exclude the types of property which creditors generally would not otherwise have access to, and so, as a creditor remedy, a receivership should not give creditors any greater access.

Section 6. Appointment of a receiver:

This section is drawn from existing provisions of ORCP 80B, and other statutory models and delineates, as more fully described below, the bases for appointment of a receiver; the procedure for appointing a person who, in a foreign action, has been appointed receiver over property in Oregon and providing the rules for determining the venue for such an appointment; sets out the extent of the appointment that may be provided for in the receivership order (though Section 11 more explicitly addresses the powers of the receiver); and permits the court to condition the appointment on the giving of security by the person seeking the receiver's appointment.

The bases for appointment generally speak to the very purpose of a receivership – to protect and preserve value. To that end, subsections (a) through (i) include the circumstances or reasons that would warrant the appointment of a receiver. And subsection (i) grants the court broad discretion to appoint a receiver in any situation where appointment is necessary to secure ample justice to the parties. And while it is not determinative, a court, in making its determination whether to appoint a receiver, may consider the existence of a contractual provision providing for the appointment.

Section 7. Eligibility to serve as receiver:

This section closely dovetails with Section 8 (described below) requiring disclosure of certain conflicts of interest which would trigger ineligibility.

This section itself provides that any person, whether or not a resident of Oregon, may serve as a receiver except: (a) an entity that is not authorized to conduct business in Oregon; (b) a person who has been convicted of a crime involving moral turpitude, or is controlled by a person convicted of such a crime; and (c) a sheriff of any county, unless as expressly permitted by statute.

The court may also require a specific individual to appear on behalf of the entity appointed.

Section 8. Required disclosures relating to conflicts of interest:

This section is something of an adjunct to Section 7 (eligibility to serve as receiver) because it requires the disclosure of certain conflicts of interest which would render a person ineligible to serve as receiver. Specifically, a person must disclose, and affirm under oath, whether the person is an affiliate of a party to the receivership; has an interest materially adverse to an interest of a party to the receivership; has a material financial interest in the outcome of the action (other than compensation); has a debtor-creditor relationship with the owner; or holds an equity interest in a party to the receivership.

Section 9. Receiver's bond, alternative security, or insurance:

This section retains the basis of the protections of ORCP 82A (2) and existing case law but clarifies that a court may waive or use alternative methods to address the purpose of this protection. The purpose of a receiver's bond is to ensure that the receiver faithfully performs the receiver's duties, renders a true accounting of receivership property and receivership receipts and disbursements, and obeys the lawful orders of the court. 1 Clark in Receivers §119, at 172(3d ed. 1959). Thus, the bond provides a source of recovery for persons harmed by the receiver's malfeasance, such as the wrongful disbursement of receivership property.

This section permits the court to require, at any time during the service of the receiver, that the receiver post a bond, some alternative form of security such as a letter of credit, or to carry insurance to secure the receiver's faithful performance of the receiver's duties. The section also permits the receiver to charge the cost of such bond, alternative form of security or insurance against the estate.

Section 10. Exclusive jurisdiction of appointing court:

Subject to the federal Constitution Supremacy Clause and its jurisprudence in relation to federal courts, this section grants the appointing court exclusive jurisdiction over the receiver, exclusive jurisdiction over and right to control all property constituting the estate, wherever located, to the full extent of the court's jurisdiction, and exclusive jurisdiction to determine all controversies relating to the collection, preservation, application and distribution of the estate and all claims against the receiver arising out of the receiver's exercise of powers or performance of duties as receiver.

The only exception to this grant of exclusive jurisdiction is for any part of the estate subject to the jurisdiction of another court under ORS 107.105.

Section 11. Powers of receiver:

This section, more than any other, provides direction to the court, makes explicit the basis of authority and somewhat broadens the provisions of ORCP 80D by setting forth a menu of powers from which a court may choose to confer upon the receiver. It includes, among other things, such powers as collecting, controlling and managing estate property; operating a business constituting estate property; engaging and compensating professionals; making improvements to estate property; using or transferring estate property outside of the ordinary course of business – a power more fully set out in Section 25 of the Code; assuming an executory contract; and allowing or disallowing claims of creditors. But the section makes explicit that the receiver may take any other action authorized under the Code and has powers conferred by the court under this section and by statute. And the court is granted the discretion to empower the receiver to take any other action that the court deems reasonably necessary to avoid injustice. Though this menu will most often be used to create the receivership order at the beginning of a proceeding, the statute makes clear that the court may at any time limit, expand or modify the powers conferred upon the receiver.

Section 12. Duties of receiver:

This section governs the receiver's duties, and provides that the court may limit, expand or modify the receiver's duties at any time. The section requires the receiver to notify all state and federal taxing authorities and relevant regulatory agencies of the receiver's appointment in accordance with any applicable laws imposing this duty (such as 26 U.S.C. 6036), comply with applicable law, and if appointed with respect to real property, to file a certified copy of the appointment order with the recorder of the county in which the real property is located.

Sections 13 & 14. Turnover of property; Collection by receiver of debts owed to owner:

To enable the receiver to carry out the receiver's duties, this section requires, upon the demand of the receiver, the turnover of estate property, with two exceptions. The receiver may not demand the turnover of residential real property without specific judicial approval, which the court may grant in the case of waste, destruction, obstruction of marketing of the property, enforcement of a domestic relations order, or other good cause shown. The other exception is for a creditor who has possession or control of estate property and the validity, perfection or priority of whose lien depends on that creditor's continued possession or control – that creditor may retain possession or control unless and until the court orders adequate protection of the creditor's lien. The section derives from UCRERA Section 11(c), the comments to which refer to Bankruptcy Code notions of adequate protection.

The section also provides that any bona fide disputes over whether property is estate property, will be resolved by the court in which the receivership is pending.

Just as Section 13 provides for the turnover of property that is estate property upon the receiver's demand, Section 14 provides for the payment of debts owing to the owner to be paid to the receiver upon the receiver's demand (except to the extent that the debt is subject to setoff or recoupment). Strengthening this requirement, the section also provides that a person who has notice of the appointment of a receiver may not satisfy the debt by payment to the owner.

Section 15. Duties of owner:

This section describes the duties of the owner and derives from Wash. Rev. Code Ann. §7.60.080. Subsection (1)(a) requires the owner to generally assist and cooperate fully with the receiver in the administration of the receivership and the receiver's performance of its duties.

Subsection (1)(c) requires the owner to deliver to the receiver all of the estate property in the person's possession, custody, or control, including accounts, books and records, including any passwords or authorizations needed to facilitate the receiver's access to this information.

To facilitate the receiver's ability to carry out its duties, subsection (1)(d) requires the owner to submit to examination under by the receiver, under oath regarding the owner's financial condition, the owner's acts, conduct, liabilities or any matter relating to the receiver's administration of the estate.

Subsection (2) makes clear that when the owner is an entity, the owner's duties under this Code extend to each officer, director, manager, member, partner, or other individual exercising or having the power to exercise control over the affairs of the entity.

Sections 16, 17 & 18. Mailing lists to be maintained by the receiver; Notices; When court order required:

All of these sections relate to the nature and process of notice.

Section 16 requires the receiver to keep two mailing lists: (i) a master mailing list of all parties to the receivership, all known creditors and interested persons who have filed a notice of appearance; and (ii) a special mailing list of all persons who request to be placed on the list. The request to be placed on the special mailing list can be accompanied with a request for a preferred form of notice, like, for example, email.

Section 17 provides that whenever a person is required to give notice under a provision of the Code, the person must notice all persons specified in the provision and all persons on the special mailing list, and file notice and proof of service with the court. And if the provision does not specify to whom notice must be given, all persons whose property interests would be affected must also be noticed. This section also provides for: (i) the amount of notice – at least as much time as the statutory provision requires, or 14 days if no time is specified; and (ii) the means of notice – by first class mail to persons not on the special notice list (or as otherwise directed by the court) and by whatever means may have been specified by those on the special notice list to those persons (or as otherwise directed by the court). The court may also shorten any notice periods for good cause shown.

Section 17 (3) provides for a form of notice that could be described as "negative notice" – that is, wherever the Code authorizes a person to take an action after giving notice (except for the actions listed in Section 18), the person may take the action without obtaining specific court authorization if the person gives notice that describes the action the person will take unless an objection is filed (and describes the procedure for objecting) and no objections are filed. If an objection is filed, the court will hear the objection and rule on it. The court may choose on its own motion to hold a hearing, and a person who otherwise would be authorized to take an action pursuant to this section may nonetheless move the court for an order authorizing the action if so desired. And the court is also permitted to consider motions and grant or deny relief without notice or a hearing, if it appears that no party to the receivership or interested person would be harmed by the relief requested.

Section 18. When court order required:

The "negative notice" procedure provided for in Section 17 may not be used by a receiver to obtain authorization to take any of the actions listed in Section 18. Rather, a receiver must, after giving notice, obtain a court order authorizing the following: sale or other disposition of real property; use or transfer of property outside of the ordinary course of business; sale of a co-owner's interest in jointly owned property; assumption of an executory contract; obtaining credit or incurring debt outside of the ordinary course of business; compromise or settlement of a controversy that might affect distribution to creditors; disallowance of all or part of a claim; and termination of the receivership. But, if the court finds that for any of these actions (except for the allowance or disallowance of claims and the termination of the receivership) the burden of seeking a court order is greater than the materiality of the action, then the court may establish conditions under which the receiver may take those actions without first obtaining a court order.

Section 19. Creditor list and inventory:

This section governs the receiver's obligation to file an inventory of estate property and a list of creditors, and provides that if the court concludes that it is unlikely that the estate is sufficient to make material distributions to creditors, then the receiver need not file list of creditors. The section requires an initial inventory report within 60 days of appointment, and explicitly grants the Court authority to modify the timeframes.

Section 20. Receiver's periodic reports:

The section requires the receiver to file monthly reports of the receiver's operations and financial affairs including such things as beginning and ending cash balances, a statement of cash receipts and disbursements, a statement of non-cash receipts and payments, a tax disclosure statement and any other information required by the court.

Section 21. Claims bar date:

To facilitate the administration of the estate, this section permits the receiver to set a deadline for submitting claims, and, upon court order, to disallow claims submitted after the deadline.

Section 22. Automatic stay of certain proceedings:

To prevent interference with the receiver's possession and management of estate property or the performance of the receiver's duties, Section 22 provides for a stay which becomes effective upon entry of the order appointing the receiver. Subsection (1) sets out the actions which are stayed: the commencement or continuation of a proceeding that was or could have been commenced before the receivership or to recover a claim against the owner that arose before the receivership; the enforcement of judgments against the owner or any estate property; any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over estate property; any act to create, perfect, or enforce any lien against estate property, to the extent the lien secures a claim against the owner that arose before the receivership; any act to collect, assess or recover a claim that arose before the receivership; and the exercise of a right of setoff against the owner.

Subsection (5) provides a list of exceptions to the stay created by subsection (1). Subsection (5)(a) permits the creditor who sought appointment of the receiver to continue a pending foreclosure proceeding, unless the court orders otherwise. Subsection (5)(b) excepts from the stay the commencement or continuation of a criminal action against the owner and subsection (5)(c) excepts the commencement or continuation of certain domestic relations actions, including actions to establish paternity or to modify an order for spousal or child support. Subsection (5)(d) excepts any act to perfect, or to maintain or continue the perfection of, a security interest in estate property which would have a super-priority over a preexisting non-purchase money security interest under ORS chapter 79, or a lien by attachment, levy or the like, including liens under ORS chapter 87. Purchase money security interests are an example of the type of lien that could be perfected after the appointment order. Subsection (5)(e) excepts from the stay the commencement or continuation of an action by a governmental unit to enforce its police or regulatory power, and if the governmental unit obtains a judgment in that police or regulatory action, subsection (5)(f) permits the enforcement of that judgment, other than a money judgment. Subsection (5)(g) permits a governmental unit to establish a tax liability or any appeal of one.

A person whose action is stayed by subsection (1), and not excepted by subsection (5), may seek relief from the stay, which the court may grant for good cause shown.

Actions in violation of the stay are voidable by the court per subsection (6), and if a person knowingly violates the stay, the court may award actual damages caused by the violation, and may sanction the violation as civil contempt per subsection (7).

The stay terminates upon the termination of the receivership.

Section 23. Utility service:

This section prohibits a utility providing service to estate property from altering, refusing, or discontinuing service without giving the receiver 14 days' notice of any default or intention to alter, refuse, or discontinue service. This section provides a mechanism for a receiver to furnish a deposit or some other form of adequate assurance of payment, upon which the court may prohibit the alteration or cessation of service.

Section 24. Executory contracts:

At the time of appointment of a receiver, the owner is often party to a number of existing contracts to buy or sell goods or services as part of its ongoing business. The receiver will need to assess the value of these contracts, some of which may be beneficial and worth honoring, but others may be burdensome and more of a liability than an asset and the receiver will choose to reject them.

To that end, subsection (1) of Section 24 permits the receiver to evaluate these executory contracts and to assume the beneficial ones (upon order of the court) and reject the burdensome ones (after giving notice). To provide the counterparty with assurance of the receiver's ability to perform, the court may condition the assumption or rejection upon terms that the court deems just and proper like, for example, a curing of defaults (other than an *ipso facto* default described below). Until a formal assumption is approved by court order, the receiver's performance of a contract does not constitute assumption, nor does it preclude rejection of it.

It was the intent of the Work Group to adopt the bankruptcy principle that if an executory contract is assumed, it is assumed *cum onere* – that is, with all the benefits and burdens of the contract. To that end, subsection (2) requires that if a receiver assumes a contract, the receiver must assume the contract in its entirety. It was also understood that what constitutes "the contract" is a matter of state law other than this act.

Even beneficial executory contracts that the receiver assumes are both assets and liabilities in that they require some performance on the part of the receiver. Subsection (3) provides that any obligation or liability incurred by a receiver due to assumption of a contract is an expense of the receivership.

Rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver's appointment, and the counterparty to the contract may take any necessary steps to terminate the contract and may submit a claim for damages from rejection of the contract. Unlike in bankruptcy, the receivership does not discharge the liability of the owner to the counterparty.

Contracts often contain clauses under which the appointment of a receiver constitute a default which permits the counterparty to terminate the contract. These so-called *ipso facto* defaults, were they permitted to be effective in a receivership, would prevent the receiver from assuming a valuable contract for the benefit of the creditor collective. Or they enable the counterparty to extract a ransom price from a receiver who chooses to assume. Neither result makes sense in a collective proceeding, and so just as these types of defaults are invalidated in bankruptcy (and in UA 17(d)), subsection (4) of this act permits a receiver to assume a contract despite the existence of an *ipso facto* default.

Subsection (5) provides three instances in which the receiver may not assume an executory contract without the consent of the counterparty. Subsection (5)(c) prohibits such assumption if the contract has prior to being assumed by the receiver. Subsection (5)(a) and (5)(b) are similar to the provisions in Bankruptcy Code Section 365(c)(1) and (2). Subsection (5)(a) requires the counterparty's consent for assumption essentially if applicable law would excuse the counterparty from accepting performance from anyone other than the owner (even if the contract itself does not restrict assignment). Subsection (5)(b) requires the counterparty's consent for the assumption of a contract to make a loan or extend credit or financial accommodations to the owner.

Subsection (6) provides that a receiver may not assign a contract without first assuming it, unless the counterparty consents to the assignment. Further regarding assignability, subsection (9) provides that nothing in this Code affects the enforceability of anti-assignment provisions in the contract or in applicable law. This is contrary to section 365(f) the bankruptcy code, which invalidates such anti-assignment provisions under certain circumstances.

Subsection (7) protects the property interests of certain counterparties in the event of rejection and, in that way, is similar to the protections afforded counterparties in Bankruptcy Code Sections 365(h)(i) and (h)(ii), 365(i), and 365(n). Generally, the protected parties are given the choice of accepting the rejection and asserting their claim for rejection damages against the estate, or remaining in possession of the property under the terms of the contract. The protected parties are a purchaser in possession under a contract for the sale of real property of the owner; the purchaser of a real property time share interest; the licensee of intellectual property rights; and the lessee of real property.

The receiver is given 180 days from appointment to seek authorization from the court to assume an executory contract. Any contracts that the receiver does not assume during that time will be deemed rejected, but the court may shorten to lengthen that 180-day period for good cause shown.

Section 25. Use or transfer of estate property outside ordinary course of business:

This section permits the receiver to use and/or transfer estate property, outside the ordinary course of the owner's business, and provides substantial guidance on the carrying out and results of the transfer.

Using the estate property outside the ordinary course of the owner's business may be a fruitful source of income for the receivership; for example, the receiver of a vineyard and winery operation might decide to permit the occasional rental of the property for weddings or receptions.

The power of a receiver to sell estate property outside the ordinary course of the owner's business has not always been clear, particularly when the receivership applied only to certain assets of the owner (for example, one parcel of land among many), in which case the receiver has sometimes been viewed as having only a custodial role. The recent real estate crisis, however, has spotlighted the idea that receivership sales may help to realize better value for all concerned as compared to foreclosure sales. Foreclosure sales do not consistently produce prices that approximate the market value that might be obtained in an arms-length, non-distress sale. By contrast, a receiver of mortgaged commercial real property could readily market that property to potential buyers in the context of operating the property during the receivership. Such marketing could permit potential buyers to perform more meaningful and complete due diligence.

Analogous to a foreclosure sale, the sale by the receiver under subsection (2) is free of the lien of the person that obtained appointment of the receiver, and of subordinate liens, but not free of liens having priority. This is because the nature of subordinate property interests is that they get extinguished by those having priority, and the nature of property interests having priority is that they ride through the process. (Under subsection (3), the subordinate liens attach to the proceeds of the transfer by the receiver.)

The transfer may be by public auction; or the transfer may be by other methods such as a privately negotiated agreement. Public auction procedures are generally thought to ensure a fair price more or less as a matter of course, because unduly low bidders will not prevail. Although privately negotiated agreements do not carry the same matter-of-course safeguard, the fact that the sale is only "upon court order" and is also subject to court-prescribed "standards or procedures calculated to maximize the proceeds of the transfer" under subsection (2) should provide similar assurances. In fact, because private negotiations provide buyers with the flexibility to investigate the property before buying or bidding, they may often result in higher proceeds for the benefit of all concerned.

Under subsection (4), a creditor who wishes to purchase may "credit-bid," i.e. buy by setoff. Because the debtor owes the creditor, the creditor may in effect pay the purchase price by forgiving the debt owed by the debtor (in whole or in part, depending on the amount the creditor wishes to bid and/or ultimately pay). However, if this credit-bidding creditor is junior to another creditor, though, the credit-bidding creditor must tender in cash the amount owed to the senior creditor. This is because forgiveness of the debt owed by the debtor does not benefit the senior creditor.

There are two provisions designed to provide finality to the purchaser and thereby help enable the securing of a workable purchase price. First, the sale is free of any right of redemption that the owner may have (just as it is free of certain liens as noted above), so that the purchaser does not risk an upset of the transaction. And second, under subsection (5) the transfer to the purchaser remains valid (and the liens noted above remain extinguished) even if, after the transfer, the order authorizing the transfer is reversed or modified for some sufficient reason, such as the demonstration that the order was procured through fraud on the court. This second protection is subject to a requirement that the purchaser have been acting in good faith, which is defined in subsection (9) as having both a subjective component ("honesty in fact") and an objective one ("the observance of reasonable commercial standards of fair dealing").

The rights of co-owners of property are protected in a balancing test that takes into account the need for receivers to carry out a transfer of the property. The interest of a co-owner that is not estate property may be transferred (along with the interest that is estate property) if the court makes a three-part determination: that partition is impracticable; that the sale without the co-owner's interest would realize significantly less for the estate; and that the benefit to the estate of the sale outweighs the detriment to the co-owner. Though not expressly stated in the statute, of course the portion of the proceeds that is attributable to the interest of the co-owner that is not estate property would go to that co-owner.

The ordinary course of an owner's business is a fact-sensitive inquiry not defined in this Code and is accordingly left to judicial development in particular cases.

Regarding the transfer of intellectual property under this section, the Work Group adopted Comment 4 of Section 16 of the UCRERA, which provides:

> *With respect to intellectual property, the rights of an owner may be limited to the rights of a nonexclusive licensee who has no ability to transfer the owner's rights as licensee without the consent of the licensor. In such a situation, the receiver could assume no greater rights than the owner had, and those rights would remain subject to the provisions of Section 90408 of the Uniform Commercial Code.*

Section 26. Receivership financing:

It may be necessary for a receiver to operate the business of the owner for a period of time and in doing so, the receiver may need to obtain credit or incur debt. Section 26 permits the receiver who is authorized to operate the business to obtain credit and incur debt in the ordinary course of business and expenses related to such debt are allowable as administrative expenses.

The receiver may also obtain credit, including secured credit, other than in the ordinary course of business but only with court approval.

Section 27. Recovery of costs related to secured property:

The ability to "surcharge" a secured creditor's collateral is an important resource available to receivers (and to trustees in bankruptcy), particularly in cases where there is little or no equity to pay even administrative expenses. For this reason, Section 27 permits a receiver to recover from property securing a secured claim the necessary costs and expenses of preserving or disposing of such property to the extent of any benefit to the holder of the secured claim.

Section 28. Abandonment:

The ability to abandon property that is burdensome or of inconsequential value is often necessary to help conclude the administration of the estate. To that end, Section 28, gives the receiver that power to abandon such property after giving notice. Abandoned property is no longer estate property.

The receiver is explicitly prohibited from abandoning estate property in contravention of a state statute or rule designed to protect the public health or safety from identified hazards.

Section 29. Actions by & against the receiver or affecting estate property:

Section 29 provides that a person may not sue a receiver personally for an act or omission in administering estate property, unless permitted by the court that appointed the receiver. This section incorporates into the Code the *Barton* doctrine, which derives from the decision of the U.S. Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 129 26 L.Ed. 672 (1881). In *Barton*, the Supreme Court held that in order to sue a court-appointed receiver, the plaintiff must first seek approval of the appointing court.

A person may not commence or continue an action to dispossess the receiver of any estate property or otherwise interfere with the receiver's management, unless permitted by the court.

This section also allows for the receiver to be joined or substituted as party in an action pending before the appointment in which the owner was a party.

The section also addresses the role of successor receivers in actions by or against the receiver in the event of the death, removal or resignation of the original receiver.

Section 30. Personal Liability of the receiver:

It is well established law that as an officer of the court, a receiver is shielded by judicial immunity for actions performed under the lawful authority of the appointment order. Consistent with that established law, this section provides that the receiver has no personal liability for acts or omissions consistent with the scope of the appointing order or any order of the court. And the receiver is entitled to all defenses and immunities provided by law for an act or omission within the scope of the receiver's appointment.

While it is often possible for a receiver to determine before accepting an appointment whether any estate property is environmentally hazardous, it is possible that such information does not come to light until after the appointment. In order to protect the receiver, subsection (5) specifically provides that nothing in this section may be construed to expand any obligation or liability of a receiver under state law, common law, or federal law for remediation of environmental damages or hazards.

On the other hand, a receiver may be personally liable if the receiver has caused the loss or diminution of value to estate property through a failure to comply with a court order or performing acts or omissions of the kind for which liability is not limited for a director (like intentional misconduct or a knowing violation of law).

Section 31. Employment & compensation of professionals:

Sound management of estate property may require the employment of professionals to assist the receiver, including but not limited to attorneys, accountants, appraisers, brokers, real estate licensees, and auctioneers. Retention and compensation of such professionals is accordingly expressly permitted. Notice of the proposed employment must be given beforehand to the parties specified in Section 17, and under subsection (2) of this Section 31. The notice must include key facts including the rate of compensation and any potential conflicts of interest. In the event of an objection to the employment, the employment may continue until such time as the court sustains the objection.

Certain relationships that might be construed as presenting a possible conflict of interest – such as the professional's having relationship with a creditor or other interested person – do not in themselves disqualify the professional from employment under this section. However, if by reason of such a relationship or otherwise the professional holds or represents an interest adverse to the estate, the professional may not be employed except by order of the court. For example, if an attorney represents an owner of land adjoining estate property with respect to an active dispute over the boundaries of the estate property, the attorney is disqualified from employment under this section except by order of the court.

Subsection (5) provides that the receiver him- or herself may act as attorney or accountant, but other professional roles such as appraiser are not similarly provided for and, by negative implication, the receiver is prohibited from acting in those other capacities, on the theory that the inherent potential for conflict is too great. Even for the roles of attorney or accountant, the receiver may employ him- or herself only if this is in the best interests of the estate. Circumstances such as the receiver's high familiarity with complex facts may satisfy this standard, but an unrestricted right of the receiver to retain him- or herself in these capacities presents too great a potential conflict of interest.

Section 32. Participation of creditors & other interested persons in receivership; effect of receivership on nonparties:

This section provides broad rules on who is bound by the acts of the receiver and the orders of the court. (To be bound by an act or order under this section is to be barred from bringing a motion or proceeding to contest the act or order.) Generally, the status of having been joined as a party to the proceeding is immaterial.

Persons are bound by the acts of the receiver so long as they have actual or constructive notice of the pendency of a receivership. Constructive notice would presumably be found from publication in a newspaper of general circulation in the applicable counties, once a week for two consecutive weeks as required by Section 33(3). It could also presumably be found from information made widely available in appropriately directed social or other media. The particular reference to newspaper publication is attributable in part to the fact that sales of real property are often publicized by that medium.

Persons having a claim against estate property, or an interest in it, are bound by sales of estate property free and clear of liens, and by other orders of the court, if they have actual knowledge of the receivership. The actual knowledge standard may depend on proof of notice and a receiver's compliance with the notice provision of the Code or court order.

Section 33. Initial notice to creditors & other interested persons:

The receiver will give notice of the receivership to all known creditors and any interested persons within 30 days of the receiver's appointment. Subsections (a) through (h) set out the essential initial information for creditors that this notice must contain, such as the appointment of the receiver, the name of the court and the case number of the receivership, a claims bar date if one has been set, and a statement that the person may not receive further notices unless the person requests to join the special mailing list.

Unless otherwise ordered by the court, the receiver will give this notice by first class mail and by publication in a newspaper of general circulation in the applicable counties at least once a week for two consecutive weeks.

Section 34. Claims process:

If the receiver determines there are insufficient assets to make distributions to creditors, then there is no reason to have a claims process and the receiver will simply give notice of that determination. But, if the receiver determines that there are sufficient assets for distributions, then the receiver will send out notice announcing and describing the claims process, the relevant bar dates, and the forms or other information necessary for submitting claims.

Section 35. Submission of claims by creditors:

Once a claims process has been established, but not before that time, claims may be submitted by delivering them to the receiver rather than by filing them with the court. Subsection (5) requires the court to forward to the receiver any claims mistakenly filed with the court.

All unsecured claims that arose before the appointment date, whether contingent, liquidated, unliquidated or disputed, must be submitted in order to receive a distribution. Unless otherwise ordered by the court, claims must be submitted within 30 days after the claims process is established, but there are different deadlines for claims for damages arising from rejection of executory contracts and for claims by state agencies. The receiver may prescribe the claim form, but if none is prescribed, the claim must be in writing and satisfy he minimal requirements for the proof of claim in subsection 4(a) through (d). A claim submitted in accordance with these requirements constitutes prima facie evidence of the validity and amount of the claim.

Section 36. Objection to allowance of claims:

This section sets forth the procedures for disallowance of claims. At any time before entry of an order approving the receiver's final report, a claim may be disallowed by the receiver (upon court order after 21 days' notice), or by the court (after a hearing on an objection by an interested person held after 21 days' notice).

Any objection to a claim may be subject to mediation before adjudication by the court (except for claims held by the state, unless the state consents) upon a request by a creditor, the receiver, the objector, or upon court order.

Because the fixing of contingent or unliquidated claims may unduly delay the administration of the estate, this section permits the estimation of these claims for purposes of allowance. Similarly, it permits the estimation of any right to payment arising from breach of an equitable remedy. Claims estimated under this section are allowed in the estimated amount. Allowance of estimated claims are subject to payment by order of the court.

Section 37. Priorities:

Claims in a receivership will receive distributions in a set priority.

Secured creditors are to be paid from the proceeds of their collateral after payment of any "surcharge" (described in Section 27 *infra*) for the necessary costs and expenses of preserving, or disposing of, the collateral to the extent of any benefit to the holder of the secured claim.

The actual, necessary administrative expenses of the estate are a third priority, ahead of the secured claim of any creditor who sought the appointment of the receiver.

The claims of the U.S. government pursuant to 31 U.S.C. §3713 are a fourth priority.

Creditors with liens on estate property that do not have to be perfected under applicable law are a fifth priority. These creditors actually just receive the proceeds of the disposition of their collateral.

Secured creditors with unperfected liens are a sixth priority, and receive the proceeds of the disposition of their collateral if and to the extent that applicable law makes unsecured creditors subject to those liens.

The holder of wage, salary and commission claims earned within 180 days of the earlier of the receiver's appointment and the cessation of the business have a dollar-capped claim which is a seventh priority. This priority is based on Bankruptcy Code §507(a)(4), which, along with the other dollar-capped provisions of the Bankruptcy Code, are increased at three-year intervals to reflect changes in the Consumer Price Index for All Urban Consumers, published by the Department of Labor. While the Work Group was cognizant of its limitations in drafting this periodic increase into this Code, the Work Group nonetheless recommends to the Legislature that it enact such periodic adjustments.

The holders of lay-away claims – claims arising from the deposit of money with the owner before the receivership in connection with the purchase, lease or rental of property or personal services for personal, family or household use – are an eighth priority. Like the seventh priority for wage claims above, this priority also has a dollar cap, and the Work Group makes the same recommendation to the Legislature to enact periodic adjustments.

Claims for spousal or child support are a ninth priority, except to the extent that the debt is assigned to another entity, voluntarily or by operation of law, or includes an obligation that is not actually in the nature of a support obligation (even if labeled as such).

Tax claims of state governmental units accrued before the receivership are a tenth priority.

Unsecured claims are an eleventh priority, followed only by the interests of the owner. So, only if all of the claims have been paid in this section may the receiver pay any residue to the owner.

To the extent any secured creditors are undersecured, they hold unsecured claims for the deficiency.

Except for the first priority “surcharge claims and the fourth priority U.S. government claims, all of the other claimants receive distributions on a pro rata basis within their priority.

Section 38. Secured claims against after-acquired property:

State law other than this Code provides that the collateral available to a secured creditor may, under certain circumstances, include property acquired by the debtor after the making of the loan. Section 38 of this Code provides that an allowed secured claim benefits, to that same extent, by property acquired by the estate or the owner after the appointment of the receiver.

The applicable circumstances most frequently include an express provision in a loan document. In addition, when a loan transaction involves collateral that naturally turns over, such as inventory or accounts receivable, but the documentation does not include an express after-acquired property provision, courts will sometimes construe such a provision as being tacitly implied.

SECTION 39. Ancillary receiverships:

An owner may have property located in more than one state, but the jurisdictional limitations of an Oregon court may cause an Oregon receiver to lack appropriate power over non-Oregon estate property. Section 39 addresses this problem in subsection (1) by providing that the Oregon receiver may, by order of the Oregon court, apply to the court of another state for appointment as receiver with respect to estate property located in that state. In seeking the order of the Oregon court the receiver may move ex parte for an expedited hearing.

Subsection (2) addresses the converse problem in other states. It provides that a person appointed as receiver by another jurisdiction may move (more likely petition) an Oregon court for appointment as receiver with respect to property of the other jurisdiction’s receivership that is located in Oregon. Section 6(3)(a) of this Code provides that upon such a motion (or petition), the Oregon court shall so appoint the person, if the person is eligible under Section (7) of this Code. Section 6(3)(b) provides that the Oregon court shall, with limited exceptions for manifest injustice, give effect to orders of the other jurisdiction’s court affecting the Oregon property. For example, under Section (6)(3)(b), the Oregon court could enter an order authorizing a foreign receiver to repossess personal property collateral in Oregon, rather than requiring the petitioning receiver to incur the cost of having to obtain the appointment of an ancillary receiver in Oregon.

Section 40. Removal of receiver:

Subsection (1) permits the court to remove a receiver for “cause”, including the receiver’s resignation or refusal to serve. The Code does not define “cause” but instead leaves it to the discretion of the court. This Work Group chose to give the court flexibility because the facts and circumstances often vary substantially from one receivership to another.

If further administration of the estate is required after removal, resignation or death of the receiver, the court may appoint a successor who immediately takes possession of the estate and assumes the duties of receiver.

Under subsection (3), once a replaced receiver has provided a full accounting for all receivership property and full report of all receipts and disbursements during its tenure, the replaced receiver is discharged from further duties and responsibilities as receiver.

Section 41. Termination of receivership:

This section provides for the termination of the receivership and the discharge if the receiver once the receiver has filed a final report and accounting complying with subsection (2), the court has approved that report after notice and an opportunity for a hearing as required in Section 18, and the receiver has distributed or disposed of all receivership property in the manner directed by the court and this Code. The final report is based on the same general template as any of the periodic reports filed by the receiver pursuant to Section 20 of this Code.

If, upon termination for any reason, the court determines that the receiver was wrongfully procured or procured in bad faith, the court may impose on the person who procured the receiver’s appointment all of the receiver’s fees and other costs, and any other sanctions the court finds appropriate.

Section 42. Applicability:

This Code will apply to receiverships in which the receiver is appointed on or after January 1, 2018.

Section 43.

In accordance with Section 4 of this Code, ORCP 80 is amended to provide that this Code controls over conflicting provisions of ORCP 80 with respect to receivership governed by this Code.

Section 44.

This section provides that, similar to the existing exemptions of fiduciaries and trustees, ORS 465.255(3) shall be amended to provide that "a receiver appointed under" this Code shall not be liable for remedial action costs incurred by the state or any other person that are attributable to or associated with a facility, or for damages for injury to or destruction of any natural resources caused by a release.

Sections 45-58.

These sections consist of necessary conforming amendments as well as miscellaneous provisions.

IV. Conclusion:

The Oregon Receivership Code should be adopted because it draws upon the state's own expertise as well as respected Uniform Law Commission and Washington State statutes in order to provide well-tailored solutions to practical questions that have long afflicted the conduct of receivership proceedings in Oregon.

Program Committee Selection Criteria

In addition to the guidance of ORS 173.338, the Oregon Law Commission approved the following criteria for the selection of law reform projects for development by the Commission:

Selection of Issues for Study/Development of Legislation

The Commission should select issues for study/development of legislation based on the following criteria:

A. Source of Work Proposals (Priorities)

1. Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
2. Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
3. Legislative Counsel proposals;
4. Law school proposals;
5. Oregon State Bar section proposals;
6. Commission member proposals; and
7. Other sources

B. Nature of Issues

The Commission should give highest priority to private law issues that affect large numbers of Oregonians and public law issues that fall outside particular regulatory areas administered by state agencies.

C. Resource Demands

The Commission should select issues that available staff and the Commission can finish within the time set for study/development of legislation.

D. Probability of Approval by Legislature/Governor

The Commission should select issues that can lead to legislative proposals with a good prospect of approval by the legislature and Governor.

E. Length of Time Required for Study/Development of Legislation

The Commission should select issues that include both those permitting development of proposed legislation for the next legislative session and those requiring work over more than one biennium.

PROJECT PROPOSAL OUTLINE

A written law reform proposal seeking involvement of the Oregon Law Commission ("Commission") should be addressed to the Program Committee for consideration and contain the following sections:

1. **PROBLEM**: Identify the specific issue to be studied or addressed by the Commission and explain the adverse consequences of current law. An illustrative example from real life is usually helpful.

2. **HISTORY OF REFORM EFFORTS:** Explain past efforts to address the problem and the successes or limitations of those efforts.

3. **SCOPE OF PROJECT:** Explain what needs to be studied, evaluated or changed to fix the problem. In what form will the final product likely be? A written recommendation, rule, statute, etc.?

4. **TIMELINE OF PROJECT:** What is the desired timeline to complete this project? If legislation is to be brought, during what legislative session would it be introduced?

5. **LAW COMMISSION INVOLVEMENT:** Explain why the issue is a good subject for law reform of broad general interest and need (as opposed to an issue likely to be advanced by a single interest group or lobby).

6. **PROJECT PARTICIPANTS:** Identify individuals who are willing to serve on a Work Group, and a Reporter who is willing to work with the Chair of the Work Group to draft the legislation and accompanying Legislative Report. The Chair of the Work Group should be a Commissioner. The Proposal may state a preference for Chair.

The Commission accepts project proposals on a rolling basis, which then go before our Program Committee for review. Program Committee meetings are scheduled as needed. Please mail a hardcopy or email a digital copy of your project proposal.

Contact Information:

Oregon Law Commission
Attn: Program Committee
Oregon Law Commission
245 Winter Street SE
Salem, OR 97301

OLC-info@willamette.edu
Phone: 503-370-6973
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Illustrative Outline of a Report to the Oregon Law Commission

All Commission recommended legislation should be accompanied by a report that among other things explains the need for the bill and the details of the bill. The following is an outline of a report to the Oregon Law Commission for Work Groups to consider when preparing their own reports to the Commission. Of course, each Work Group's issues are unique and certain sections outlined below may not be necessary for every report. Therefore, the following outline is only a guide and actual reports may differ.

Introductory summary

This section briefly identifies the problem area, the reason why it needs attention, and the overall objective of the bill. The introductory summary may be followed by the actual text of the proposal's scope section, if the text is quite brief, otherwise by a summary of its provisions.

History of the project

This section recounts when the OLC undertook the project, who led it, who was on the Work Group, who participated in the research and the design of the proposal, the process of consultation with experts in or outside Oregon, and interested persons outside the Commission.

Statement of the problem area

This section explains in some detail what in the existing state of the law is problematic, either by reason of uncertainty and lack of clear standards, or because apparently clear standards are inconsistent or self-contradictory, or are outmoded, inefficient, inadequate, or otherwise unsatisfactory.

The objectives of the proposal

The preceding sections set the stage for now identifying the objectives of the proposal concretely (as distinct from general goals like "clarification," "simplification," or "modernization") in advance of explaining the choice of legal means to achieve those concrete objectives. This section would identify propositions that are uncontroversial and others on which different interests have competing objectives. If one objective of the proposal is to craft an acceptable compromise among competing interests, this section would candidly state what opposing positions were argued in the consultations, and why the proposal represents the best and most principled accommodation of those that have merit. This section would also note any issues that were discussed but were deferred, complete with an explanation of the deferral.

Review of legal solutions existing or proposed elsewhere

The report here or later should describe models of existing or proposed legal formulations that were examined in preparing the proposal. An explanation of how Oregon compares with the rest of the states would be helpful.

The proposal

In this section, the report should set forth the whole proposal verbatim, except for revisions of a lengthy statute that is better attached as an appendix. The report would then proceed by setting out significant parts of the bill section by section (or by multi-section topics), followed by explanatory commentary on each item. American Law Institute statutory projects offer an illustrative model.

On occasion, the Commission may choose to offer alternative drafts. This can be appropriate when the Commission considers it important that a statute (or rule) provide clear and consistent guidance on a legal problem while leaving to the political decision-makers the choice of which among competing policy objectives should prevail.

Conclusion

The conclusion summarizes the reasons why the bill should be adopted.

Appendices

These would include a bibliography of sources, and perhaps relevant statutory texts or excerpts from other relevant documents or published commentary bearing on the proposal.

Form of publication

A formal report to the Oregon Law Commission should be reproduced in a format suitable for preservation by the Commission, Legislative Counsel, the Department of Justice, and for distribution to libraries and other interested subscribers, perhaps by one of the state's academic law reviews.

Apart from the formal report, the experts who worked on the project should be encouraged to publish their own articles analyzing and commenting on the subject of the report in more detail. Publication in these two different forms was the common practice for scholarly reports to the Administrative Conference of the United States.

MEMORANDUM

To: Commissioners of the Oregon Law Commission
From: David Kenagy
Date: September 6, 2001
Re: Managing Mid-Session Amendments to Law Commission recommended bills

Our experience in the 2001 Legislative Session taught that even the most carefully drafted Law Commission legislative recommendations will be amended during the legislative process. We also learned that the amendments may be proposed from many sources for reasons some of which may not even be known or revealed until after an amendment has been adopted.

Other Law Commissions around the country have faced the same issue. In general they favor maximum flexibility for those charged with guiding the legislation on behalf of the Commission. They do not adopt policy constraining the process but follow understood practices that have developed over their years of experience. I suggest that we do the same. This memo displays the broad outlines of the approach used by the Executive Director's office, which we intend to use in the future, subject to further guidance from the Commission.

You will recall that in light of the experiences of the 2001 Session, the Commission discussed at its July 13, 2001 meeting how to best process the inevitable amendments to Law Commission bills. This discussion included a desire to see Commission recommendations enacted, unless the content of the final enactment departs fundamentally from the original recommendation.

The Commission's Executive Director is responsible for guiding the Commission's recommendations through the legislative process. In that capacity the Executive Director is expected to exercise an initial judgment when faced with a proposed legislative amendment to a Law Commission bill. That initial judgment is to distinguish between amendments that make either "material" or "immaterial" changes to the Law Commission bill. Technical text changes and corrections which do not alter the purpose and function of a bill are examples of immaterial changes.

In the exercise of this initial judgment concerning materiality, the Executive Director will resolve doubts in favor of assuming materiality in order to engage the wider consultation and discussion about the amendment as detailed below. Consultation with either the Commission Chair, Vice-Chair or others usually would be a part of the Executive Director's initial decision making process.

If an amendment is immaterial, the Executive Director will continue to guide the amended Law Commission bill as would be the case without amendment. Making clear, however, that the amendment does not carry formal Law Commission approval.

If an amendment is material, the Executive Director will take steps from among those listed below. The steps selected will naturally depend upon the stage of the legislative process in which the amendment is proposed or made.

Generally, early in the Session there is more time for broad-based discussion, reflection and review. Later in the Session faster responses are needed, requiring a more confined and efficient discussion. Regardless of the step chosen, the Executive Director will consult with the Chair of the Commission in order to take such other necessary steps or combinations of steps as may not be contemplated at this writing. The keys are good communication and flexibility in approach.

The hierarchy of steps in managing mid-session amendments is as follows:

1. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Law Commission for formal consideration and a vote on taking a position on the amendment. Only this first approach would authorize the Executive Director to affirmatively report support or rejection of an amendment "on behalf of the Commission." This approach, however, requires both an assessment of the time available for such action and the nature and scope of the amendment itself. Experience has shown that some amendments, while fairly judged "material," are of lesser scope and effect than others and may therefore be better addressed in a less formal manner.

2. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Work Group responsible for the Commission's draft at a meeting of the Work Group or informally by email or otherwise where necessary.

3. In consultation with the Commission Chair or Vice-Chair, present the amendment to the responsible Work Group Chair, to the Work Group Reporter, and to any members of the Work Group known to the Executive Director to be most knowledgeable on the subject raised by the amendment.

4. In consultation with the Commission Chair or Vice-Chair, present the amendment to the Work Group Chair, Reporter or other most knowledgeable Work Group member.

Following each of the above actions the Executive Director will carry out the steps next reasonably necessary to implement the guidance obtained from the process. In no case shall the views of any person or group of persons be reported by the Executive Director as the views of the Law Commission unless supported by a vote of the Commission affirming those views.

To: Commissioners of the Oregon Law Commission
Date: November 9, 2001

<u>Re: Memorandum of Understanding: Reminding Work Group Members to Act on Their Independent Professional Judgment</u>

The Oregon Law Commission exists to provide clarification and improvement of Oregon law. ORS 173.315; ORS 173.357. For this purpose, the Commission must rely on knowledgeable committees, known as Work Groups, to pursue the various substantive projects that are the Commission's task. ORS 173.352 (1) provides that the Commission shall determine the membership and organization of the committees and "shall appoint their members." Work groups generally are made up of Commissioners and volunteers who bring either professional expertise to the law reform project or familiarity with community interests that are particularly affected by the project.

The goal of a Commission project is to produce what the Commission, in its professional judgment, determines to be the best feasible improvement in the law, taking into account that different people and groups have divergent views on and interests in the subject matter. This goal is furthered by finding a way for knowledgeable advisors who will express those views and interests to inform the Commission's Work Groups, while leaving the decisions on the substantive issues to the disinterested professional judgment of the regularly appointed members of the Work Group. The work of these committees can only be hampered if some members subordinate their judgment of the public interest to the interests of a particular private party or client. It is recommended that the Commission accept a practice by the Executive Director's office of communicating to Work Group members that they are to speak and vote on the basis of their individual and professional convictions and experience in the exercise of independent judgment.

Other commissions and committees in Oregon and throughout the United States have addressed the issue of membership criteria in this context. Some have promulgated statutes, rules, or policies to require or encourage members to contribute solely on the basis of their personal experience and convictions. For example, Congress passed the Federal Advisory Committee Act in 1972. A section of that statute speaks to membership. 5 U.S.C.A. app.2 § 5 (West 1996). That Act arose out of the growing number of advisory groups in the nation and growing concern that special interests had captured advisory committees, exerting undue influence on public programs. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3495; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE L. ON REG. 451, 462 (1997). The Act also required advisory committees to keep minutes, including a record of persons present. In short, the goal of the Act was to establish openness and balanced representation but also prevent the surreptitious use of advisory committees to further the interests of any special interest. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500.

Another example comes from the National Assessment Governing Board, appointed by the Secretary of Education, for the purpose of formulating policy guidelines for the National Assessment; the Board has twenty-five members. 20 USCA § 9011 (West 2000). The statute establishing the Board contains the following provision limiting membership: "The Secretary and the Board shall ensure at all times that the membership of the Board reflects regional, racial, gender, and cultural balance and diversity and that the Board exercises its independent judgment, free from inappropriate influences and special interests." <u>Id</u>. at §9011 (b)(3). Still another example is found in ORS 526.225; that Oregon statute authorizes the State Board of Higher Education to appoint a Forest Research Laboratory Advisory Committee composed of fifteen members. Composition of the Committee is to include three members from the public at large, but they may not "have any relationship or pecuniary interest that would interfere with that individual representing the public interest."

Less formal examples are found in other law reform organizations. The American Law Institute, in its Rules of Council, provides guidelines for membership in the Institute. Rule 9.04, titled Members' Obligation to Exercise Independent Judgment, was added at the December 1996, meeting of the Council. That Rule communicated that members are to "leave client interests at the door." Finally, the Louisiana State Law Institute has a philosophical policy statement, dating back to 1940, that encourages "thorough study and research, and full, free and non-partisan discussion." (John H. Tucker, Address at Louisiana State University on the Philosophy and Purposes of the Louisiana State Law Institute (Mar. 16, 1940)).

Instead of a formal rule or statute to express an ideal that Oregon Law Commission Work Group members should leave their client interests at the door, the Executive Director's office suggests the Commission accept this Memorandum of Understanding and the following statement:

"To maintain the Oregon Law Commission's professional non-partisan analysis of legal issues in support of law reform, Commissioners and those individuals appointed by the Commission to serve as Work Group members are expected to exercise independent judgment when working on Oregon Law Commission projects by speaking and voting on the basis of their individual and professional convictions and experience. Recommendations to and from the Law Commission must be the result of thoughtful deliberation by members dedicated to public service. Therefore, Work Group members are not to subject their individual and professional judgment to representation of client or employer interests when participating in the Work Group's decisions."

Unless otherwise directed, the Executive Director's staff will incorporate the above statement into the Work Group letters of appointment as a means of communicating to Work Group members the Commission's important mission and expectations.