House Bill 2381

Order printed by the Speaker pursuant to House Rule 12.00A (5). Preession filed (at the request of House Interim Committee on Judiciary for Oregon Law Commission)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor’s brief statement of the essential features of the measure as introduced.

Establishes new elective share for surviving spouses. Provides that elective share is percentage of augmented estate based on number of years of marriage. Describes assets to be considered by court in establishing augmented estate. Establishes priorities for sources of payment of elective share. Creates procedure for filing motion or petition seeking payment of elective share.

A BILL FOR AN ACT


Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 24 of this 2007 Act are added to and made a part of ORS chapter 114.

DEFINITIONS

SECTION 2. Definitions. For purposes of sections 2 to 24 of this 2007 Act:

(1) “Power” or “power of appointment” includes a power to designate the beneficiary under a beneficiary designation.

(2) “Property” includes rights subject to a beneficiary designation.

(3) “Transfer” includes:

(a) An exercise or release of a presently exercisable general power of appointment held by the decedent, as described in section 14 (6) of this 2007 Act;

(b) A lapse at death of a presently exercisable general power of appointment held by the decedent, as described in section 14 (6) of this 2007 Act;

(c) An exercise, release or lapse of a general power of appointment that the decedent created in the decedent; and

(d) An exercise, release or lapse of a general power of appointment that the decedent conferred on another person as described in section 15 (2)(c) of this 2007 Act.

ELECTIVE SHARE

SECTION 3. Elective share generally. (1) If a decedent is domiciled in this state on the decedent’s date of death, and the decedent is survived by a spouse, the surviving spouse of the decedent may elect to receive the elective share provided by sections 2 to 24 of this 2007 Act.

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

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(2) Any amounts received under ORS 114.015 are in addition to the elective share provided for in sections 2 to 24 of this 2007 Act.

(3) If a decedent dies domiciled outside this state, any right of a surviving spouse of the decedent to take an elective share in property in this state is governed by the law of the decedent’s domicile at death.

SECTION 4. Amount of elective share. (1) Except as otherwise provided in sections 2 to 24 of this 2007 Act, the amount of the elective share is equal to a percentage of the augmented estate of the deceased spouse as provided in this section. Properties and assets included in the augmented estate shall be determined as provided in sections 2 to 24 of this 2007 Act.

(2) The elective share of a surviving spouse is determined by the length of time the spouse and decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:

Less than 2 years...5% of the augmented estate
2 years but less than 3 years .......7% of the augmented estate
3 years but less than 4 years .......9% of the augmented estate
4 years but less than 5 years .......11% of the augmented estate
5 years but less than 6 years .......13% of the augmented estate
6 years but less than 7 years .......15% of the augmented estate
7 years but less than 8 years .......17% of the augmented estate
8 years but less than 9 years .......19% of the augmented estate
9 years but less than 10 years .......21% of the augmented estate
10 years but less than 11 years .......23% of the augmented estate
11 years but less than 12 years .......25% of the augmented estate
12 years but less than 13 years .......27% of the augmented estate
13 years but less than 14 years .......29% of the augmented estate
14 years but less than 15 years .......31% of the augmented estate
15 years or more....33% of the augmented estate
SECTION 5. Payment of elective share. In determining whether any payment is required
to a surviving spouse in satisfaction of the elective share provided for in sections 2 to 24 of
this 2007 Act, the court shall consider the values of the decedent’s probate estate, the
decedent’s nonprobate estate and the decedent’s nonprobate transfers to the surviving
spouse. 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 amount required to
satisfy the elective share shall be paid out of the decedent’s probate estate and the
decedent’s nonprobate estate in the manner provided by section 21 of this 2007 Act.

SECTION 6. Waiver of right to elect and other rights. (1) The right of election under
sections 2 to 24 of this 2007 Act may be waived, wholly or partially, before or after marriage
by a written contract, agreement or waiver signed by the surviving spouse.

(2) A surviving spouse’s waiver under this section is not enforceable if the surviving
spouse proves that the surviving spouse did not execute the waiver voluntarily.

(3) A surviving spouse’s waiver under this section is not enforceable if the surviving
spouse proves that the waiver was unconscionable when the waiver was executed and that
before execution of the waiver the surviving spouse:

(a) Was not provided a fair and reasonable disclosure of the property or financial obli-
gations of the decedent;

(b) Did not voluntarily and expressly waive, in writing, any right to disclosure of the
property or financial obligations of the decedent beyond the disclosure provided; and

(c) Did not have, or reasonably could not have had, an adequate knowledge of the prop-
erty or financial obligations of the decedent.

(4) The court shall decide whether a waiver is unconscionable under subsection (3) of this
section as a matter of law.

(5) Unless specifically provided otherwise, a written agreement that waives all rights in
the property or estate of a present or prospective spouse, using the phrase “all rights” or
other equivalent language, or a complete property settlement entered into after or in antici-
ipation of separation or divorce is a waiver of all rights to an elective share under sections
2 to 24 of this 2007 Act by each spouse in the property of the other and a renunciation by
each of all benefits that would otherwise pass to each spouse from the other by intestate
succession or by virtue of any will executed before the waiver or property settlement.

SECTION 7. Who may exercise right of election. (1) The right of election may be per-
sonally exercised by a surviving spouse, or may be exercised on the surviving spouse’s behalf
by a conservator, guardian or agent under the authority of a power of attorney. If the sur-
viving spouse dies before the election is exercised, the right of election may be exercised by
a personal representative for the estate of that spouse.

(2) An election under sections 2 to 24 of this 2007 Act must be made by filing a motion
or petition within the time specified in section 24 of this 2007 Act, whether the election is
made by the surviving spouse or by another person under the provisions of this section.

SECTION 8. Exercise of elective share by Department of Human Services. (1) Except as
provided in this section, the Department of Human Services may exercise the right of
election under sections 2 to 24 of this 2007 Act on behalf of a surviving spouse if the de-
partment has a claim against the surviving spouse for amounts paid to the surviving spouse
as public assistance, as defined in ORS 411.010, or for amounts paid for the care and main-
tenance of the surviving spouse in a state institution as described in ORS 179.610 to 179.770.
(2) Notwithstanding section 6 of this 2007 Act, the surviving spouse may not waive the right of election under sections 2 to 24 of this 2007 Act if the Department of Human Services has a claim against the surviving spouse for amounts paid to the surviving spouse 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.

(3) The Department of Human Services may not exercise the right of election on behalf of a surviving spouse pursuant to the provisions of this section if:

(a) The decedent established a special needs trust as described in 42 U.S.C. 1396p(d)(4), as in effect on the effective date of this 2007 Act, for the benefit of the surviving spouse;

(b) The decedent funded the trust with an amount that equals or exceeds the amount that the surviving spouse would be entitled to as an elective share under sections 2 to 24 of this 2007 Act; and

(c) The trust names the Department of Human Services as the beneficiary of all amounts remaining in the trust at the time of the surviving spouse’s death necessary to pay any claim of the department for amounts paid to the surviving spouse 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.

(4) If a decedent established a special needs trust for a surviving spouse that otherwise meets the requirements of subsection (3) of this section, but funded the trust with an amount that was less than the amount that the surviving spouse would be entitled to as an elective share under sections 2 to 24 of this 2007 Act, the Department of Human Services may exercise the right of election on behalf of the surviving spouse but the payment to the surviving spouse as an elective share may not exceed an amount equal to the difference between the amount that the surviving spouse would be entitled to as an elective share and the amount with which the trust was funded.

AUGMENTED ESTATE
(Generally)

SECTION 9. Augmented estate. (1) Except as otherwise provided in sections 2 to 24 of this 2007 Act, the augmented estate consists of all of the following property, whether real or personal, movable or immovable, tangible or intangible, wherever situated:

(a) The decedent’s probate estate as described in section 12 of this 2007 Act.

(b) The decedent’s nonprobate estate as described in sections 13 to 19 of this 2007 Act.

(c) The decedent’s nonprobate transfers to the surviving spouse, as described in section 20 of this 2007 Act.

(2) The value attributable to any property included in the augmented estate under sections 2 to 24 of this 2007 Act must be reduced by the amount of all enforceable claims against the property.

(3) The value attributable to any property included in the augmented estate may include the present value of any present or future interest and the present value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security Act.

SECTION 10. Exclusions from augmented estate. (1) The augmented estate does not in-
clude any value attributable to future enhanced earning capacity of either spouse.

(2) The augmented estate does not include any property that was irrevocably transferred before or after the death of the decedent spouse with the written joinder or written consent of the surviving spouse. For purposes of this subsection, consent by the surviving spouse to split-gift treatment under the federal gift tax laws does not constitute consent to a transfer made by the decedent.

SECTION 11. Effect of separation. If the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there was a judgment of legal separation, the court may deny any right to elect against the will or may reduce the elective share to such amount as the court determines reasonable and proper. In deciding if all or part of the elective share should be denied, the court shall consider whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other relevant circumstances.

(Decedent's Probate Estate)

SECTION 12. Decedent's probate estate. For purposes of sections 2 to 24 of this 2007 Act, a decedent's probate estate is 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 includes all property that could be administered under a small estate affidavit pursuant to ORS 114.505 to 114.560.

(Decedent's Nonprobate Estate)

SECTION 13. Decedent's nonprobate estate. For purposes of sections 2 to 24 of this 2007 Act, a decedent's nonprobate estate is property described in sections 13 to 19 of this 2007 Act that is not included in the decedent's probate estate.

SECTION 14. Decedent's nonprobate estate; property owned immediately before death.

(1) A decedent's nonprobate estate includes all property over which the decedent immediately before death held a presently exercisable inter vivos general power of appointment that could be exercised only by the decedent. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the property that is transferred upon the death of the decedent to any person other than the decedent's estate or surviving spouse or that is transferred for the benefit of any person other than the decedent's estate or surviving spouse. The amount included in the decedent's nonprobate estate under the provisions of this subsection is not affected by the manner in which the transfer occurs.

(2) A decedent's nonprobate estate includes the decedent's fractional interest in property held by the decedent in any form of survivorship tenancy immediately before the death of the decedent. The amount included in the decedent's nonprobate estate under the provisions of this subsection is the value of the decedent's fractional interest, to the extent the fractional interest passes by right of survivorship at the decedent's death to a surviving tenant other than the decedent's surviving spouse. For the purposes of this subsection, the decedent's fractional interest in property held in a survivorship tenancy is determined by multiplying the value of the property by a fraction the numerator of which is one and the
denominator of which is one plus the number of tenants who survive the decedent.

(3) A decedent's nonprobate estate includes the decedent's ownership interest in property
or accounts held immediately before death under a payable on death designation, under a
transfer on death registration or in coownership registration with a right of survivorship.
The amount included in the decedent's nonprobate estate under the provisions of this sub-
section is the value of the decedent's ownership interest, to the extent the decedent's own-
nership interest passed at the decedent's death to any person other than the decedent's estate
or surviving spouse or for the benefit of any person other than the decedent's estate or
surviving spouse.

(4) A decedent's nonprobate estate includes the net cash surrender value of an insurance
policy on the life of the decedent, including accidental death benefits, if immediately before
death the decedent owned the insurance policy or held a presently exercisable general power
of appointment over the policy or its proceeds that could be exercised only by the decedent.
The net cash surrender value of an insurance policy is included in the nonprobate estate only
if all or part of the proceeds of the policy were payable at the decedent's death to any person
other than the decedent's estate or surviving spouse or for the benefit of any person other
than the decedent's estate or surviving spouse. The net cash surrender value of an insurance
policy is determined immediately before the death of the decedent for the purposes of this
subsection.

(5) A decedent's nonprobate estate includes any property that the decedent could have
acquired by revocation of a revocable trust or other transfer of property, without regard to
whether the revocation was required to be made by the decedent alone or in conjunction with
other persons.

(6) A general power of appointment is presently exercisable for purposes of this section
if before death the decedent could have exercised the power to create a present or future
interest in the decedent, in the decedent's creditors, in the decedent's estate or in creditors
of the decedent's estate. A power of appointment is presently exercisable even though the
decedent lacks capacity to exercise the power.

SECTION 15. Decedent's nonprobate estate; property transferred during marriage with
interest retained by decedent. (1) A decedent's nonprobate estate includes property trans-
ferred by the decedent during marriage by means of an irrevocable transfer under which the
decedent retains the right to the possession or enjoyment of the property, or retains the
right to the income from the property, to the extent that the decedent's right terminates
on or after the decedent's death. The amount included in the decedent's nonprobate estate
under the provisions of this subsection is:

(a) The value of those parts of the property over which the decedent retained the right
to possession or enjoyment, to the extent those parts of the property pass outside probate
to or for the benefit of any person other than the decedent's estate or surviving spouse; and

(b) The value of those parts of the property from which the decedent retained the right
to receive income, including but not limited to a right to payments under a commercial or
private annuity, an annuity trust, a unitrust or a similar arrangement, to the extent those
parts of the property pass outside probate to or for the benefit of any person other than the
decedent's estate or surviving spouse.

(2) A decedent's nonprobate estate includes property transferred by the decedent during
marriage by means of a transfer under which the decedent creates a power over income or
property to or for the benefit of the decedent, creditors of the decedent, the decedent’s estate or creditors of the decedent’s estate, if:

(a) The power is exercisable by the decedent alone;

(b) The power is exercisable by the decedent in conjunction with any other person; or

(c) The power is exercisable by a person who does not have a substantial beneficial interest in the property or income that would be adversely affected by the exercise or nonexercise of the power. For purposes of this paragraph, a person who has a general power of appointment over the property or income has a beneficial interest in the property or income.

(3) The following amounts are included in the decedent’s nonprobate estate under the provisions of subsection (2) of this section to the extent that the power created by the decedent is exercisable at the decedent’s death to or for the benefit of any person other than the decedent’s surviving spouse or to the extent that the property is transferred at the decedent’s death to or for the benefit of any person other than the decedent’s estate or surviving spouse:

(a) If the decedent creates a power over property, the value of any property subject to the power is included in the decedent’s nonprobate estate.

(b) If the decedent creates a power over income, the value of the property that produces the income is included in the decedent’s nonprobate estate.

(c) If the decedent creates a power over both income and property, the greater of the amount determined under paragraph (a) of this subsection and the amount determined under paragraph (b) of this subsection.

(4) Subsection (2) of this section applies only to transfers of property made by the decedent on or after January 1, 2008.

SECTION 16. Decedent’s nonprobate estate; property transferred within two years of death; termination of right, interest or power. (1) A decedent’s nonprobate estate includes property that passed during marriage and during the two-year period immediately before the decedent’s death by means of the termination of a right to property, the termination of an interest in property or the termination of a power over property, if the property would have been included in the decedent’s nonprobate estate under section 14 (1) to (4) or 15 of this 2007 Act had the transfer occurred at the time of the decedent’s death.

(2) The amount included in the decedent’s nonprobate estate under the provisions of subsection (1) of this section is the value of the property that would have been included under section 14 (1) to (4) or 15 of this 2007 Act determined as of the time that the right, interest or power terminated. Amounts under subsection (1) of this section are included in the decedent’s nonprobate estate only to the extent that the property passed upon termination to or for the benefit of any person other than the decedent or the decedent’s estate, spouse or surviving spouse.

(3) For purposes of this section:

(a) A termination of a right or interest in property occurs when the right or interest is terminated by the terms of the instrument that governs the right or interest, or when the decedent transferred or relinquished the right or interest.

(b) Except as provided in paragraph (c) of this subsection, a termination of a power over property occurs when the power terminates by exercise, release, lapse, default or otherwise.

(c) A termination of a power described in section 14 (1) of this 2007 Act occurs only when the power terminates by exercise or release of the power.
SECTION 17. Decedent’s nonprobate estate; insurance premiums. (1) Subject to subsection (2) of this section, a decedent’s nonprobate estate includes the amount of life insurance premiums paid by decedent during marriage and during the two-year period immediately before the decedent’s death on a life insurance policy that was acquired by the decedent within two years before the decedent’s death if the proceeds of the policy were payable at the decedent’s death to any person other than the decedent’s estate or surviving spouse, or for the benefit of any person other than the decedent’s estate or surviving spouse.

(2) The amount included in a decedent’s nonprobate estate under this section is limited to the amount by which insurance premiums paid by the decedent during the period described in subsection (1) of this section exceed the cash surrender value of the policy.

SECTION 18. Decedent’s nonprobate estate; other property transferred within two years of death. (1) The decedent’s nonprobate estate includes property that passed during marriage and during the two-year period immediately before the decedent’s death by means of any other transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent’s surviving spouse.

(2) Except as provided in subsection (3) of this section, the amount included in the decedent’s nonprobate estate under the provisions of this section is the value of the transferred property to the extent that the aggregate transfers to any one donee during either of the two years immediately before the decedent’s death exceeds the amount that qualifies for exclusion from federal gift tax under 26 U.S.C. 2503 (b) or (c), as in effect on the effective date of this 2007 Act.

(3) The amount included in the decedent’s nonprobate estate under the provisions of this section does not include any transfer of property for medical or education expenses to the extent the transfer qualifies for exclusion from federal gift tax under 26 U.S.C. 2503 (e), as in effect on the effective date of this 2007 Act.

SECTION 19. Decedent’s nonprobate estate; excluded property. (1) Except for insurance premiums included in the decedent’s estate under section 17 of this 2007 Act, a decedent’s nonprobate estate does not include any property for which the decedent received full consideration.

(2) A decedent’s nonprobate estate does not include any insurance policy maintained by the decedent in compliance with a court order.

(Decedent’s Nonprobate Transfers to Spouse)

SECTION 20. Decedent’s nonprobate transfers to surviving spouse. (1) Except as provided in subsection (2) of this section, the decedent’s nonprobate transfers to the decedent’s surviving spouse include all property that passed outside probate at the decedent’s death from the decedent to the surviving spouse by reason of the decedent’s death, including:

(a) The decedent’s fractional interest in property held in a survivorship tenancy, determined in the manner specified in section 14 (2) of this 2007 Act, to the extent that the decedent’s fractional interest passed to the surviving spouse as surviving tenant;

(b) The decedent’s ownership interest in property or accounts held in coownership registration with the right of survivorship, to the extent that the decedent’s ownership interest passed to the surviving spouse as surviving coowner; and

(c) All other property that would have been included in the decedent’s nonprobate estate
under sections 13 to 19 of this 2007 Act had it passed to or for the benefit of a person other
than the decedent’s spouse.

(2) The decedent’s nonprobate transfers to the decedent’s surviving spouse do not include
any property passing to the surviving spouse under the federal Social Security Act.

PAYMENT OF ELECTIVE SHARE

SECTION 21. Priority of sources from which elective share payable. (1) The following
amounts are applied first to satisfy an elective share amount and to reduce or eliminate any
contributions due from the decedent’s probate estate and recipients of the decedent’s
nonprobate transfers to others:

(a) The amount included in the decedent’s probate estate under section 12 of this 2007
Act that passes to the surviving spouse by testate or intestate succession.

(b) The amount of all of the decedent’s nonprobate transfers to the surviving spouse de-
dscribed in section 20 of this 2007 Act.

(2) If after application of the amounts specified in subsection (1) of this section the
elective share amount is not fully satisfied, the following amounts shall be applied to the
extent necessary to satisfy the balance of the elective share amount:

(a) Amounts included in the decedent’s probate estate.

(b) Amounts included in the decedent’s nonprobate estate under sections 2 to 24 of this
2007 Act except those amounts included under sections 16 and 18 of this 2007 Act.

(3) Amounts applied against the unsatisfied balance of an elective share amount under
subsection (2) of this section shall be collected from both the probate and nonprobate estates
of the decedent in a manner that ensures that the probate and nonprobate estates bear
proportionate burdens for the amounts necessary to pay the elective share amount.

(4) Amounts applied against the unsatisfied balance of an elective share amount under
subsection (2) of this section out of the probate estate of the decedent must be apportioned
among all recipients of the decedent’s probate estate in a manner that ensures that each
recipient bears liability for a portion of the payment that is proportionate to the recipient’s
interest in the decedent’s probate estate. Amounts applied against the unsatisfied balance
of an elective share amount under subsection (2) of this section out of the nonprobate estate
of the decedent must be apportioned among all recipients of the decedent’s nonprobate estate
in a manner that ensures that each recipient bears liability for a portion of the payment that
is proportionate to the recipient’s interest in the decedent’s nonprobate estate.

(5) If after application of the amounts specified in subsections (1) and (2) of this section
the elective share amount is not fully satisfied, the remaining portion of the decedent’s
nonprobate estate must be applied to satisfy the balance of the elective share amount in a
manner that ensures that each recipient of the remaining portion of the decedent’s
nonprobate estate bears liability for a portion of the payment out of the nonprobate estate
that is proportionate to the recipient’s interest in the nonprobate estate.

(6) All apportionments required under this section between the probate and nonprobate
estates of the decedent and between the recipients of those estates shall be based on the
assets of each estate that are subject to distribution by the court under the provisions of
sections 2 to 24 of this 2007 Act.

SECTION 22. Liability of recipients of decedent’s nonprobate estate. (1) The following
recipients of the decedent’s nonprobate estate are the only persons who may be required to
make a proportional contribution toward the satisfaction of the surviving spouse’s elective
share under the provisions of sections 2 to 24 of this 2007 Act:

(a) An original recipient of the decedent’s nonprobate estate.

(b) A person who has received as a gift all or part of the decedent’s nonprobate estate
from an original recipient of the property, to the extent the person has the property or its
proceeds.

(c) A person who received the proceeds of a policy whose premiums were included in the
decedent’s nonprobate estate under section 17 of this 2007 Act.

(2) A recipient of the decedent’s nonprobate estate who is required to make a propor-
tional contribution toward the satisfaction of the surviving spouse’s elective share may elect
to make the contribution by returning property determined to be adequate to satisfy the
recipient’s obligation or by paying a sum of money equal to the value of that property.

(3) If any provision of sections 2 to 24 of this 2007 Act is preempted by federal law with
respect to a payment, an item of property or any other benefit included in the decedent’s
nonprobate estate, a person who, not for value, receives the payment, item of property, or
any other benefit is obligated to return the payment, item of property or benefit, or is per-
sonally liable for the amount of the payment or the value of that item of property or benefit
to the person who would have been entitled to the payment, item of property or benefit if
that provision was not preempted.

SECTION 23. Protection of payors and other third parties. (1) Except as provided in
subsection (2) of this section, a person is not liable for having made a payment or transferred
an item of property or other benefit pursuant to an instrument after having requested and
received satisfactory proof of death, or for having taken any other action in good faith reli-
ance on the validity of an instrument, even though the payment, item of property or other
benefit is part of a decedent’s nonprobate estate under the provisions of sections 2 to 24 of
this 2007 Act.

(2) A person is liable for making a payment or transferring an item of property or other
benefit included in the decedent’s nonprobate estate under the provisions of sections 2 to 24
of this 2007 Act if the payment or delivery is made after the person receives written notice
from the spouse or the spouse’s representative that indicates that the surviving spouse or
representative has filed a motion or petition for the elective share under section 24 of this
2007 Act or that the surviving spouse or representative intends to file a motion or petition
within the time allowed in section 24 of this 2007 Act.

(3) Notice under subsection (2) of this section must be mailed by registered or certified
mail, return receipt requested, or be served in the same manner as a summons in a civil
action. The person receiving the notice may deposit any money or property held by the
person with the court having jurisdiction of the probate proceedings relating to the
decedent’s estate or, if no proceedings have been commenced, with the circuit court for the
county of the decedent’s residence. If motion or petition is filed in the court within the
specified time under section 24 of this 2007 Act, the court shall order disbursement of the
money or property to the appropriate beneficiary. Deposit of the money or property with the
court discharges the person making the deposit from all claims for the money or property.

PROCEDURE
SECTION 24. Proceedings for elective share; time limit. (1) If any property of a decedent is subject to probate, the surviving spouse may claim the elective share only after the appointment of a personal representative. The election must be made by filing a motion in the proceeding and serving a copy of the motion on the personal representative, on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. The motion must be filed within 120 days after the appointment of the personal representative, or 30 days after the date of the filing of the inventory, whichever is later.

(2) If no property of a decedent is subject to probate, the surviving spouse may claim the elective share by filing a petition in a circuit court. Venue for the proceeding is as provided in ORS 113.015. A copy of the petition must be served on all persons who would be entitled to receive information under ORS 113.145 and on all distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (3) of this section, a petition under this section must be filed within nine months after the date of the decedent’s death. The petition must contain an inventory and valuation of the decedent’s nonprobate estate. The fee for filing a petition under this subsection shall be in the amount prescribed in ORS 21.310, based on the value of the nonprobate estate.

(3) A surviving spouse may withdraw a motion for an election filed under subsection (1) of this section at any time before the court enters an order granting the motion. A surviving spouse may withdraw a petition for an elective share filed under subsection (2) of this section at any time before entry of a judgment on the petition.

(4) After notice and hearing the court shall determine the elective share amount, and shall order its payment pursuant to the priorities established under section 21 of this 2007 Act. If it appears that property has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise.

MISCELLANEOUS

SECTION 25. ORS 116.133 is amended to read:

116.133. (1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devisee would be defeated by the order of abatement stated in subsection (2) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in [ORS 114.105 as to the share of the surviving spouse who elects to take against the will] sections 2 to 24 of this 2007 Act relating to the elective share of the surviving spouse, shares of distributees abate without any preference or priority as between real and personal property in the following order:

(a) Property not disposed of by the will.
(b) Residuary devises.
(c) General devises.
(d) Specific devises.

(3) A general devise charged on any specific property or fund is considered, for purposes of abatement, property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is considered a general devise to the extent of the failure or insufficiency.

(4) Abatement within each classification is in proportion to the amounts of property each of the distributees would have received had full distribution of the property been made in accordance with the terms of the will.

(5) Persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from that property unless the particular devise forms a substantial amount of the total estate and the court specifically orders contribution because of the devise.

(6) When the subject matter of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

SECTION 26. Sections 2 to 24 of this 2007 Act apply only to the surviving spouses of decedents who die on or after the effective date of this 2007 Act. Notwithstanding the repeal of ORS 114.105, 114.115, 114.125, 114.135, 114.145, 114.155 and 114.165 by section 28 of this 2007 Act, the rights of a surviving spouse of a decedent who dies before the effective date of this 2007 Act shall continue to be governed by the law in effect immediately before the effective date of this 2007 Act.

SECTION 27. A written contract, agreement or waiver entered into before the effective date of this 2007 Act, whether prenuptial or post-nuptial, that waives in whole or in part the elective share of a surviving spouse shall be effective as a waiver under section 6 of this 2007 Act unless a court determines that the agreement, contract or waiver was not executed voluntarily or was unconscionable under the provisions of section 6 of this 2007 Act. Section 6 (5) of this 2007 Act applies to contracts, agreements or waivers entered into before the effective date of this 2007 Act.


SECTION 29. The unit and section captions used in this 2007 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2007 Act.