

**Elective Share Work Group**

**ELECTIVE SHARE**

**HB 2381**

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Report Approved at  
Oregon Law Commission Meeting on  
January 18, 2007

## **I. Introductory Summary**

Oregon's elective share statutes provide that a surviving spouse is entitled to 25% of the net probate estate of a deceased spouse regardless of the provisions of the deceased spouse's will. The purpose of elective share statutes is to help ensure that no surviving spouse is disinherited by their spouse and barred from receiving a portion of the couple's marital estate. There are two primary justifications for this rule: 1) both spouses contribute to the acquisition of wealth during marriage and both should receive an equal portion of the couple's marital estate (partnership theory); and 2) the surviving spouse should be provided some measure of support (support theory).

In contrast, a spouse who seeks a divorce in Oregon is usually entitled to 50% of a marital estate. Thus, a spouse who files for divorce receives substantially more of the marital estate than a spouse who opts to take the elective share. In addition, the elective share statute applies only to the net estate,<sup>1</sup> so it can easily be avoided through nonprobate transfers, such as trusts. In short, Oregon's elective share statute has been criticized as having too low of a percentage and for being too easy to circumvent.

## **II. History of the Project**

In 2001, the Law Commission established an Elective Share Work Group which spent considerable time studying this problem and recommended that the Commission consider the possibility of proposing that Oregon adopt some form of community property regime as a solution to this and other problems inherent in a separate property system. As a result, the Elective Share Work Group was reconstituted as the Marital Property Work Group. In 2003, the Marital Property Work Group started its work, focusing its attention primarily on the Uniform Marital Property Act (UMPA). After significant deliberation, the work group recommended a modified version of the UMPA. Legislative Counsel prepared a draft statute and the work group disseminated it to various sections of the Oregon State Bar for input and feedback. After receiving almost uniformly negative response from various bar sections the Work Group decided to abandon the proposal that would have established a community property regime in Oregon.

In 2005, the Elective Share Work Group reassembled in order to focus on the narrower issue of the disparity between the amounts a surviving spouse can obtain through the elective share versus the amount a spouse can obtain through divorce. The Work Group was chaired by Bernie Vail, Northwestern School of Law, Lewis and Clark College and included the following members: Alan Brickley, First American Title Co.; Susan Gary, University of Oregon School of Law; Heather Gilmore, Heather O. Gilmore PC; Karl Goodwin, Department of Justice; Susan Grabe, Oregon State Bar; Evan Hansen, Michele Grable & Associates; Steven Heinrich, Attorney in private practice; David Heynderickx, Legislative Counsel; Sally LaJoie, Oregon

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<sup>1</sup> ORS 114.105 provides, in part, that "...the surviving spouse of the decedent has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent..." ORS 111.005 (23) defines "Net estate" as the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.

State Bar; Rick Mills, Department of Human Services; David Nebel, Oregon State Bar; Richard Pagnano, Davis, Pagnano, & Williams LLP; Lane Shetterly, Department of Land Conservation and Development; Brian Thompson, Luvaas Cobb; Tim Wachter, Bullivant Houser Bailey PC; Merle Weiner, University Oregon School of Law; and Michael Yates, Yates Matthews & Associates.

### **III. Statement of Problem Area**

ORS 114.105 provides that a surviving spouse has the option to elect to take one-fourth of the value of the net estate of the deceased spouse (decedent) as opposed to taking under the terms of the will. In a divorce proceeding, however, ORS 107.105(f) requires courts divide assets in a manner that is “just and proper in all of the circumstances.” As a practical matter, parties to a divorce proceeding receive half of the assets unless there is some reason to vary the distribution. There is a significant discrepancy between what a surviving spouse receives who remains married and takes the elective share (25% of the net estate) and a spouse who ends the marriage through divorce (50% of *all* marital assets). Additionally, ORS 114.105 limits what is available for a spouse to elect by confining the elective share to a percentage of the assets that are part of the net estate. Common estate planning techniques include the establishment of nonprobate assets that are not part of the net estate, such as trusts, ownership of property with rights of survivorship, and life insurance policies. Thus, it is common for a net probate estate to be worth substantially less than the spouses’ actual marital estate.

In recognition of these problems with the elective share, and to address other probate matters, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Probate Code (UPC).<sup>2</sup> HB 2381 is modeled in part on section 2-202 of the 1990 UPC. Under the UPC section 2-202, the value of the elective share is determined based on a sliding scale that starts after one year of marriage at 3% and increases to 50% after 15 years of marriage. The results of the elective share provisions under the UPC are driven by the partnership theory of marriage. Under the partnership theory each spouse of a long term marriage would be entitled to 50% of the estate under the rationale that both spouses share in the work to accumulate marital assets. The partnership theory can be stated in various ways and is sometimes thought of “as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.” M. Glendon, *The Transformation of Family Law 131* (1989). Integral to ensuring that a surviving spouse receives his or her share of a marital estate is to calculate the elective share based on the augmented estate.<sup>3</sup> The augmented estate is calculated by combining the probate estate, nonprobate estate, and other transfers to the surviving spouse. Using the

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<sup>2</sup> As of December 2006, 18 states have adopted some form of the UPC. Those states are: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin.

<sup>3</sup> Below are definitions of some important terms that are used in this draft:

- 1) Probate Estate: Section 12 of this draft defines the probate estate as “the value of all estate property that is subject to probate...”. Probate property is property that passes under the decedent’s will or by intestacy.
- 2) Nonprobate Estate: Sections 14 through 18 of this draft define the nonprobate estate as property that the decedent had an interest in that was not included in the probate estate. Generally, nonprobate property is property that passes under an instrument other than a will (e.g. a trust).
- 3) Augmented Estate: Section 9 of this draft defines the augmented estate as a decedent’s probate estate, nonprobate estate, and nonprobate transfers to the surviving spouse.

augmented estate to calculate the elective share greatly reduces the ability of a person to circumvent elective share statutes.

One criticism of elective share statutes is that they provide either too little or too much of the marital assets to the surviving spouse. For this reason, many scholars favor community property because it generally provides for equitable ownership and distribution of assets upon the death of a spouse. If marital property is titled to the decedent, there is the chance that the surviving spouse will receive substantially less than 50% of the marital estate. Alternatively, if marital property is titled to the surviving spouse, he or she may end up receiving much more than 50% of the marital estate. The following scenarios illustrate these points.

#### Illustration<sup>4</sup>

Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B. Throughout their long life together, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these \$600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third (one-quarter under current Oregon law) of A's "estate."

#### Scenario 1

*Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets.*

If all the marital assets were titled in A's name, B's claim against A's estate would only be for \$200,000—well below B's \$300,000 entitlement produced by the partnership/marital-sharing principle.

If \$500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for \$166,500 (1/3 of \$500,000), which when combined with B's "own" \$100,000 yields a \$266,500 cut for B—still below the \$300,000 figure produced by the partnership/marital-sharing principle.

#### Scenario 2

*Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share.*

If \$300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for \$100,000, which when combined with B's "own" \$300,000 yields a \$400,000 cut for B—well above the \$300,000 amount to which the partnership/marital-sharing principle would lead.

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<sup>4</sup> Modified from the General Comments of the Uniform Probate Code (2006).

### Scenario 3

#### *Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion.*

If only \$200,000 were titled in A's name, B would still have a claim against A's estate for \$66,667 (1/3 of \$200,000), even though B was *already* overcompensated as judged by the partnership/marital-sharing theory.

This proposal was drafted in contemplation of these scenarios in order to ensure that if the surviving spouse elects to take under the elective share laws, the surviving spouse will receive at least one-third of the marital assets. This would be the case regardless of which name was on the title or what methods the decedent used to distribute assets after death.

Another criticism of elective share statutes is that they are contrary to freedom of testation. That is, they place certain limitations on what a person can do with his or her property upon death. Some argue that the decedent is in the best position to determine the future needs of his or her family and that the decedent will take these concerns into consideration when formulating an estate plan. On the other hand, the decedent can leave a surviving spouse penniless. Thus, there is friction between testamentary freedom and society's interest in protecting a surviving spouse. This is one consideration that was used to select the elective share amount of 33% as opposed to the 50% number used by the UPC. In addition, this issue can be eliminated entirely through the use of a prenuptial or postnuptial agreement. (See Sections 6 and 27 of HB 2381, which are described below; See also current ORS 114.115)

As a final concern, Oregon's current elective share statute rewards the surviving spouse, regardless of the length of the marriage. In one Pennsylvania case<sup>5</sup> the groom collapsed and died at the marriage ceremony and the surviving spouse was allowed to elect against his estate. This inequity can be further exacerbated where there are multiple marriages. Oregon's current elective share statute would not fully protect a decedent's desire to provide for children of previous marriages. The main objective of providing a sliding scale amount for the elective share between 5% and 33% is to account for shorter marriages under the reasoning that the partnership theory of marriage is better suited for longer term marriages.

#### **IV. Objective of the Proposal (Section Analysis)**

HB 2381 seeks to partially eliminate the discrepancy between what a spouse may receive through the elective share statutes and divorce proceedings, address the criticisms listed above regarding equitable distribution and freedom of testation, protect the surviving spouse, and bring Oregon law up to date with current estate planning techniques. This is accomplished through a two part change. First, the percentage that the surviving spouse can elect to take under the statute is increased from 25% to a maximum amount of 33%. Second, the statute changes the definition of the estate that is elected against by subjecting all assets, not just the net estate, to the proposed percentage. The draft provides several other changes in an effort to reflect the overarching policy of protecting the surviving spouse and providing an improved process for electing against the decedent's estate.

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<sup>5</sup> *In re Neiderhiser's Estate*, 27 Fiduc. Rep. 329 (Pa. Com. Pl. 1977).

**A. Increase the percentage of the estate that may be obtained through choosing to receive the elective share**

Section 4 of this draft provides that a surviving spouse may obtain up to 33% of the augmented estate if that spouse chooses to receive the elective share. The percentage of what a spouse can receive under the elective share is based on the duration of the marriage. The amount starts at 5% for less than two years of marriage and increases each year of marriage up to a maximum of 33% after 15 years of marriage.

Justification for increasing the amount to 33%

There are several reasons why the work group chose to increase the elective share to 33% and not some other amount. Elective share statutes vary widely from state-to-state usually ranging from 33% to 50%. From a philosophical perspective, the elective share arguably should be close to 50%, especially in longer marriages, because each spouse has contributed to the marriage. The sliding scale approach recognizes that there are widely varying fact patterns under which an elective share may be claimed and that individuals involved in a longer marriage are likely more deserving of a large portion of the estate.

From a practical perspective, the work group decided not to increase the elective share amount to 50% – making it equal to what a party would likely obtain in a divorce proceeding – because of opposition from estate planners. One common estate planning technique employed by estate planners is to create a trust that will provide for the needs of a surviving spouse but which passes the trust property to others at the spouse's death. There are several reasons for creating these trusts, one of which is to ensure that a surviving spouse is able to qualify for certain state benefits, such as Medicaid, without depleting the assets on medical bills.<sup>6</sup> Under current law, the assets that are placed in these trusts are not used to calculate the elective share. Under this proposal, however, the assets in these trusts would factor into the elective share calculation and potentially increase the elective share amount significantly. If the surviving spouse failed to make the election, the surviving spouse could be disqualified from Medicaid for effectively allowing assets that belong to the surviving spouse to transfer to another person. If the surviving spouse was incompetent, which is often the case, DHS would seek to have a conservator nominated to make the election on behalf of the surviving spouse.

The state is authorized to bring an action under ORS 414.105 upon the death of the surviving spouse to recover amounts paid for public assistance and care and maintenance. The amount the state can recover is dependent on the surviving spouse's remaining assets. In short, the higher the percentage of the elective share, the more likely the state can recover from an estate for reimbursement for amounts expended for the benefit of the surviving spouse.

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<sup>6</sup> Assets placed in certain types of trusts, such as special needs or supplemental trusts (*See* 42 U.S.C. 1396p(d)(4)(setting out the types of trusts that are not used to calculate Medicaid eligibility under state plans), are not used in Medicaid asset calculations so long as the distributions do not violate Medicaid's income and resource tests. *See also* OAR 461-140-0010 *et seq.* (setting out Oregon's eligibility rules).

**B. Augment the estate that is subject to the elective share by including property transferred by the deceased two years preceding death, joint tenancies, and transfers in which the deceased retained either the right to revoke or the income for life.**

Sections 9 to 21 set out which assets are included in the augmented estate for purposes of determining the elective share and establish how the elective share shall be satisfied. Section 9 provides for the augmented estate to include the decedent's probate estate, the decedent's nonprobate estate, and the decedent's nonprobate transfers to the surviving spouse. This is a significant change from current law, which provides for election against only the net probate estate. Section 21 determines the priority of sources from which the elective share is payable. Section 12 provides the definition of the decedent's probate estate, sections 13 to 19 describe the decedent's nonprobate estate, and section 20 describes the decedent's nonprobate transfers to the spouse. It is necessary to include the probate estate, nonprobate estate, and nonprobate transfers to calculate the augmented estate to ensure that the surviving spouse receives his or her full elective share. The following example will help illustrate this point.

Assume that a surviving spouse from a marriage of over 15 years opts to take the elective share instead of taking under the terms of the will. Further assume that there is \$500,000 of probate assets (none of which was bequeathed or devised to the surviving spouse), \$250,000 of nonprobate assets, and a \$250,000 nonprobate transfer to the surviving spouse before the decedent died. Under the provisions of this measure the augmented estate would be \$1,000,000 and the surviving spouses elective share amount would be \$330,000. Under Section 21 (1)(a) and (b) amounts included in the decedent's probate estate that pass to the surviving spouse and nonprobate transfers to the surviving spouse would be used first to satisfy the elective share amount. Thus, the \$250,000 that was given to the surviving spouse would be used first to satisfy the elective share. The remaining \$80,000 would be satisfied using the probate estate. If the \$250,000 nonprobate transfer to the surviving spouse was not used to calculate the elective share, the elective share would only be \$247,500 (33% of \$750,000) and the surviving spouse would receive well under \$330,000 (33% of \$1,000,000).

Justification for using the augmented estate to calculate the elective share

In today's society, nonprobate property accounts for a large portion of an average estate. This is largely in response to the negative view of the probate process. This leads to two problems regarding the elective share: 1) individuals may defeat the intent of the elective share by eliminating probate property altogether; and 2) courts are not provided clear guidance when deciding whether to include will substitutes as part of the estate in an elective share proceeding. Providing that nonprobate property shall be used to determine the augmented estate will effectively stop an individual from circumventing elective share laws to disinherit a spouse. In addition, the statutes will give courts guidance, which will alleviate confusion and inconsistent results.

### **C. Other methods to protect the surviving spouse and improve the elective share process**

This proposal sets forth other provisions in an effort to further advance the policy of protecting the surviving spouse. Part of this effort has led to procedural changes to increase the efficiency, fairness, and effectiveness of the elective share statutes.

#### Payment of Elective Share

Sections 21 to 23 set out the method of paying the elective share, including the priority of sources from which the elective share is payable, the liability of recipients of the decedent's nonprobate estate, and protection of payors and other third parties. The priority for payment of the elective share begins with the probate property of the decedent that passes to the surviving spouse. Following is the decedent's nonprobate transfers to the surviving spouse and then the decedent's remaining probate and nonprobate estates. This system of priority reflects the fairness of the elective share by requiring that the surviving spouse's nonprobate property received from the decedent be counted against the elective share. Likewise, it reflects to a great degree the intent of the decedent by allowing for probate transfers to be made and counted against the elective share. (See current ORS 114.105)

#### Time Limit

Section 24 of the proposal increases the time limit for filing for an elective share from 90 days to 120 days. This section provides further protection to the surviving spouse.

#### Who may exercise the right of election

Section 7 of the proposal expands the group of persons who can exercise the right of election. ORS 114.155 currently allows a court or the conservator of the estate to exercise the right of election. The proposal would increase that group of people to include a conservator, guardian, agent, the personal representative of the estate should the surviving spouse die before the election is exercised, and the Department of Human Services if the department has a claim against the surviving spouse for amounts paid to the surviving spouse as public assistance or care and maintenance.

### **V. Proposal House Bill 2381**

#### **Section 1**

Section 1 provides that the sections of this draft are added to and made a part of ORS chapter 114.

#### **Section 2**

This section adds definitions for the terms "power," "power of appointment," "property," and "transfer." The purpose of this section is to provide clarity and continuity throughout the act. The definitions were also necessitated by the change from using the probate estate to calculate the elective share, to using the augmented estate to calculate the elective share.

#### **Section 3**



Section 3 sets out the right of the elective share generally. It also clarifies that any amount received under ORS 114.015 (child or spousal support) is in addition to the elective share. The section also adds a choice of law provision for a surviving spouse to elect against a decedent's in state property when the decedent is domiciled outside of the state of Oregon. In such a case the law of the state where the decedent is domiciled governs.

#### **Section 4**

This section provides that the amount of the elective share will be a percentage of the augmented estate dependent on the length of the marriage. The elective share starts at 5% of the augmented estate for less than two years of marriage, and it increases 2% for every year of marriage thereafter until it reaches the maximum of 33% for 15 years of marriage or more.

#### **Section 5**

This section requires the court to consider the amounts of the decedent's probate estate, decedent's nonprobate estate, and decedent's nonprobate transfers to determine whether the elective share amount has been satisfied. If the court determines that the decedent's nonprobate transfers to the surviving spouse do not satisfy the amount of the elective share, any additional amounts necessary to satisfy the elective share will be paid out of the decedent's probate and nonprobate estate in a manner provided by Section 21.

#### **Section 6**

This section provides the parameters for waiving the right of election, either before or after the marriage by written agreement. The section also provides the limitations on the enforceability of the agreement to waive the right of election.

#### **Section 7**

Section 7 provides who may exercise the right of election which includes the surviving spouse, or for the benefit of the surviving spouse by a conservator, guardian, or agent under the authority of power of attorney. Likewise, if the surviving spouse dies before exercising the right of election the personal representative may exercise the right of election for the estate of that spouse.

#### **Section 8**

This section provides for exercise of the elective share by the state through the Department of Human Services (DHS). DHS may exercise the right of election in order to fulfill a claim against the surviving spouse for amounts paid as public assistance, as defined in ORS 411.010, or for amounts paid for the care and maintenance of the surviving spouse in a state institution as described in ORS 179.610 to 179.770, despite whether or not the surviving spouse has waived the right of election. DHS may not exercise the right of election, however, if the decedent establishes a special needs trust in an amount equal to or exceeding the elective share amount and names DHS as the beneficiary for the purpose of reimbursing DHS for amounts paid in public assistance or care and maintenance.

#### **Sections 9 to 11 – Augmented Estate Generally**

Section 9 provides for what is to be included in the augmented estate, namely the decedent's probate estate, the decedent's nonprobate estate, and the decedent's nonprobate

transfers to the surviving spouse. Section 10 provides for certain exclusions from the augmented estate, specifically the future enhanced earning capacity of either spouse and any irrevocable transfers made with the consent of both spouses during their lifetime. Section 11 describes the effect of separation on the ability of the surviving spouse to take the elective share. Specifically, the section authorizes a court to deny part or all of the elective share as the court deems reasonable and proper. In making this determination, the court must consider whether the marriage was a first or subsequent marriage for either or both spouses, the contribution of the surviving spouse to the marital assets, the length and cause of the separation, and any other relevant circumstances.

## **Section 12**

This section defines the decedent's probate estate as the value of all estate property that is subject to probate and that is available for distribution after payment of claims and expenses of administration. A decedent's probate estate also includes all property that could be administered under a small estate affidavit.

## **Sections 13 to 19 – Decedent's Nonprobate Estate**

These sections set out the details of what is included in the decedent's nonprobate estate. These sections represent the most significant change to current law because they allow the surviving spouse to elect against the decedent's nonprobate property, whereas under current law the surviving spouse can only elect against the decedent's net estate, or probate property. The nonprobate estate essentially consists of everything that is not in the probate estate or transferred to the surviving spouse.

Nonprobate property includes the following property so long as it is not included in the probate estate or otherwise passed on to the surviving spouse:

- 1) Property owned by the decedent immediately before death that was transferred by the decedent upon death. (Section 14)
- 2) The decedent's fractional interest in property held by the decedent in any form of survivorship tenancy. (Section 14)
- 3) Decedent's ownership interest in property or accounts under a payable on death designation, under transfer on death registration, or in co-ownership registration with a right of survivorship. (Section 14)
- 4) The net cash surrender value of a certain life insurance policies. (Section 14)
- 5) Property the decedent could have acquired by revocation of a revocable trust or other transfer of property. (Section 14)
- 6) Certain property transferred by the decedent during marriage by means of an irrevocable transfer or by means of a transfer under which decedent retained power over income or property. (Section 15)
- 7) Certain property passed during marriage and during the two-year period immediately before the decedent's death. (Section 16)
- 8) The amount of specified life insurance premiums paid by decedent during marriage and during the two-year period immediately before the decedent's death. (Section 17)
- 9) All other transfers of property made during marriage during the two-year period immediately before the decedent's death. (Section 18)

A decedent's nonprobate estate does not include any property for which the decedent received full consideration or any insurance policy maintained by the decedent in compliance with a court order. (Section 19)

### **Section 20**

This section defines the decedent's nonprobate transfers to the surviving spouse for purposes of calculating the augmented estate. Generally, transfers include any transfer of property to the surviving spouse that passed to the surviving spouse outside probate at the decedent's death, and includes property held in survivorship tenancy, accounts held in co-ownership with the right of survivorship, but excludes property passing to the surviving spouse under the federal Social Security Act.

### **Sections 21 to 23 – Payment of the Elective Share**

These sections set forth the method of paying the elective share. Section 21 describes the priority of sources from which the elective share is payable. Section 22 describes the liability of recipients of the decedent's nonprobate estate. This section is important because it defines the relationship between the surviving spouse and the other parties that could potentially be liable to the surviving spouse for the elective share. Section 23 sets forth the protection afforded to receivers of property who in good faith already disposed of the transferred property. Conversely, it sets forth the liability of persons who disposes of transferred property with knowledge of the pending motion to take an elective share.

### **Section 24**

This section details the procedure for claiming the elective share, including notice to the estate and the procedure for filing a motion. Of significance, this section increases the time limit to file a motion from 90 days to 120 days.

### **Section 25**

This section provides conforming amendment to ORS 116.133.

### **Section 26**

This section provides that this act applies only to surviving spouses of decedents who die on or after the effective date of this act.

### **Section 27**

This section provides for the ability to waive the right to the elective share, in either a prenuptial or postnuptial agreement.

### **Section 28**

This section repeals ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165.

### **Section 29**

This section provides that the unit and section captions are not part of the law.