

Elective Share Work Group

**ELECTIVE SHARE
HB 3077**

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* Amended to reflect amendments made to the bill after further discussions with the Estate Planning Section of the Oregon State Bar.

I. Introductory Summary

Oregon's elective share statute provides 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 protect a surviving spouse from disinheritance by his or her decedent spouse. 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 assets (partnership theory); and 2) the surviving spouse should be provided some measure of support (support theory).

In contrast with the elective share, a spouse who seeks a divorce in Oregon is entitled to an equitable distribution of the couple's assets, usually roughly 50% of those assets. Thus, a spouse who files for divorce typically receives substantially more than a spouse who opts to take the elective share. Not only is the percentage higher, but in addition, the elective share statute applies only to the probate estate,¹ so it can easily be avoided through nonprobate transfers, such as revocable trusts. In short, Oregon's elective share statute has been criticized as having a percentage that is too low 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

¹ 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.

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 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. The Work Group and the Law Commission recommended HB 2381 to the 2007 Legislative Assembly. After serious questions and amendment needs arose shortly before chamber deadlines, staff, upon consultation with the Work Group and Commission leadership, decided to halt advancing the bill during the 2007 session.

A Work Group was reconvened in 2008 to address the concerns with the 2007 bill. The Work Group was chaired by Bernie Vail, Northwestern School of Law, Lewis and Clark College and included the following members: Patricia Baxter, Oregon DHS; Susan Gary, University of Oregon School of Law; Karl Goodwin, Department of Justice; Jane Patterson; Paul Pickerell, DHS; Tim Wachter, Duffy Kekel LLP; and Eric Wieland, Samuels Yoelin Kantor Seymour & Spinrad LLP.²

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 (probate estate, net after claims) of the deceased spouse (decedent) as opposed to taking under the terms of the will. The amount of the elective share is reduced if the surviving spouse receives nonprobate transfers from the decedent. 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, each party to a divorce proceeding receives half of the couple’s assets unless there is some reason to vary the distribution. Thus, there is a significant discrepancy between the amount received by a surviving spouse who remains married and takes the elective share (25% of the probate estate, at most) and a spouse who ends the marriage through divorce (50% of *all* assets owned by both spouses).

Three problems with the current elective share statute cause this result: 1) the statute applies only to probate assets; 2) the statute considers only the decedent’s

² Jeffrey M. Cheyne of Samuels Yoelin Kantor Seymour & Spinrad LLP and Charles Mauritz of Duffy Kekel LLP also assisted with the project in early 2009 after raising concerns at the Oregon Law Commission meeting on February 11, 2009. Penny Serrurier of Stoel Rives LLP, William Brewer of Hershner Hunter LLP, and Bill Brautigam, DHS, participated in April and May 2009 regarding session amendments.

assets in determining the elective share amount; and 3) the percentage used, 25%, is well below the partnership percentage of 50%. In recognition of these problems with elective share statutes, and to address other probate matters, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) drafted the Uniform Probate Code (UPC) in 1969 and revised it substantially in 1990.³ Many states have adopted portions of the UPC, and Oregon now is one of the few states with an elective share statute limited to probate assets. Oregon also has the lowest maximum percentage of any state with an elective share statute. The Work Group's proposal, HB 3077, is modeled in part on section 2-202 of the 1990 UPC.

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 couple's combined estates 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 an augmented estate.⁴ The augmented estate is calculated by combining the decedent's probate estate, nonprobate estate, and transfers to the surviving spouse with the surviving spouse's assets. Using the augmented estate to calculate the elective share greatly reduces the ability of one spouse to circumvent elective share statutes.

The UPC also incorporates the support theory by providing for a minimum elective share amount of \$50,000. This minimum amount applies regardless of the length of the marriage and means that in a small estate (joint assets of less than \$100,000) the surviving spouse will get more than the elective share amount calculated using the appropriate percentage. The Oregon proposal does not include a minimum elective share amount.

³ 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.

⁴ Below are definitions of some important terms that are used in this draft:

1) Probate Estate: Section 10 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 11 through 13 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 8 of this draft defines the augmented estate as a decedent's probate estate, decedent's nonprobate estate, the surviving spouse's estate, and the decedent's probate and nonprobate transfers to the surviving spouse.

A. Elective share limited to probate assets

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 probate estate. Common estate planning techniques include the holding of title to assets in ways that mean that the assets will not be part of the probate estate (e.g. trusts, property owned with rights of survivorship, life insurance policies and all nonprobate assets). Thus, it is common for the probate estate to be worth substantially less than a decedent's property, and anyone wishing to avoid application of the elective share can do so by transferring assets outside probate (e.g., by establishing a revocable trust).

The problem with limiting the elective share to probate assets is that the amount of the elective share will depend on how the couple held title to their assets.

B. Elective share limited to decedent's assets

Oregon's statute applies the elective share to the decedent's assets and does not consider whether the surviving spouse has assets in his or her name (unless assets were received from the decedent). This approach has been criticized because it may lead to overfunding or underfunding the elective share. The following illustration explains this concern, as well as the concern about limiting the elective share to probate assets.

Illustration⁵

Consider A and B, who were married in their twenties. They never divorced, and A died at age 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 \$800,000, marking them as a somewhat affluent but hardly wealthy couple.

Under Oregon's current elective-share law, B's ultimate entitlement depends on the manner in which the couple titled their assets of \$800,000 and whether the assets were titled in one name individually or in some nonprobate form. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. (B would likely be left with \$400,000 if the couple divorced.) The reason is that under Oregon's elective-share law, B has a claim to one-quarter of A's probate estate, and B's assets are not considered in determining the amount of the elective share.

Scenario 1

Marital Assets Disproportionately Titled in Decedent's Name.

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 \$400,000, the amount B would be entitled to receive under the

⁵ Modified from the General Comments of the Uniform Probate Code (2006).

50/50 partnership/marital-sharing principle.

If \$700,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for \$175,000 (1/4 of \$700,000), which when combined with B's "own" \$100,000 yields a \$275,000 cut for B that is still below the \$400,000 figure.

If A transferred all the assets to a revocable trust, keeping the power to revoke for life and keeping complete control over the trust, B's elective share would be zero.

If all the assets were titled in A's name and A added transfer-on-death or pay-on-death provisions to each asset, naming someone other than the surviving spouse to take, B's elective share would be zero.

Scenario 2

Marital Assets Equally Titled.

If \$400,000 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" \$400,000 yields a \$500,000 cut for B—well above the \$400,000 amount to which the partnership/marital-sharing principle would lead.

Scenario 3

Marital Assets Disproportionately Titled in Survivor's Name

If only \$200,000 were titled in A's name, B would still have a claim against A's estate for \$50,000 (1/4 of \$200,000), even though B already had \$600,000 and was overcompensated as judged by the partnership/marital-sharing theory.

Under UPC section 2-202, the elective share applies to an “augmented estate” comprised of assets held in the names of either spouse. The UPC follows, to a substantial degree, the model of the gross estate for federal estate tax purposes – any assets over which the decedent or the surviving spouse exercised some degree of control are included in the augmented estate. The proposal uses the augmented estate concept, but takes a more limited approach in the assets included. For example, the UPC includes trusts over which the decedent had a general power of appointment, trusts created by the decedent in which the decedent retained a life estate, and life insurance policies. The proposal does not include these assets, for reasons explained below.

C. Percentage

Under 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 sliding scale attempts to address two concerns. First, in a long-term marriage (defined in the statute as 15 years) the property is more likely to be marital property and therefore the spouses should share the

property equally. In a shorter-term marriage, the property is less likely to be property earned or acquired during the marriage. The smaller percentages take this into consideration. Rather than trying to determine which property is marital property and which property is separate property, the UPC uses the sliding scale to approximate a fair division of the couple's assets.

Even with the sliding scale, the statute may 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 marital assets upon the death of a spouse. Spouses may come to the marriage with property earned or inherited prior to the marriage. This is true in particular in late-in-life marriages. Elective share states generally do not distinguish between property earned or acquired during the marriage and property that is the separate property of the one of the spouses. As noted above, an attempt to adopt community property in Oregon failed.

D. Testamentary freedom

A 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 went into the Work Group's decision 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 24 of HB 3077, which are described below; See also current ORS 114.115)

IV. Objective of the Proposal (Section Analysis)

HB 3077 seeks to partially eliminate the discrepancy between what a spouse may receive through the elective share statutes and divorce proceedings, address the criticisms identified above, protect the surviving spouse, and update Oregon law. The proposal makes two basic changes to the elective share statute. First, the percentage that the surviving spouse can elect to take under the statute is changed from a flat 25% to a sliding scale ranging from 5% to 33%, depending on the length of the marriage. Second, the statute changes the definition of the estate that is elected against by including more assets, and by including assets of both the decedent spouse and the surviving spouse, in the computation of the elective share amount. 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.

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

Section 3 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 and elder law attorneys. These two groups expressed several concerns. First, an elective share may be more likely in a second marriage when not all the couple’s assets are marital assets. If a spouse came to the marriage with significant assets earned or inherited before the marriage, giving the other spouse a full 50% share might not be appropriate.

Second, a spouse may want to leave property to children and not to the surviving spouse because the surviving spouse has qualified for government benefits, such as Medicaid. The decedent may prefer to bypass the surviving spouse to avoid the use of their remaining assets on medical bills.⁶ Under current law, if the decedent held his or her assets in a revocable trust, then no elective share will be available to the surviving spouse. Under this proposal, however, the assets in a revocable trust would factor into the elective share calculation and potentially increase the elective share amount significantly. In the Medicaid context, 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 were

⁶ 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).

incompetent, which is often the case, a conservator could 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. The percentage chosen was chosen as a compromise. Although the State will receive less than it would if the percentage were 50%, under current law the percentage for anyone with competent legal counsel is zero because the decedent will use a revocable trust.

B. Augment the estate that is subject to the elective share by including property transferred by survivorship tenancies, pay-on-death and transfer-on-death designations, and transfers in which the deceased retained the right to revoke.

Sections 8 to 20 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 8 provides for the augmented estate to include the decedent's probate estate, the decedent's nonprobate estate, the surviving spouse's estate, the decedent's probate transfers to the surviving spouse, 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 16 determines the priority of sources from which the elective share is payable. Section 10 provides the definition of the decedent's probate estate, sections 11 to 12 describe the decedent's nonprobate estate, section 13 describes the surviving spouse's estate, section 14 describes the decedent's probate transfers to the surviving spouse, and section 15 describes the decedent's nonprobate transfers to the surviving spouse. It is necessary to include the probate estate, nonprobate estate, the surviving spouse's estate, and both probate and nonprobate transfers to the surviving spouse to calculate the augmented estate to provide a fair elective share.

The Work Group spent a great deal of time deciding which assets to include in the augmented estate. The Work Group concluded that the best approach was to include the assets most likely to be used to avoid the elective share and those over which the decedent retained the most control. Certain types of assets, included under the UPC's elective share, were removed from the proposal either because their inclusion seemed too intrusive on common estate planning practices (e.g., charitable remainder trusts) or likely to represent nonmarital assets (e.g., property over which the decedent held a general power of appointment). Life insurance was also excluded. Property for which the decedent received "fair consideration" is not included. The intention is not to include property sold by the decedent.

The nonprobate property included in the augmented estate is limited to the decedent's fractional interest in survivorship property, property held with a payable on death designation, a transfer-on-death registration, a co-ownership registration with a right of survivorship, a power to designate a beneficiary, and any property that could have been acquired by the exercise of a power of revocation held by the decedent, including revocable trusts. Life insurance is not included, even if owned by the decedent.

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. The proliferation of tools to avoid probate, and increasing use of those tools, leads to two problems regarding Oregon's elective share: 1) individuals may defeat the intent of the elective share by eliminating probate property altogether; and 2) courts lack clear guidance when deciding whether to include will substitutes as part of the estate in an elective share proceeding. A statute that includes nonprobate property in determining the augmented estate will effectively stop an individual from circumventing elective share laws to disinherit a spouse. In addition, the statute will give courts guidance, which will alleviate confusion and inconsistent results.

When states first enacted elective share statutes, husbands tended to hold title to property and husbands tended to die first. Today, both husbands and wives hold property and either may be the first to die. Considering the property owned by both spouses is necessary to avoid overfunding the elective share.

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. Procedural changes should increase the efficiency, fairness, and effectiveness of the elective share statutes.

Payment of Elective Share

Sections 4 and 16-17 set out the method of paying the elective share, including the priority of sources from which the elective share is payable and the liability of recipients of the decedent's nonprobate estate. The priority for satisfying the elective share is as follows: First, by utilizing the surviving spouse's own property and transfers to the surviving spouse by the decedent (probate and nonprobate); Second, by utilizing the decedent's probate property and the decedent's nonprobate property with proportionate liability of all recipients. This system requires that property received by the surviving spouse from the decedent, either under a will or through a nonprobate mechanism, count against the elective share. Thus, the surviving spouse must accept an interest in a trust and will not have the option of taking property outright, if the trust interest equals or exceeds the amount

of the elective share. The title-owning spouse retains a great deal of control over the disposition of the property, including property set aside for the surviving spouse.

Time Limit

Section 4 of the proposal increases the time limit for filing for an elective share, currently set at 90 days. Under Section 4, an election must be filed within nine months of the death of the decedent. The time period was chosen as a compromise, long enough to allow time for decision-making (particularly if the surviving spouse is receiving government benefits) but not so long as to interfere with the administration of the estate.

Who may exercise the right of election

Section 7 of the proposal states that the surviving spouse may personally exercise the election or the election may be exercised on the spouse's behalf by a conservator, a guardian, or an agent acting under a power of attorney. The surviving spouse must be alive when the election is made.

V. Proposal: HB 3077

Section 1

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

Section 2

Section 2 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 property in Oregon 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 3 – Percentage

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 4

See Section 19 below.

Section 5

This section requires the court to consider the amounts of the decedent's probate estate, decedent's nonprobate estate, the decedent's probate and nonprobate transfers to the spouse and the spouse's assets to determine whether the elective share amount has been satisfied. If the court determines that the amount of the elective share has not been satisfied, 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 16.

Section 6 – Waiver of the Elective Share

This section provides the parameters for waiving the right of election, either before or after the marriage by written agreement.

Section 7 – Who May Make Election

Section 7 provides who may exercise the right of election: the surviving spouse, or, on behalf of the surviving spouse, a conservator, guardian, or agent acting under the authority of a power of attorney.

Sections 8 to 9 – Augmented Estate Generally

Section 8 provides for what is to be included in the augmented estate, specifically the decedent's probate estate, the decedent's nonprobate estate, the decedent's probate and nonprobate transfers to the surviving spouse, and the surviving spouse's estate. Section 8 indicates that the augmented estate is reduced by enforceable claims and encumbrances against the property and that the augmented estate includes the present value of any present or future interests included in the augmented estate. This section specifies that property may not be double counted. Section 9 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 lifetimes or after the death of the decedent. This section also excludes community property.

Section 10 – Decedent's Probate Estate

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 11 to 12 – 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 some of the decedent's nonprobate property, whereas under current law the surviving spouse can only elect against the decedent's net estate, or probate property. 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) The decedent's fractional interest in property held by the decedent in any form of survivorship tenancy. (Section 12(1))
- 2) 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 12(2))
- 3) Property held immediately before death for which the decedent had the power to designate a beneficiary. (Section 12(3))
- 4) Property the decedent could have acquired by the exercise of a power of revocation of a revocable trust or other revocable transfer of property. (Section 12(4))

A decedent's nonprobate estate does not include the present value of any life insurance policy payable on the death of the decedent. (Section 12(5))

Section 13 – Surviving Spouse's Estate

This section states that the augmented estate includes assets owned by the surviving spouse, under the same terms as the assets of the decedent are included. In addition, section 13 provides detailed rules on how to value trusts and unitrusts.⁷

Section 14 – Decedent's Probate Transfers to the Surviving Spouse

The augmented estate includes all property subject to probate that transfers to the surviving spouse, either through intestacy or under a will.

Section 15 – Decedent's Nonprobate Transfers to the Surviving Spouse

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. The section includes the proceeds of an insurance policy on the decedent's life, payable to the surviving spouse, even though insurance proceeds payable to someone other than the surviving spouse are not included in the augmented estate.

Sections 16 - 18 – Payment of the Elective Share

These sections set forth the method of paying the elective share. Section 16 describes the priority of sources from which the elective share is payable. Because the surviving spouse's own assets are considered, the surviving spouse will receive an elective share from the decedent's probate or nonprobate assets only if the surviving spouse's own assets plus any property received from the decedent through probate or nonprobate transfers do not reach the value of the elective share amount. Section 17 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 18 provides a process for seeking a protective order.

⁷ Florida's statutes regarding valuation were modified for this approach.

Sections 4 and 19 - Procedure

These sections detail the procedure for claiming the elective share, including notice to the estate and the procedure for filing a motion. An election must be filed within nine months after the death of the decedent. The ORCP applies to elective share matters, and a surviving spouse may withdraw a petition for the exercise of the elective share.

Section 20 – Effect of Separation

Section 20 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 21

This section provides a conforming amendment to ORS 114.555 to address small estate time lines.

Section 22

This section provides a conforming amendment to ORS 116.133.

Section 23

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 24

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

Section 25

This section repeals ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165, the existing elective share provisions.

Section 26

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

Section 27

This section makes the bill take effect on January 1, 2011. This delay of one year from the traditional effective date for new legislation gives families, attorneys,

and courts one year to prepare and be educated on the new law. In addition, it allows for any glitches to be addressed by legislation in 2010.

Amendment Note

Amendments were made in both the House and Senate Judiciary Committees to address concerns of the Oregon State Bar's Estate Planning Section. The report was rewritten to reflect the numerous amendments and was submitted to the legislature. The Law Commission had approved the bill and the further collaboration work with the Section.