

Amendments to the Oregon Probate Code
Report of the Probate Modernization Work Group
on
HB 3006, HB 3007, and HB 3008

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From the Office of
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I. Introductory summary

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

II. History of the project

In October 2013, the Oregon Law Commission (“OLC” and “Commission”) appointed the Probate Modernization Work Group (“Work Group”) to review and recommend changes to the Oregon probate statutes. Members of the Work Group came from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice, and the Circuit Courts (both probate judges and staff). The Work Group began working through the probate statutes and beginning in 2015 recommended bills that have been enacted into law by the Oregon Legislature. The following bills, with changes to the chapters indicated, have been enacted: Senate Bill 379 (2015) (Chapter 112); House Bill 4102-A3 (2016) (Chapter 111 and technical corrections to Chapter 112); House Bill 2986 (2017) (Chapters 111, 113, 114, 115, and 116, and related Chapters 18 and 125). The Work Group now has recommendations for changes to Chapters 113, 114, 115, 116. Legislative Counsel has prepared HB 3006, HB 3007, and HB 3008 with these changes.

The current Work Group members are: Lane Shetterly, Chair of the Work Group, OLC Commissioner and Attorney; Sandy Weintraub, Director of the Oregon Law Commission ; Susan N. Gary, Reporter for the Work Group, OCL Commissioner and Professor at University of Oregon School of Law; Marisa N. James, Senior Deputy Legislative Counsel; Cleve Abbe, Lawyers Title of Oregon LLC; Kathy Belcher, Attorney; Victoria Blachly, Attorney; Susan Bower, Department of Justice Charitable Activities Section; Judge Claudia Burton, Marion County; Retired Judge Rita Cobb, Washington County; Shannon Conley, Attorney; John Draneas, Attorney; Heather Gilmore, Attorney; Christopher Hamilton, Attorney; Robin Hunting, Clerk in the Civil Case Unit for Clackamas County; Sara Kearsley, Attorney; Rebecca Kueny, Attorney; Bryan Marsh, Probate Coordinator/Attorney: Oregon Judicial Department; Gretchen Merrill, Senior Assistant Attorney General: Oregon Department of Justice; Rick Mills, Policy Analyst: Oregon Department of Human Services; Jeff Petty, Clackamas County Probate Coordinator; Bonnie Richardson, Attorney; Matthew Schrumpf, Assistant Attorney General: Oregon Department of Justice; Ken Sherman, Attorney; Linda Thomas-Bush, VP & Senior Trust Officer: U.S. Bank; Jennifer Todd, Attorney; Amy Zubko, Oregon State Bar. P. Jeff Cheyne, Attorney, was a valued member of the Work Group until his untimely death.

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

Technological and social changes have affected the way people manage and dispose of their property. Lawyers working with the probate statutes have identified ways in which the statutes could be improved, both by modernizing some provisions and by clarifying provisions where the language is unclear.

The probate statutes provide two options for probate: (1) full probate, which in Oregon is not as burdensome as in some states but has more requirements and therefore costs more than in other states, and (2) a small estate affidavit process, which is limited to estates defined as small in terms of property and lacks some of the requirements of notice that a full probate has. For some estates, the protections of a full probate may not be needed, but a personal representative may be necessary to transfer an asset, exercise a power of appointment, or bring a wrongful death proceeding.

The proposed amendments provide better guidance for people administering small estates and better protection for creditors of the decedent and heirs or beneficiaries. The proposal also provides a more streamlined process for a probate that must be opened but has no assets, including guidance about what happens when assets are discovered, and provides specific rules for estates involving wrongful death claims.

IV. Review of legal solutions existing or proposed elsewhere

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

V. The proposal

Legislative counsel drafted three bills to carry out the proposal. These bills are described separately, in the order of the bill number. HB 3006 adopts rules for estates with no known assets, HB 3007 amends the rules for small estates administered by affidavit, and HB 3008 adopts rules for estates with personal injury or wrongful death claims.

A. HB 3006 – This bill amends Chapters 113, 115, and 116.

HB 3006 creates procedures that improve the administration process for an estate with no known assets that require administration (a “no-asset estate”). Sometimes a probate estate must be opened in order to give a personal representative authority, even though no assets will be distributed through the estate. For example, a personal representative may need to be appointed only to exercise for the limited purpose of exercising a power of appointment over an otherwise non-probate asset. The

amendments in HB 3006 relieve a no-asset estate of some requirements necessary in a full-probate. The requirements that do not apply are imposed to protect estate assets, so if an estate has no known assets, the requirements are not needed. If assets are later discovered, the personal representative must file an amended inventory with the court and comply with rules that did not apply when the personal representative believed that the estate had no assets. The amendments create a procedure for a personal representative to follow when the personal representative learns about or obtains assets in what had been a no-asset estate.

The Work Group understands that at the most literal level a decedent will almost always leave some assets, even if nothing more than clothes and personal items. The Work Group's reference to a "no asset estate" is intended to refer to estates where any assets are *de minimis* but the estate nonetheless requires probate administration for reasons other than the transfer of property held by the estate.

HB 3006 also allows a personal representative in a full probate to file a statement in lieu of required annual and final accountings, if the distributees of the estate consent. Currently, the personal representative may file a statement in lieu of the final accounting if the distributees all consent and all creditors are paid.

Section 1: ORS 113.035 lists the information that must be included in a petition for appointment of a personal representative and for the probate of a will. Section 1 of the bill adds to ORS 113.035 a requirement that if the petition states that the estate has no assets, the petition state the reason for filing the petition.

Section 2: This section amends ORS 113.105, which addresses the amount of the bond for the personal representative. No bond will be required if the petition states that the petitioner knows of no estate assets. If the personal representative later learns of assets belonging to the estate, the personal representative must file a motion to set or waive the bond, within 30 days of filing the inventory showing assets.

If the only asset in the estate is real property subject to foreclosure, and the decedent had no equity in the real property, the estate is not a no-asset estate. The real property is an asset that must be administered

Section 3. ORS 113.155 requires the personal representative to publish notice to interested persons. Section 3 creates an exception to this duty for an estate with no known assets. If the personal representative later learns of assets, the personal representative must begin publishing notice within 30 days after filing the inventory showing assets.

Section 4. ORS 113.165 creates a duty to file an inventory. Section 4 adds language requiring the personal representative in a no-asset estate to file an inventory stating that no property of the estate has come into the possession or knowledge of the personal representative.

Section 5. ORS 113.175 is amended to provide that if a personal representative of a no-asset estate learns about assets of the estate, the personal representative must file an inventory listing the assets within 30 days after learning about the assets.

Section 6. ORS 115.003 requires a personal representative to make a diligent effort to search for creditors of the decedent, to give notice to each creditor identified, and to file proof of compliance with the court. Section 6 adds a provision stating that this duty does not apply to the personal representative of a no-asset estate, but that if the personal representative later learns about assets of the estate, the personal representative must comply with ORS 115.003. The period for compliance begins with the date of the inventory showing the newly discovered assets.

Section 7. ORS 115.135 provides rules for the allowance and disallowance of claims presented the personal representative. If the estate is a no-asset estate, the personal representative need not take action when a claim is presented. However, if the personal representative later learns about assets of the estate, the personal representative must respond to claims presented before the personal representative received or learned about the assets. The personal representative has 60 days after filing the inventory that lists the newly discovered assets to disallow the claim.

Sections 8 and 9. Section 8 adds a new section, Section 9, to Chapter 116. The new section permits the personal representative of a no-asset estate to close the estate four months after the delivery and mailing of a notice required at the start of the probate. The procedure in the new section applies only if the estate continues to be a no-asset estate. The personal representative must send a copy of the motion to close the estate to everyone who would be entitled to a final account if the estate had held assets. The recipients of the notice have 20 days in which to file objections with the court. The judgment closing the estate discharges the personal representative. Although the judgment acts as a bar to actions against the personal representative, a court can, within a year following the judgment, permit an action if the judgment was taken through misrepresentation or fraud of the personal representative or mistake or excusable neglect of the claimant. This authority tracks the rule in ORS 116.213 for personal representatives of estates with assets.

Section 10. ORS 116.083 provides rules for the filing of annual and final accounts by the personal representative. Section 10 amends the law with respect to the administration of estates that have assets. Section 10 adds a provision permitting the personal representative to submit a statement in lieu of an annual accounting, if the distributees consent in writing. The account must include a list of unpaid claims and must be sent to each creditor whose claim remains allowed and unpaid. An unpaid creditor may require the personal representative to file an accounting simply by giving notice to the personal representative. No motion or order is required in order to compel the personal representative to file an accounting in that case; the notice from the creditor itself is sufficient.

Subsection (3)(a) provides that if the distributees consent, the personal representative may file a statement in lieu of an annual account (subject to the requirements for doing

so that apply) “[u]nless otherwise provided by order of the court.” The Work Group intends that such an order be based on particular facts and circumstances that apply to the estate in question and make annual accounts necessary to its administration; the Work Group does not intend that this section authorize a court to establish local rules or enter orders that apply to all estates or to any class of estates, or to enter such an order without a specific determination of its need. An order prohibiting a statement in lieu of an annual account may be entered on the motion of an interested party or on the court’s own motion, but must be based on the circumstances of the estate for which the order is entered. If courts use this subsection to impose a standing order that personal representatives must file annual accounts, the statutory rule should be re-examined.

The distributees can revoke their consent to the filing of a statement in lieu of annual account, by notice to the court.

Subsection (3)(b) lists all the information that must be included in a statement in lieu of account. Subsection (3)(b)(C) requires that the statement include a copy of the most recent statement for each financial account owned by the estate. “Each” is intended to emphasize that all accounts must be reported, and “financial account” includes accounts held in banks, brokerage companies, credit unions, and other similar entities.

Section 11. This section updates a cross-reference in 116.113.

Section 12. The section addresses when the changes apply. The provisions related to no-asset estates apply to estates in which the petition to appoint a personal representative is filed on or after the effective date of the Act. The statement in lieu of annual accountings applies to accounts required to be filed on or after the effective date.

B. HB 3007 – This bill amends Chapters 113, 114, and 116.

The Work Group heard many concerns about the use of small estate affidavits. These affidavits are a useful way to transfer property without the need for a full probate, but many of the statutory provisions about the use of these affidavits are unclear. A number of changes proposed in this bill will guide the affiant, will clarify the fiduciary duties of the affiant, and will better protect the interests of creditors and beneficiaries or heirs. The affiant is the person who has authority to act in the small estate.

The Work Group discussed the balancing of interests between permitting the affiant to transfer title to property quickly and efficiently and giving creditors, heirs, and beneficiaries adequate time to challenge actions taken by the affiant. The proposal permits the affiant to transfer property after four months, with the consent of all successors in interest, but also preserves a two-year period for a challenge by summary review.

Section 1. This section adds a definition of small estate affidavit to 114.505.

Sections 2 and 3. Section 2 adds a new section, Section 3, to Chapter 114. Section 3 covers the value limits for small estates. Some of the rules—the dollar amounts—were moved from ORS 114.515. The new section does not change the value limits; this section only addresses the dates of valuation. The new section combines the value limits with a new provision that sets the effective date for valuation. A small estate affidavit can only be used for estates under the specified amount, so clarity with respect to the valuation date is important. The Work Group discussed whether the value should be determined at the date the affidavit is filed. As a practical matter, valuation takes time and tying the valuation date to the date of filing did not seem feasible. However, because values change over time, using the date of death as the valuation date indefinitely did not make sense. The new provision states that the assets will be valued on the date of death, except that, if an affidavit is filed more than a year after the decedent died, values are to be determined as of a date within 45 days of the date of filing the affidavit.

Section 4. This section amends ORS 114.515 to coordinate with the new section, Section 3 of this bill, and it makes other changes to the small estate process.

The Work Group thought that a person disqualified from acting as a personal representative should also be disqualified from acting as an affiant acting under a small estate affidavit. Section 4 adds that rule to ORS 114.515. The Work Group acknowledges that the absolute disqualification of a person who has been convicted of a felony is broader than the corresponding provisions of ORS 113.092, relating to the appointment of a personal representative in a formal probate estate, in that ORS 113.092 allows the court to take into account the nature of the felony conviction in determining whether to appoint a convicted felon. The Work Group concluded that, since there is no procedure in a small estate for the court to evaluate an affiant's qualifications or prior felony convictions, it was better to err on the side of protecting heirs, devisees and creditors with the absolute disqualification.

Section 4 amends the subsections regarding the duty to correct an affidavit filed with the court to provide better guidance as to the affiant's responsibilities. The affiant must file an amended affidavit to correct a material error or omission or to include property that was missing from the original affidavit.

A new subsection explains that if the fair market value of the property listed in the amended affidavit exceeds the value limits, the affiant's authority terminates. This could happen if the fair market value given for an asset is too low. Although the affiant's authority to act with respect to the assets terminates, the affiant has a continuing duty to deliver the estate assets to a personal representative who requests them. The affiant must file a notice with the court reporting that the small estate statutes do not apply and must send a copy of the notice to each person who received a copy of the prior affidavit.

If the affiant took actions when the value of the assets exceeded the small estate value limits, the actions are subject to review by the court and the subsequently appointed personal representative for the estate.

ORS 114.515(3) states that an affiant must wait at least 30 days after the decedent's death before filing an affidavit. The 30-day requirement gives surviving family members or others time to determine what assets the decedent held and the extent of claims against the estate. The waiting period may lessen the need to amend the affidavit for an after-discovered asset. The Work Group discussed increasing the time period, but concluded that the 30-day requirement was appropriate.

The clerk of a probate court may acknowledge an affidavit if the affiant presents identification and a statement under penalty of perjury.

Sections 5 and 6. These sections improve language in ORS 114.517 and 114.520.

Section 7. This section amends ORS 114.525, which sets out the information that must be included in a small estate affidavit. The amendments require more information to be included in the affidavit, with the goals of reminding the affiant that certain notices must be given and strengthening the protection for the decedent's creditors and heirs or beneficiaries. The changes limit disclosure of the decedent's Social Security number to the last four digits and add the following requirements for information to be included in the affidavit:

- State the name and post-office address of the affiant and that the affidavit is made pursuant to ORS 114.505-114.560.
- State that no personal representative has been appointed in Oregon and no estate administration is open in Oregon
- State the mailing address for presentment of claims
- State an electronic address or facsimile address if the affiant authorizes creditors to file claims that way
- List anticipated administration expenses and attorney fees
- State that the affiant is not disqualified under 114.515(2) (which refers to the disqualification rules for personal representatives)
- State that a copy of the death record will be delivered to the Department of Human Services, together with the affidavit
- State whether the decedent was incarcerated in Oregon within 15 years of death, and if so state that copies of the affidavit and death record will be delivered to the Department of Corrections
- State that undisputed claims will be paid as provided in ORS 114.545
- State that claims not listed in the affidavit or larger than those listed may be barred unless presented within four months of the filing of the affidavit or unless a petition for the appointment of a personal representative is filed

The affidavit must also include text provided in the statute titled "Notice of Obligation to Pay Debt or Turn Over Property." The notice alerts a recipient of a small estate affidavit of the recipient's duty to respond to the affiant's request to deliver property. The notice explains that the affiant can enforce the request in court and that if the affiant prevails the court can award attorney's fees to the affiant. The notice is intended

to alert holders of assets such as banks to the potential penalties for failure to respond to a request from an affiant.

Section 7 requires that the affiant file a certified copy of the death record as a confidential document. The affiant may need to use a death record for other purposes, in administering the estate, and this section does not limit the use of a death record for any necessary or appropriate purpose. This section is only concerned with court filings that include the death record.

If the decedent left a will, the affiant must file the original will, or if the original will is filed in another jurisdiction, the affiant must file a certified copy of the original will and proof that the will meets the requirements of a will under Oregon law. This provision clarifies that a copy of a will cannot be filed in a small estate proceeding.

Section 8. This section makes a number of changes to improve the language of 114.535, the section that describes the process the affiant uses to obtain control of property belonging to the decedent and to transfer the property to the persons entitled to the property.

ORS 114.535 currently requires the affiant to wait 10 days after filing the affidavit with the court before beginning the process of obtaining and transferring property. Section 8 removes the requirement to wait. The Work Group concluded that because the affidavit itself cannot be filed until 30 days after the decedent's death, ORS 114.515(3), an additional waiting period was unnecessary.

Section 8 also clarifies that if a person who holds assets of a decedent fails to pay or deliver the assets to the affiant upon delivery of a certified copy of the affidavit, the affiant may bring an action to compel payment or delivery. Section 8 adds a requirement that before bringing such an action the affiant must serve a written demand by certified mail. The written demand must state that if the recipient fails to pay the debt or transfer the property, the affiant may file a motion to compel and may be awarded attorney's fees. The written demand will serve as notice of the consequences of failing to respond.

If the recipient of a written demand fails to pay the debt or transfer the property within 30 days after the affiant serves the written demand, the affiant can file a motion to compel. The court may enter a judgment awarding attorney fees to the prevailing party if the court finds (1) the affiant filed the motion without an objectively reasonable basis to do so or (2) the person with the property refused to pay the debt or transfer the property without an objectively reasonable basis.

Section 9. Section 9 improves and clarifies the language in ORS 114.537, the section that governs access to safe deposit box held by the decedent.

Section 10. This section amends ORS 114.540 and clarifies the rules for presentment of claims to the affiant. Current ORS 114.540 states that claims may be filed within four months of the filing of the affidavit or four months after the filing of a

supplemental affidavit. Section 10 adds an explanation of what constitutes presentment of a claim to an affiant. Under Section 7 of this bill the affidavit must include an address for claims to be sent and may include an electronic or facsimile address if the affiant chooses to accept claims that way. Section 10 clarifies that a claim will be presented if it is sent or delivered to any address listed in the affidavit. A claim may be filed with the court, but filing a claim with a court does not constitute presentment. The Department of Human Services typically files a claim with the court to give the court notice of the claim, and other creditors may do so as well, so the Work Group wanted the statute to clarify that filing a claim with the court is not, by itself, presentment.

Section 10 adds a requirement that if the affiant disallows a claim, the affiant must state the reason for the disallowance. An affiant may not disallow a claim just because the affiant believes the estate has insufficient funds to pay the claim. The claim may ultimately not be paid, if funds are lacking, but allowance or disallowance should depend on whether the claim is a valid claim. The Work Group heard that some affiants and personal representatives routinely disallow claims, without good reason. The Work Group also heard a concern that requiring the statement of a reason would be read as an admission of the claim and might be used to preclude other defenses that could be used after the affiant obtained more information. The proposal makes clear that the requirement that the disallowance state the reason is not intended to bind or limit the affiant. Subsection (2)(b) provides that the statement of a reason is not an admission by the affiant and does not preclude the affiant from asserting other defenses to the claim.

A claim that has been disallowed in the manner provided will be barred unless the claimant files a petition for summary determination or a petition for the appointment of a personal representative is filed.

Sections 11 and 12. Section 11 adds a new section, Section 12, to Chapter 114. The new section replaces ORS 114.540(3), to clarify the process to be followed by a creditor who wants to challenge the disallowance of a claim. The new section improves the language explaining the use of summary determination, and adds, as guidance, the rule that a court's decision under summary determination can be enforced only through a petition for summary review. Under summary determination, the order is not enforceable as a money judgment, but a creditor can petition for summary review to obtain an enforceable money judgment.

Section 13. ORS 114.545 sets out the powers and duties of the affiant. The Work Group sought to address confusion over whether an affiant is acting as a fiduciary by confirming the affiant's fiduciary role in ORS 114.545. Section 13 also clarifies that the affiant may not commingle property of the estate with the affiant's personal property. A new provision directs the affiant to retain records of the administration of the estate until the later of two years from filing the small estate affidavit or the conclusion of any summary review proceeding.

Current ORS 114.545(b) requires the affiant, within 30 days of filing the affidavit, to mail, deliver, or record each instrument that the affidavit states will be mailed, delivered, or recorded. Section 13 deletes the reference to recording an instrument, because no instrument should need to be recorded within 30 days of the filing of the affidavit.

The bill moves some of the duties currently in ORS 114.545 to a new section, Section 15 of this proposal, in order to provide additional guidance and clarification.

Section 14. This section states that Sections 15 and 16 are added as new sections in Chapter 114.

Section 15. This section provides clearer rules for selling or transferring property during the administration of the estate. The sale must be for “adequate consideration.”

An affiant can sell or transfer real property with the consent of all heirs or devisees who would succeed to an interest to the property, personal property that is specifically devised to an individual devisee with the consent of the devisee, and other personal property without the consent of any other person. The bill adds that a purchaser in good faith takes the interest free of any interest of the claiming successors. The consideration received by the estate will be subject to the interests of the successors.

The consent necessary to sell real property is the consent of only the successors in interest to the property to be sold, and not all devisees or heirs. The Work Group determined that requiring consent from the broader group imposed unnecessary difficulties for the estate. Although it is possible that a will contest brought after the transfer by consent might change the successors in interest after the property is sold, in the context of a small estate, the Work Group believed the protections of the 30-day waiting period and the fiduciary duties imposed on the affiant should be sufficient in the context of a small estate.

Although tangible personal property may be specifically devised to a group of children or descendants, the Work Group concluded that obtaining consent from the entire group of devisees could be impossible. The affiant can sell the personal property, unless it is devised to one individual, but the fiduciary duties imposed on the affiant help protect the devisees.

Although a sale of real property requires the consent of all successors in interest, if a successor refuses to consent, the affiant can file a petition for summary review under ORS 114.550 and ask the court to approve the sale.

Section 16. The goal of the new section is to clarify the fiduciary role of the affiant as well as the liability of the affiant for a breach of fiduciary duties. The section spells out the affiant’s liability with regard to the administration of estate property, including income from that property. The affiant is chargeable for property not part of the estate if the affiant commingled the property with estate assets or received the property under a duty imposed by the small estate statutes. The affiant is liable for losses due to neglect,

commingling, unauthorized self-dealing, or negligence in connection with administration of the assets.

Section 17. A claiming successor (e.g., an heir, devisee, or creditor) who has not been paid amounts owed from a small estate can file a petition for summary review. A creditor may file a petition under this section only if after the creditor's claim was disallowed the creditor filed a petition for summary determination under Section 12 of this bill.

ORS 114.550 provides the rules for filing the petition, continuing the requirement in current law that it must be filed within two years after the filing of the small estate affidavit. Section 17 amends ORS 114.550 to require the affiant to file an answer within 30 days of the filing of a petition. If a court allows the claim of a creditor, the court can order the claim paid from estate property, including property that has already been distributed to a successor. Section 17 clarifies that the court may remove or surcharge an affiant and can authorize the substitution of a new affiant. Section 17 also adds a provision authorizing a person entitled to property from the estate to file a petition for summary review to compel the affiant to distribute the property within 60 days after the two-year period.

ORS 114.540 provides that a creditor's claim is barred after four months from the filing of a small estate affidavit or amended small estate affidavit. ORS 114.550(1)(c) clarifies that this four-month limit applies only if the creditor was listed as a disputed creditor in the affidavit and received a copy of the affidavit within 30 days of the filing of the affidavit. If the creditor did not receive notice, the creditor has two years to file a claim through the summary determination process.

Section 18. This section improves language in ORS 114.552.

Section 19. This section amends ORS 114.555, which provides rules for the transfer of property by the affiant. Under current law, if a personal representative has not been appointed, property subject to a small estate affidavit is considered transferred to the successors in interest at the end of the four-month period following the filing of the affidavit. The work group believed that concept of automatic transfer creates confusion and uncertainty. Section 19 provides, instead, that at the end of the four-month period, the affiant has the authority to transfer the property, but the property is not automatically transferred.

The change in Section 19 allows the affiant more time to sell property and pay creditors or settle claims so the distributees will not take property subject to claims. For real property the four-month automatic transfer raised particular problems, because the property typically could not be sold before the end of the four-month period. The affiant now has more time to sell the property, and the transfer of title can go directly to the buyers. The affiant can then distribute the proceeds to the successors.

Section 19 also provides that if a petition for summary review has been filed, the affiant cannot distribute property until after the claims that are the subject of the summary

review proceeding are paid and clarifies that the decedent's property is subject to the claims of creditors for the two-year period, whether the property is held by the affiant or transferred to successors.

Sections 20-31. These sections amend ORS 114.215, 238.390, 113.238, 130.150, 238.458, 708A.655, 723.844, 446.616, 803.094, 116.223, and 58.387. These sections make conforming changes, including changes to cross references and changes in references to “affidavit” to the new term, “small estate affidavit.”

Section 32. This section makes clarifying changes to ORS 112.238.

Section 33. This section provides that the changes apply to decedents who die on or after the effective date of the Act and to deeds executed on or after the effective date.

Section 34. This section explains that captions are provided only for convenience.

C. HB 3008 – This bill amends Chapters 30, 113, and 116, and adds new provisions.

HB 3008 creates new probate rules related to personal injury and wrongful death claims arising out of injuries to the decedent. Proceeds recovered in a wrongful death action do not become assets of the estate and are distributed instead pursuant to the wrongful death statutes, specifically ORS 30.030. If the only asset of an estate is a wrongful death claim, many of the rules governing a probate estate are not needed, but an estate must be opened because the claim must be brought by the personal representative. The new provisions address problems that have arisen because of a disconnect between the probate proceeding and the wrongful death action, and lack of clarity around the administration of a wrongful death claim. The bill streamlines the process, while providing better protection for the personal representative, creditors, and beneficiaries.

Furthermore, the bill addresses confusion that can arise because the proceeds of personal injury claims—claims filed on behalf of a decedent for injuries sustained before death that do not cause the death—are assets of the decedent's estate, so a full probate is required.

Section 1. This section creates definitions of beneficiary, interested person, personal injury claim, and wrongful death claim, for purposes of the new sections.

Section 2. This section explains that all existing statutory sections continue to apply to wrongful death claims and to estates with personal injury claims, except to the extent that the new sections create exceptions.

Section 3. Although Supplemental Local Rules in various counties require probate court approval when a personal injury or wrongful death claim is settled, the Oregon statutes do not require approval. If the claim goes to judgment the trial court will approve the result, but most cases settle before judgment.

Although an estate's beneficiaries or creditors may have an interest in a personal injury claim, if the claim is settled without court oversight, the settlement may not be fair to them. Alternatively, even if the settlement is fair, beneficiaries may later second-guess a settlement and argue that the claim was worth more than it was. Requiring court approval for a settlement will protect the persons entitled to proceeds and the personal representative. Another reason to require court approval is that confusion may exist about whether a claim is a personal injury (survival) claim or a wrongful death claim. The persons entitled to the proceeds of a settlement may be different depending on the characterization of the claim, and a court can make that determination.

Settlement may happen before trial or during trial, and parties typically agree to a settlement subject to court approval. Requiring court approval in advance of an agreement would impede the settlement process. Instead, Section 3 clarifies that parties to a personal injury claim or wrongful death claim may enter into a settlement agreement subject to the approval of the probate court.

As already required by UTCR 9.040 and Supplemental Local Rules in several counties, the tort attorney for the personal representative must file a declaration under penalty of perjury that:

- States whether the claim is a personal injury claim or a wrongful death claim,
- Describes the incident that caused the injury or death
- Describes the injuries
- States the amount of the claim
- States the amount of the settlement
- States the amount of attorney fees and costs
- States the amount of payments for medical, burial, and memorial services, including any payments owed to the Department of Human Services
- States the amount of any personal representative fee related to the claim
- States the reason for the settlement and the efforts to maximize recovery
- States that the attorney has examined applicable medical records
- Explains why it is appropriate to settle the claim

The explanation of why it is appropriate to settle the claim will include an explanation of the attorney's independent evaluation of the interests of the estate.

Note that the petition for approval of the settlement need not state the amount of the settlement. The petition is public, but the declaration can be made confidential. Confidentiality can assist in settlement. Note further that notice to beneficiaries is not required before approval of the settlement. Current law does not require notice to the beneficiaries before settlement, *Matter of White's Estate*, 609 P.2d 365, 289 Or. 13 (1980), and after discussion the Work Group determined that the law should remain as it is in this regard.

In determining whether to approve the settlement, the court will consider the information provided in the petition. The expectation is that the court will consider the factors in the petition and other circumstances in making an independent evaluation of the appropriateness of the settlement.

Section 4. If the only asset of an estate is a personal injury claim, the requirement to post a bond is deferred until a settlement is approved. While the claim is ongoing, the personal representative can file an annual report on the status of the claim in lieu of the annual account that would otherwise be required for a probate estate.

Section 5. If the sole reason for opening a probate is to enable a personal representative to pursue a wrongful death claim, some of the probate requirements normally imposed are not necessary. Section 5 requires the petition to include a statement that the petitioner is filing the petition for the sole purpose of pursuing a wrongful death claim, to list the names of all the beneficiaries (as defined in Section 1), with information about each of them, and to include a statement that reasonable efforts have been made to identify and locate all beneficiaries.

Section 6. This section requires the personal representative to send information about the estate, including contact information for the lawyer bringing the wrongful death claim and the lawyer representing the personal representative, to all beneficiaries under ORS 30.020, the Department of Human Services, and the Oregon Health Authority. Before filing a motion to close the estate, the personal representative must also notify the Department of State Lands with respect to any beneficiary who cannot be located.

Section 6 requires notice to beneficiaries early in the process, which gives beneficiaries under ORS 30.020 the opportunity to protect their interests.

Section 7. This section waives certain requirements that otherwise apply to personal representatives of estates, when the personal representative has been appointed for the purpose of pursuing a wrongful death claim and there are no other assets of the decedent's estate subject to administration. In that case, the following requirements are waived:

- Notice to devisees, heirs, and interested persons (notice in a wrongful death estate is required under Section 6 of the proposal),
- Publication of notice,
- Bond,
- Proof of compliance with the requirement to search for claimants, and
- Inventory.

The personal representative may file an annual report on the status of the claim, in lieu of an annual account, and may file a motion to close the estate, in lieu of a final account.

The personal representative has an ongoing duty to look for probate assets. If any probate assets are identified the probate will become a full probate as to those assets and the rules governing the administration of an estate will apply.

Section 8. This section provides that after the wrongful death action has been resolved, and if no other assets of the estate have been found, the personal representative can file a motion to close the estate. The personal representative must attach receipts or other evidence showing that the amount recovered in the action has been distributed as provided in the wrongful death statute, ORS 30.030. The personal representative must set a time for filing objections and must mail a notice of the motion to close the estate to all beneficiaries, at least 20 days before the time set.

The court's judgment closing the estate discharges the personal representative. The court can, within a year after closing the estate, permit an action to be brought against the personal representative if the judgment was taken through misrepresentation or fraud of the personal representative or through mistake or excusable neglect of the claimant. This provision codifies the decision in *Fuentes v. Tillett*, 263 Or. App. 9 (2014), in which the court held that approval barred a later claim only to the extent that facts had been reasonably revealed. Section 8 adds a one-year statute of limitations to the *Fuentes* decision. Section 8 is similar to ORS 116.213, discharge of personal representative.

Section 9. This section provides that damages obtained in a wrongful death action must be placed in the lawyer trust account for the attorney representing the personal representative in the estate or the lawyer representing the personal representative on the wrongful death claim. The court can permit deposit in another account, with withdrawal permitted only on order of the court.

The Work Group concluded that placing the funds in the lawyer trust account provided sufficient protection for the funds. Lawyer trust accounts are protected through the Oregon State Bar Client Security Fund and the Professional Liability Fund.

Section 10. ORS 116.173 provides a schedule for determining the fee of the personal representative. This section applies to probate estates, generally. The fee is based on the value of assets in the estate, and that value may change over time. ORS 116.173 states that each asset is valued at its highest value shown on the inventory, an amended or supplemental inventory, an interim account, and the final account. This rule remains unchanged, but Section 10 amends ORS 116.173 in two ways. First, this section amends the definition of "property subject to the jurisdiction of the court" by adding amounts recovered on a personal injury claim and proceeds recovered in a wrongful death claim. This change codifies *Brown v. Hackney*, 208 P.3d 988, 228 Or App 441 (2009). Second, a new subsection adds that if the highest value of an asset shown on any filing was materially misstated at the time the document was filed, the value for purposes of determining the fee will be the highest correctly stated value. This provision is intended to avoid a situation in which the value of an asset has been materially misstated at some point in the process of administering the estate, but the misstated value nevertheless would be used in determining the personal

representative's fee. The fee is to be based on the highest correctly stated value. If an asset is listed in the inventory as having a certain value, but then that value declines during the administration of the estate, such as due to casualty loss or a decline in market value, this amendment does not require that the lower value be used to calculate the personal representative's fee. In such a case, the value was not materially misstated at the higher value; rather, the value of the asset was correctly stated, but later declined due to some intervening factor.

Section 11. This section amends ORS 30.030, which provides for distribution of proceeds of a wrongful death claim. Section 11 clarifies that fees should be paid to the personal representative for work attributable to the wrongful death claim.

Section 12. This section amends ORS 113.015, the section that provides for venue for a probate action. Section 12 adds as a county where a probate can be opened the county where a personal injury claim or wrongful death claim can be maintained.

Section 13. The provisions of this bill apply to settlement agreements entered into on or after the effective date of the Act, to estates in which a petition for the appointment of a personal representative is filed on or after the effective date of the Act, to damages received on or after the effective date of the Act, and to applications for compensation of a personal representative is filed on or after the effective date of the Act (even if the petition for appointment of that personal representative occurred before the effective date).

Section 14. This section explains that captions are provided only for convenience.