

Rep. Johnson: Aye
Rep. Mannix: Aye
Rep. Miller: Aye
Chair Baum: Aye

PUBLIC HEARING ON HB 2266

- 063 **CHAIR BAUM:** Opens hearing on HB 2266 and assigns Rep. Johnson as carrier for HB 2255.
- 070 **WARREN C. DERAS, OSB ESTATE PLANNING AND ADMINISTRATION SECTION:** Introduces himself and discusses position on HB 2266 (see Exhibit C). Not permitted to testify on behalf of the bar because these proposals have not been approved by the executive board.
- 163 **REP. MANNIX:** Asks whether or not the amendments are going to put this bill back the way the section proposed it or are there other changes?
- 167 **WARREN DERAS:** We are adopting some of the basic format changes taken by Legislative Counsel and trying to reconcile our provisions with them.
- 171 **REP. MANNIX:** Comments on terms of art such as "claims".
- 172 **WARREN DERAS:** Claims clearly should not have been used.
- 171 **REP. MANNIX:** Is there any division of opinion about these issues?
- 178 **WARREN DERAS:** No, they were unanimous. The second item proposed with regard to contract to a will case, is to modify that statute of frauds to require a contract to make a will dispute be based on a writing. The Court of Appeals found a way around the statute of frauds in will contracting cases by allowing, in Hocks v. Hocks, an individual to bring a case as fraud. See written testimony, page 2. See also the amendment on page 1 relaxing the statute of frauds. On page 2 beginning on line 40, makes the proceedings under the new contract to make a will statute the exclusive remedy for claims based upon a promise of the decedent.
- 231 **REP. MANNIX:** Shouldn't the words be "name and mailing address", is there any reason for that terminology located on page 2 of the bill? Subsection 7, lines 3 and 4.
- 245 **WARREN DERAS:** That language is picked up from paragraphs 4, 5, and 6 above, the existing language in the probate code.
- 258 **REP. MANNIX:** Do you understand it to be just the mailing address?
- 250 **WARREN DERAS:** Not aware of any special or unusual meaning.
- 262 **REP. MILLER:** The exclusive remedy provision means the fraud route will not be available if this is adopted.
- 266 **WARREN DERAS:** That was the intent. It depends on whether you interpret the clause as procedural or substantive. My intent was that it be substantive.

- 277 **REP. MILLER:** Could you provide an example on how this will work when implemented.
- 280 **WARREN DERAS:** Discusses the amendment on page 1 and gives examples of the purpose. Must establish a prima facie case without their own testimony.
- 319 **REP. MILLER:** Please provide some examples.
- 328 **WARREN DERAS:** Witnesses would have first hand knowledge. The second item requires the case be proven by clear and convincing evidence with their own testimony. The standard is higher than ordinary burden of proof in a civil action.
- 386 **REP. MILLER:** How much application in the real world will this bill have?
- 390 **WALTER CROW:** There will be some effect in the legal community. Gives some examples based on his experience.
- 430 **REP. MILLER:** In the situation where you dispose of certain specific requests and then you deal with the personal affects, would you expect some recollection on specific items? Is there a proof problem?
- 447 **WARREN DERAS:** That is a promise not a contract situation. For a contract to make a will to stick, it needs some consideration.
- 451 **WALTER CROW:** There needs to be reliance. Responds to the fact situation.
- 459 **REP. MILLER:** Do you find this language in other jurisdictions?

TAPE 1 SIDE B

- 030 **WARREN DERAS:** We did not search other jurisdictions. The changes are of language directly from the Uniform Probate Code.
- 035 **WALTER CROW:** In 1969 Oregon adopted pieces of the Uniform code. ORS 12.270, the will section, is verbatim from the Uniform Probate Code. In the survey we found throughout the US about 50% of the states had adopted the UPC or something stricter.
- 051 **REP. BRIAN:** Wonders how many times this will clear up or negate the fraud claim versus the problems or claims it will cause.
- 058 **WARREN DERAS:** Discusses meritorious claims and the Hawks case.
- 084 **REP. EDMUNSON:** Back to Section 3, paragraph 5 regarding the exclusive remedy. Understands the intent to preclude claims fraud but questions whether there are situations where a claim of fraud would be appropriate and secondly in those cases, would there be damages available that would not be available in a contract claim in the form of punitive damages?
- 093 **WALTER DERAS:** Under Oregon law, the estate is not liable for punitive damages even if the decedent was.

- 095 **REP. EDMUNSON:** Those punitive die with the decedent?
- 096 **WARREN DERAS:** The right to punitive damages against a decedent die at his death.
- 097 **REP. EDMUNSON:** Are there any damages that would be available in claims of fraud that would not be available in claim for contract?
- 100 **WALTER DERAS:** No.
- 107 **REP. EDMUNSON:** Would like to have that question answered in a little more depth.
- 113 **WARREN DERAS:** The law is clear with regard to punitive damages.
- 116 **CHAIR BAUM:** Intent of the chair is to have this discussion go on a little longer.
- 118 **WARREN DERAS:** That would be appropriate.
- 121 **REP. BRIAN:** Would the contract form supersede a written will or come in conflict with it?
- 124 **WARREN DERAS:** Yes. A will can easily violate a contract to make a will. If it did and the contract was properly proved, the contract would take precedence.
- 128 **REP. BRIAN:** It would not matter which came first?
- 129 **WARREN DERAS:** The timing would not matter.
- 130 **REP. MANNIX:** Following up on Rep. Edmunson's concerns, punitive damages would only be applied to someone truly punishable for what they did. What if someone is alive and an action is brought against them?
- 134 **WARREN DERAS:** The character of a contract to make a will case is that you do not suffer damages until the person dies.
- 139 **CHAIR BAUM:** Explains a contract to make a will.
- 147 **WALTER CROW:** Rep. Mannix's observation is a good question.
- 157 **REP. MANNIX:** Is it specific performance or some sort of equitable performance?
- WARREN DERAS:** In a declaratory judgment.
- 160 **CHAIR BAUM:** The intent of the chair is to explore this further and have it back before the committee again. Closes hearing on HB 2266.

PUBLIC HEARING ON HB 2267

- 167 **CHAIR BAUM:** Opens the hearing on HB 2267.

367 **CHARLIES WILLIAMSON, OREGON TRIAL LAWYERS' ASSOCIATION:** Testifies in support of the bill with the proposed amendments.

MOTION: Rep. Miller moves to adopt the HB 2386-1 amendments.

VOTE: Hearing no objections, the motion is adopted.

MOTION: Rep. Miller moves HB 2386 as amended be sent to the full committee with a do pass recommendation.

VOTE: Motion passed with all members present voting aye. Rep. Brian, Clark, and Mannix excused.

(Tape 97, Side A)

HB 2266 - REVISES THE RULES FOR WILL CONTESTS, WORK SESSION

419 **GREG CHAIMOV:** Provides summary of bill.

> HB 2266 has two parts. One part makes it easier to sue for breach of a contract to make a will. The second part fixes a constitutionally defective notice provision in the section of the statutes regarding will contests.

> The committee was not enthused about the possibility for making it easier for people to sue their relatives but was kindly disposed to the notice provisions. Mr. Deras' has put together HB 2266-1 amendments (**EXHIBIT B**) which fixed the notice provision but deleted the portions about breach of a contract to make a will. There is one additional change requiring the deletion of a redundant section and that is labeled the additional amendment (**EXHIBIT C**).

TAPE 98, SIDE A

010 **WARREN DERAS:** Testifies in support of bill and explains amendments.

> The original motive behind this bill was an effort to soften the substantive requirements for a contract to make a will case. The committee was provided an outline which sets forth the various goals of the measure (**EXHIBIT D**).

MOTION: Rep. Edmunson moves that HB 2266-1 amendments and additional amendment be adopted.

VOTE: Hearing no objection, amendments are adopted.

MOTION: Rep. Edmunson moves that HB 2266 as amended be sent to the full committee.

VOTE: Motion passed with all members present voting aye. Rep. Brian, Clark, and Mannix excused.

(Tape 98, Side A)

HJR 60 - REPEALS MANDATORY RETIREMENT FOR JUDGES, PUBLIC HEARING

243 **VOTE: 9 - 2** Motion passes. Edmunson to carry.

AYE: Baum, Bauman, Bell, Edmunson, Johnson, Mannix, Mason, Sunseri, Miller
 NO: Brian, Parks
 EXCUSED: Clark

247 **REP. BRIAN:** Gives notice of possible minority report.

HB 2266 - CONTRACTS RELATING TO WILLS - WORK SESSION

254 **CHAIMOV:** Summarizes HB 2266. **EXHIBIT E**

262 **MOTION, REP. BAUMAN:** Moves adoption of HB 2266-2 Amendments.

263 **VOTE: No objection.** Motion passes.

264 **MOTION, REP. BAUMAN:** Moves HB 2266 as amended to the Floor with a "do pass" recommendation.

280 **VOTE: 11 - 0** Motion passes. Rep. Bell to carry.

AYE: Baum, Bauman, Bell, Brian, Edmunson, Johnson, Mannix, Mason, Parks, Sunseri,
 Miller
 NO: 0
 EXCUSED: Clark

HB 2386 - WORK SESSION

285 **CHAIMOV:** Summarizes HB 2386.

289 **MOTION, REP. MANNIX:** Moves HB 2386 as amended to the Floor with a "do pass" recommendation.

302 **VOTE: 11 - 0** Motion passes. Rep. Johnson to carry.

AYE: Baum, Bauman, Bell, Brian, Edmunson, Johnson, Mannix, Mason, Parks, Sunseri,
 Miller
 NO: 0
 EXCUSED: Clark

SB 342 - NOTICE OF APPEAL IN JUVENILE CASES - WORK SESSION

306 **HOLLY ROBINSON:** Summarizes SB 342.

313 **REP. MANNIX:** There is a typing error.

317 **ROBINSON:** Has notified LC.

HB 2266, 1991 Session
Contract to Make a Will/Will Contest Bill
Objectives and Bill Outline

Warren C. Deras

- I. **GOAL:** Establish time limits for will contests which meet Tulsa due process requirements. The present limit in ORS 113.075 does not meet Tulsa standard.
- A. In Tulsa Professional Collection Services v. Pope, 485 US _____, 108 S Ct 1340, 99 L Ed 565 (1988), the U.S. Supreme Court held that claims of "known or reasonably ascertainable creditors" of an estate could not be defeated in probate without "actual notice" to them. The same due process principles apply here.
- B. **Section 2** requires that known potential contestants be listed in the probate petition, and **Section 4** requires notice to them in the form of a copy of the notice to heirs and devisees. No search required for ascertainable contestants.
1. **Problem:** The language in Section 2 has been altered from that proposed by the OSB Section to use the word "claim" twice in ORS 113.035(7) at Page 2, line 4. "Claim" is a defined term in the probate code under ORS 111.005(7), and it should not be used here.
 2. **Problem:** The language in Section 4 has been altered from that proposed by the OSB Section to provide at page 3, lines 16-17, that the notice state that the four month time period for filing a will contest or contract to make a will case runs from the filing of the affidavit rather than from the giving of notice. While that is technically correct, it will result in an awkward and confusing notice. It would be best to have the time limit in fact run from notice rather than filing of the affidavit. That is the approach agreed to in 1989 for claims under ORS 115.005(2)(b). It would also eliminate the extra four month delay that sometimes results when an affidavit is lost or filed late. Neither the OSB Section proposal nor the bill as written do that, My proposed amendments to sections 3 and 4 make that change and also clarify the line between the two different types of procedures to which the two different limits apply.
 3. **Problem:** Some search constitutionally required to give notice. Amendments add that to page 3 after line 27.
- C. **Section 3** establishes that the limit for will contests by persons given notice will be four months after notice.
1. **Problem:** The language in Section 3(1) through (4) has been significantly altered from that proposed by the OSB Section. We have lost all coverage for contract to make a will cases where the decedent died intestate or the case does not otherwise affect the "validity of the will. Again, the improper language "claim" has slipped in at Page 2, line 25. The wording of subsection 2 also creates confusion about the division of will contests into two categories for time limit purposes. My amendments are aimed at correcting these problems.

HOUSE JUDICIARY

SUB-COMMITTEE ON: Civil

Bill No. 2266 **Pages** 4

Exhibit C **Date** 1-17-91

Presented by Warren Deras

II. **GOAL:** Establish a clear time limit and procedure for claims based on contracts to make a will. The law is presently unclear as to what the limit is.

A. **Problem:** This goal has been totally lost in the re-writing of section 3 by Legislative Counsel. This is because Section 3 only applies to proceedings to "contest the probate of the will or the validity of the will" (Page 2, lines 20-21). Many will contract to make a will cases involve intestate estates or otherwise do not challenge the validity of a will. In the OSB Section bill:

1. The provision comparable to Section 3 treats contract to make a will cases as will contests.
2. The provision comparable to Section 3 becomes the exclusive remedy for rights based on a contract to make a will, thus excluding use of claims procedures for that purpose.

B. The proposed amendments to Section 3 restore clear applicability to contract to make a will cases.

III. **GOAL:** Relax the evidentiary standards for contract to make a will cases to protect persons who reasonably rely on oral promises and to eliminate the need to bring fraud claims under Hocks v. Hocks, 95 Or App 40 (1989).

A. **Section 1** establishes an exception to the ORS 112.270 statute of frauds for contract to make a will cases by allowing recovery if the following standards are met:

1. The person asserting rights under the contract establishes it by evidence other than just his own testimony and/or the testimony of a party to the contract.

a. **Problem:** This is significantly different from the measure approved and submitted by the OSB Section, which required the person asserting rights under the contract to make a prima facie case (that is, provide evidence on all elements of the case) without his or her own testimony (ORS 115.195 standard applicable to claims) or that of a party to the contract. As written the bill this would allow proof where only one element of the contract (for example, consideration) is supported by disinterested testimony. The proposed amendment to Section 1 restores the original intent of the section.

2. The contract is proved by clear and convincing evidence (including testimony of the person asserting rights under the contract).

B. **Section 3(5)** provides that an action under that section asserting a contract to make a will is the exclusive means of recovery based on reliance on a promise of the decedent, overruling Hocks v. Hocks. This will eliminate the need to alternatively plead and try to prove the more difficult (and emotionally damaging) elements of fraud--i.e. the decedent's intent to defraud. The contract case should not require proof of any elements not required for a fraud case.

IV. Proposed amendments also correct transitional section to restore potential for will contests in old estates.

Proposed Amendments to HB 2266

Warren C. Deras

1.

Delete Page 1, lines 12-14, and insert in lieu thereof:

(2) To establish a contract under paragraph (d) of subsection (1) of this section a person must prove a prima facie case establishing the terms of the contract by evidence which does not include the testimony of the person asserting rights under the contract or of any other party to the contract.

2.

Delete Page 2, lines 3 and 4, and insert in lieu thereof:

(7) The name and post-office address of any person asserting an interest in the estate, or on whose behalf such an interest has been asserted, based on an assertion that:

3.

Delete Page 2, Lines 19-25, and insert in lieu thereof:

113.075. (1) [When a will has been admitted to probate,] Any interested person may [7 at any time within four months after the date of the filing of the affidavit under ORS 113.145 or four months after the first publication of notice to interested persons, whichever is later] contest the probate of the will or the validity of the will or assert an interest in the estate by filing a petition in the probate proceedings asserting that:

4.

Delete Page 2, Lines 32-37, and insert in lieu thereof:

(2) A proceeding under paragraph (a) or (b) of subsection (1) of this section shall be commenced before the later of:

(a) If the information described in ORS 113.145 was delivered or mailed to the person on whose behalf the petition is filed, four months after the date of such delivery or mailing; or

(b) If the person on whose behalf the petition is filed was not required to be named in the petition as an interested person, four months after the first publication of notice to interested persons.

(3) A proceeding under paragraph (c) of subsection (1) of this section shall be commenced before the earliest of:

(a) If the information described in ORS 113.145 was delivered or mailed to the person on whose behalf the petition is filed, four months after the date of such delivery or mailing;

(b) If the person on whose behalf the petition is filed was not required to be named in the petition as an interested person, four months after the first publication of notice to interested persons; or

(c) One year after the death of the decedent.

5.

Delete Page 3, Lines 14-17, and insert in lieu thereof:

(g) If information under this section is required to be delivered or mailed to a person described in subsection (7) of ORS 113.035, a statement that the rights of such person in the estate may be barred unless the person proceeds as provided in ORS 113.075 within four months of the delivery or mailing of the information.

6.

After Page 3, Line 27, insert:

(5) If the personal representative has reason to believe that the petition did not include in it the name and address of any person described in subsection (4), (5), (6), or (7) of ORS 113.035, the personal representative shall make reasonable efforts under the circumstances to ascertain each such name and address and shall promptly deliver or mail information as described in subsection (1) of this section to each such person located after the filing of the petition and before the filing of the final account. On or before filing the final account under ORS 116.083 the personal representative shall file in the estate proceeding proof by affidavit of compliance with this subsection or a waiver of notice as provided under ORS 111.225.

7.

Delete Page 3, Lines 33-36, and insert in lieu thereof:

(3) The amendments to ORS 113.075 by section 3 of this Act shall not apply to the estates of decedents dying before the effective date of this Act until July 1, 1992.

8.

The relating clause should be to "probate" or "decedents' estates", not "wills".

**PROPOSED AMENDMENTS TO
HOUSE BILL 2266**

1 On page 1 of the printed bill, line 2, delete "112.270,".

2 Delete lines 4 through 16.

3 In line 17, delete "2" and insert "1".

4 On page 2, delete lines 3 and 4 and insert:

5 "(7) The name and post-office address of any person asserting an interest
6 in the estate, or on whose behalf an interest has been asserted, based on a
7 contention that:".

8 In line 18, delete "3" and insert "2".

9 In line 22, delete the boldfaced material and insert "or assert an interest
10 in the estate for the reason that:".

11 Delete lines 23 through 25.

12 Delete lines 32 through 37 and insert:

13 "(2) An action described in subsection (1) of this section shall be com-
14 menced by the filing of a petition in the probate proceedings, except that an
15 action described in paragraph (c) of subsection (1) of this section may be
16 commenced by the filing of a separate action in any court of competent ju-
17 risdiction.

18 "(3) An action described in paragraph (a) or (b) of subsection (1) of this
19 section shall be commenced before the later of:

20 "(a) Four months after the date of delivery or mailing of the information
21 described in ORS 113.145 if that information was required to be delivered or
22 mailed to the person on whose behalf the petition is filed; or

23 "(b) Four months after the first publication of notice to interested persons
24 if the person on whose behalf the petition is filed was not required to be

1 named in the petition as an interested person.

2 "(4) An action described in paragraph (c) of subsection (1) of this section
3 shall be commenced before the earliest of:

4 "(a) Four months after the date of delivery or mailing of the information
5 described in ORS 113.145 if that information was required to be delivered or
6 mailed to the person on whose behalf the action is commenced;

7 "(b) Four months after the first publication of notice to interested persons
8 if the person on whose behalf the action is commenced was not required to
9 be named in the petition as an interested person; or

10 "(c) One year after the death of the decedent."

11 In line 38, delete "(4)" and insert "(5)".

12 Delete lines 40 through 42.

13 In line 43, delete delete "4" and insert "3".

14 On page 3, line 16, delete "filing" and insert "delivery or mailing of the
15 information."

16 Delete line 17.

17 After line 27, insert:

18 "(5) If before the filing of the final account the personal representative
19 has actual knowledge that the petition did not include the name and address
20 of any person described in ORS 113.035 (4), (5), (6) or (7), the personal rep-
21 resentative shall:

22 "(a) Make reasonable efforts under the circumstances to ascertain each
23 of those names and addresses;

24 "(b) Promptly deliver or mail information as described in subsection (1)
25 of this section to each of those persons located after the filing of the petition
26 and before the filing of the final account; and

27 "(c) File in the estate proceeding, on or before filing the final account
28 under ORS 116.083, proof by affidavit of compliance with this subsection or
29 a waiver of notice as provided under ORS 111.225."

30 In line 28, delete "2 and 4" and insert "1 and 3".

1 Delete lines 30 through 36 and insert:

2 "(2) The amendments to ORS 113.075 by section 2 of this Act shall not
3 apply to the estates of decedents dying before the effective date of this Act
4 until July 1, 1992."
5

1 (6) If the decedent died testate, the names and post-office addresses of the devisees, and the ages
2 of any who are minors.

3 (7) The name and post-office address of any person asserting an interest in the estate,
4 or on whose behalf a claim has been asserted, based on a claim that:

5 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
6 or part;

7 (b) There exists a will that has not been alleged in the petition to be the will of the
8 decedent; or

9 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
10 or devise, or to die intestate.

11 [(7)] (8) Whether the original of the last will of the decedent is in the possession of the court
12 or accompanies the petition. If the original will is not in the possession of the court or accompa-
13 nying the petition and an authenticated copy of the will probated in another jurisdiction does not
14 accompany the petition, the petition shall also state the contents of the will and indicate that it is
15 lost, destroyed or otherwise unavailable and that it was not revoked.

16 [(8)] (9) A statement of the extent and nature of assets of the estate, to enable the court to set
17 the amount of bond of the personal representative.

18 SECTION 3. ORS 113.075 is amended to read:

19 113.075. (1) [When a will has been admitted to probate,] Any interested person may [at any time
20 within four months after the date of the filing of the affidavit under ORS 113.145 or four months after
21 the first publication of notice to interested persons, whichever is later,] contest the probate of the will
22 or the validity of the will by filing a petition for that purpose in the probate proceedings.

23 (2) Proceedings to contest a will shall be commenced within four months after the date
24 of the filing of the affidavit as provided in ORS 113.145 (4), or within one year after the death
25 of the decedent, whichever is earlier, if the contest is based on a claim that:

26 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
27 or part;

28 (b) There exists a will that has not been alleged in the petition to be the will of the
29 decedent; or

30 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
31 or devise, or to die intestate.

32 (3) Notwithstanding subsection (2) of this section, proceedings to contest the probate of
33 a will shall be commenced within four months after the date of filing of the affidavit as
34 provided in ORS 113.145 (4), or within one year after the death of the decedent, whichever is
35 later, if the contest is based on a claim that:

36 (a) A will exists that was executed after a will that has been admitted to probate; or

37 (b) A will exists and no will has been admitted to probate.

38 (4) For the purposes of this section, proceedings to contest a will shall be deemed com-
39 menced by the filing of the petition as provided in subsection (1) of this section.

40 (5) Proceedings under this section are the exclusive remedy of any person asserting
41 rights against the estate of a decedent based upon reliance by that person on a promise of
42 the decedent to make a will or devise, or not to revoke a will or devise, or to die intestate.

43 SECTION 4. ORS 113.145 is amended to read:

44 113.145. (1) Upon appointment a personal representative shall deliver or mail to the devisees

**HB 2266, 1991 Session
With 2266-01 Amendments
Contract to Make a Will/Will Contest Bill
Objectives and Bill Outline**

Warren C. Deras

- I. **GOAL:** Establish time limits for will contests which meet Tulsa due process requirements. The present limit in ORS 113.075 does not meet Tulsa standard.
- A. In Tulsa Professional Collection Services v. Pope, 485 US _____, 108 S Ct 1340, 99 L Ed 565 (1988), the U.S. Supreme Court held that claims of "known or reasonably ascertainable creditors" of an estate could not be defeated in probate without "actual notice" to them. The same due process principles apply here.
 - B. **Section 1** requires that known potential contestants be listed in the probate petition, and **Section 3** requires notice to them in the form of a copy of the notice to heirs and devisees. No search required for ascertainable contestants, but if any come to the attention of the personal representative during administration, notice must be given.
 - C. **Section 2** establishes that the limit for will contests by persons given notice will be four months after notice. If no notice was required the limit is four months after publication.
- II. **GOAL:** Establish a clear time limit and procedure for claims based on contracts to make a will. The law is presently unclear.
- A. **Sections 1 and 3** bring contract to make a will cases into the same procedures as are applicable to will contests.
 - B. **Section 2** establishes two different rules for contract to make a will cases, as opposed to will contests:
 - 1. Contract to make a will cases are subject to a one year statute of ultimate repose.
 - a. Anyone asserting such a contract should be aware of the death and should act within a year of death, even if no one else files a probate.
 - b. Since probate may ordinarily be filed years after death (for example, to clear title to property in the decedent's name where there was no timely probate), the time limit on disputing a will has to be open for a comparable period of time.
 - 2. Contract to make a will cases may be brought in circuit court and heard by a jury at the option of the person bringing the action. This conforms to present practice.
- III. **GOAL:** Assure constitutionally required notice to interested persons whose existence comes to the attention of the personal representative after probate is commenced.
- A. Under existing ORS 113.145(1) notice of the commencement of probate need only go to heirs, devisees, and (now) contestants if they are "named in the petition". Under ORS 113.035 the petition need name only those persons "so far as known". It is not at all unusual to have a need to file the petition before all heirs are known, particularly for a single person dying without children.

B. **Section 3** amends ORS 113.145 to require that notice go to those required to be listed in the petition--i.e., all those known to the petitioner--even if they are not listed, and the time limitations in **Section 2** do not begin to run against someone known to the petitioner to have an interest, but not listed, until notice is given. Furthermore **Section 3** adds a new subsection (5) to ORS 113.145 requiring notice to heirs and devisees whose existence comes to the attention of the personal representative prior to the filing of the final account. It does not require an active search for such persons.

IV. **GOAL:** Relax the evidentiary standards for contract to make a will cases to protect persons who reasonably rely on oral promises and to eliminate the need to bring fraud claims under Hocks v. Hocks, 95 Or App 40 (1989).

A. This goal has been eliminated from the revised bill.

V. **GOAL:** Apply the new time limits to existing rights after a reasonable waiting period:

A. Section 4(2) accomplishes this. Pre-existing will contests and contract to make a will cases may be foreclosed on July 1, 1992, if not commenced before that date.

House Bill 2266

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Representative Tom Mason for Oregon State Bar Estate Planning Section)

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.

Allows contract to make will and other contracts relating to wills to be proved by clear and convincing evidence. Requires notice of probate proceedings to persons asserting interest in estate by reason of claim that will is ineffective, that another will exists, or that there exists contract to make will or other contract relating to will. Modifies period in which such actions may be brought. Establishes proceedings under Act as exclusive remedy for asserting such claims. Specifies applicability of provisions.

A BILL FOR AN ACT

1
2 Relating to wills; creating new provisions; and amending ORS ~~112.250~~, 113.035, 113.075 and 113.145.

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

17 SECTION 1. ORS 113.035 is amended to read:

18 113.035. Any interested person or executor named in the will may petition for the appointment
19 of a personal representative and for the probate of a will. The petition shall include the following
20 information, so far as known:

21 (1) The name, age, domicile, post-office address, date and place of death, and social security ac-
22 count number or taxpayer identification number of the decedent.

23 (2) Whether the decedent died testate or intestate.

24 (3) The facts relied upon to establish venue.

25 (4) The name and post-office address of the person nominated as personal representative and the
26 facts that show the person is qualified to act.

27 (5) The names, relationship to the decedent and post-office addresses of persons who are or
28 would be the heirs of the decedent upon the death of the decedent intestate, and the ages of any
29 who are minors.

1 (6) If the decedent died testate, the names and post-office addresses of the devisees, and the ages
2 of any who are minors.

5 "(7) The name and post-office address of any person asserting an interest
6 in the estate, or on whose behalf an interest has been asserted, based on a
7 contention that:"

5 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
6 or part;

7 (b) There exists a will that has not been alleged in the petition to be the will of the
8 decedent; or

9 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
10 or devise, or to die intestate.

11 [(7)] (8) Whether the original of the last will of the decedent is in the possession of the court
12 or accompanies the petition. If the original will is not in the possession of the court or accompa-
13 nying the petition and an authenticated copy of the will probated in another jurisdiction does not
14 accompany the petition, the petition shall also state the contents of the will and indicate that it is
15 lost, destroyed or otherwise unavailable and that it was not revoked.

16 [(8)] (9) A statement of the extent and nature of assets of the estate, to enable the court to set
17 the amount of bond of the personal representative.

18 SECTION 2-ORS 113.075 is amended to read:

19 113.075. (1) [*When a will has been admitted to probate,*] Any interested person may [*at any time*
20 *within four months after the date of the filing of the affidavit under ORS 113.145 or four months after*
21 *the first publication of notice to interested persons, whichever is later,*] contest the probate of the will
22 or the validity of the will ~~by boldfaced material and insert~~ "or assert an interest

9 in the estate for the reason that:".

26 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
27 or part;

28 (b) There exists a will that has not been alleged in the petition to be the will of the
29 decedent; or

30 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
31 or devise, or to die intestate.

12 "(2) An action described in subsection (1) of this section shall be com-
menced by the filing of a petition in the probate proceedings, except than
14 an action described in paragraph (c) of subsection (1) of this section may be
15 commenced by the filing of a separate action in any court of competent ju-
16 risdiction.

17 "(3) An action described paragraph (a) or (b) of subsection (1) of this
18 section shall be commenced before the later of:

19 "(a) Four months after the date of delivery or mailing of the information
20 described in ORS 113.145 if that information was required to be delivered or
21 mailed to the person on whose behalf the petition is filed; or

22 "(b) Four months after the first publication of notice to interested persons
23 if the person on whose behalf the petition is filed was not required to be
24 named in the petition as an interested person.

1 "(4) An action described in paragraph (c) of subsection (1) of this section
2 shall be commenced before the earliest of:

3 "(a) Four months after the date of delivery or mailing of the information
described in ORS 113.145 if that information was required to be delivered or
5 mailed to the person on whose behalf the action is commenced;

17 “(5) If before the filing of the final account the personal representative
18 has actual knowledge that the petition did not include the name and address
19 of any person described in ORS 113.035 (4), (5), (6) or (7), the personal rep-
20 resentative shall:

21 “(a) Make reasonable efforts under the circumstances to ascertain each
22 of those names and addresses;

23 “(b) Promptly deliver or mail information as described in subsection (1)
24 of this section to each of those persons located after the filing of the petition
25 and before the filing of the final account; and

26 “(c) File in the estate proceeding, on or before filing the final account
27 under ORS 116.083, proof by affidavit of compliance with this subsection or
28 a waiver of notice as provided under ORS 111.224.”.

28 SECTION ~~4~~ (1) The amendments to ORS 113.035 and 113.145 by sections ~~4~~ and ~~3~~ of this Act
29 apply only to probate proceedings commenced on or after the effective date of this Act.

1 “(2) The amendments to ORS 113.075 by section 2 of this Act shall not
2 apply to the estates of decedents dying before the effective date of this Act
3 until July 1, 1992.”.

**PROPOSED AMENDMENTS TO
HOUSE BILL 2266**

1 On page 1 of the printed bill, line 2, delete "112.270,".

2 Delete lines 4 through 16.

3 In line 17, delete "2" and insert "1".

4 On page 2, delete lines 3 and 4 and insert:

5 "(7) The name and post-office address of any person asserting an interest
6 in the estate, or on whose behalf an interest has been asserted, based on a
7 contention that:".

8 In line 18, delete "3" and insert "2".

9 In line 22, delete the boldfaced material and insert "or assert an interest
10 in the estate for the reason that:".

11 Delete lines 23 through 25.

12 Delete lines 32 through 39 and insert:

13 "(2) An action described in subsection (1) of this section shall be com-
14 menced by the filing of a petition in the probate proceedings, except that an
15 action described in paragraph (c) of subsection (1) of this section may be
16 commenced by the filing of a separate action in any court of competent ju-
17 risdiction.

18 "(3) An action described in paragraph (a) or (b) of subsection (1) of this
19 section shall be commenced before the later of:

20 "(a) Four months after the date of delivery or mailing of the information
21 described in ORS 113.145 if that information was required to be delivered or
22 mailed to the person on whose behalf the petition is filed; or

23 "(b) Four months after the first publication of notice to interested persons
24 if the person on whose behalf the petition is filed was not required to be

1 named in the petition as an interested person.

2 “(4) An action described in paragraph (c) of subsection (1) of this section
3 shall be commenced before the earliest of:

4 “(a) Four months after the date of delivery or mailing of the information
5 described in ORS 113.145 if that information was required to be delivered or
6 mailed to the person on whose behalf the action is commenced;

7 “(b) Four months after the first publication of notice to interested persons
8 if the person on whose behalf the action is commenced was not required to
9 be named in the petition as an interested person; or

10 “(c) One year after the death of the decedent.”.

11 In line 43, delete “4” and insert “3”.

12 On page 3, line 16, delete “filing” and insert “delivery or mailing of the
13 information.”.

14 Delete line 17.

15 After line 27, insert:

16 “(5) If before the filing of the final account the personal representative
17 has actual knowledge that the petition did not include the name and address
18 of any person described in ORS 113.035 (4), (5), (6) or (7), the personal rep-
19 resentative shall:

20 “(a) Make reasonable efforts under the circumstances to ascertain each
21 of those names and addresses;

22 “(b) Promptly deliver or mail information as described in subsection (1)
23 of this section to each of those persons located after the filing of the petition
24 and before the filing of the final account; and

25 “(c) File in the estate proceeding, on or before filing the final account
26 under ORS 116.083, proof by affidavit of compliance with this subsection or
27 a waiver of notice as provided under ORS 111.225.”.

28 In line 28, delete “5” and insert “4” and delete “2 and 4” and insert “1
29 and 3”.

30 Delete lines 30 through 36 and insert:

1 “(2) The amendments to ORS 113.075 by section 2 of this Act shall not
2 apply to the estates of decedents dying before the effective date of this Act
3 until July 1, 1992.”.

4

100 **JOHN ELLIS, DEPARTMENT OF JUSTICE:** Submits and paraphrases written testimony in support of HB 2802 (EXHIBIT G).

150 **CHAIR COHEN:** Would the HB 2802-A2 amendment fix the loophole which enables a parent whose tax refund is being attached to avoid the attachment?

155 **ELLIS:** Yes.

May want to make a reference to Chapter 314, which is the tax code.

160 **MOTION: CHAIR COHEN:** Moves to adopt the -2 amendments and instruct counsel to reference Chapter 314 if necessary.

VOTE: Without objection, amendment is adopted.

165 **MOTION: SEN. HAMBY:** Moves HB 2802, as amended, to the floor with a do pass recommendation.

168 **VOTE:** On a roll call vote, motion passes.
AYES: Senators Brockman, Hamby, Springer, Hill, Cohen
NAYS: None
EXCUSED: Senators Bunn, Shoemaker

175 **CHAIR COHEN:** Opens public hearing on HB 2386.

PUBLIC HEARING - HB 2386

180 **ANDY MORROW, OREGON STATE BAR:** Testifies in support of HB 2386 which proposes limited changes to the corporation law.

Reviews proposed changes.

225 **CHAIR COHEN:** Does this augment the statute passed this session with respect to merging and take-over issues?

227 **MORROW:** It is not intended to deal with that separately. Gives examples.

252 **CHAIR COHEN:** Opens public hearing on HB 2266.

PUBLIC HEARING - HB 2266

257 **WARREN DERAS, OREGON STATE BAR:** HB 2266 contains the remnants of a bill proposed by the Estate Planning and Administration Section of the Oregon State Bar. The remnants are still supported by the Section.

Notes that HB 2266-A still contains lines 40 through 42, page 2, Subsection 5. Those lines were deleted in the House Judiciary Committee.

States purpose of probate process.

The 1989 Session extensively amended the Oregon Claims Statute.

Paraphrases written testimony in support of HB 2266 (**EXHIBIT H**).

Original purpose of HB 2266 was to soften the statute of frauds for contract to make a will cases.

Purpose of language deleted from the bill in the House, but which still appears in HB 2266-A, was to overrule the Hocks v. Hocks case.

Asks committee to delete lines 40 through 42 of HB 2266-A.

TAPE 199, SIDE B

040 **CHAIR COHEN:** Opens work session on HB 3165.

WORK SESSION - HB 3165

055 **TAYLOR:** Reviews provisions of HB 3165 which committee last heard on May 27. Bill was brought at the request of the Oregon Collectors Association. The bill modifies the definition of debt collector for the purposes of unlawful debt collection to include those who collect on dishonored checks. HB 3165-1 amendment clarifies ambiguity between federal and state law.

065 **MOTION: SEN. HAMBY:** Moves adoption of HB 3165-1 amendments.

VOTE: Without objection, amendment is adopted.

068 **MOTION: SEN. HILL:** Moves HB 3165, as amended, to the floor with a do pass recommendation.

VOTE: On a roll call vote, motion passes.

AYE: Senators Brockman, Hamby, Springer, Hill, Cohen

NAY: None

EXCUSED: Senators Bunn, Shoemaker

074 **CHAIR COHEN:** Opens work session on HB 2372.

WORK SESSION - HB 2372

079 **SEN. SPRINGER:** Have the bar associations in Linn and Benton counties been consulted and taken a position on the bill?

088 **JUDGE FRANK KNIGHT, BENTON COUNTY:** Has talked to a number of members of the Benton County Bar. Has not discussed the bill with members of the Linn County Bar but thinks that they support the bill. Believes that the president of the Benton County Bar sent a letter to the committee.

237 SMITH: I don't think it works that way. There is a difference in culture and value systems. We do not use peyote as a drug, but as ceremonial medicine for prayer and healing.

HB 3438, WORK SESSION

276 CHAIR COHEN: Submits -A3 and -A4 amendments (Exhibits F & G).

283 JIM SEYMOUR, JUVENILE JUSTICE COALITION: We support the -3 and -5 amendments. -Submits written testimony (Exhibit H) from AFSCME.

408 PAUL SNIDER, ASSOCIATION OF OREGON COUNTIES: We need to balance labor concerns with the need to make the pilot process appealing to counties.

TAPE 209, SIDE B

HB 2203, RELATING TO THE DEFINITION OF CONTRABAND, WORK SESSION

101 SWENSON: Reviews intended purpose and history of bill. -Submits and reviews -A3 amendments (Exhibit I).

119 SEN. BROCKMAN: Someone confined in an institution can't have cash?

125 SWENSON: No.

163 SEN. HILL: Moves to adopt the -A3 amendments to HB 2203.

166 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS. SENATORS BUNN, HAMBY, AND SPRINGER WERE EXCUSED.

167 SEN. HILL: Moves HB 2203, as amended, to the floor with a "do pass" recommendation.

173 MOTION CARRIES UNANIMOUSLY, WITH SENATORS BUNN, HAMBY, AND SPRINGER EXCUSED.

HB 2264, RELATING TO JUVENILE DIVERSION PROGRAMS, WORK SESSION

184 SWENSON: Reviews history and intended purpose of bill. -Submits and reviews -A2 amendments (Exhibit J).

218 CHAIR COHEN: Moves to adopt the -A2 amendments to HB 2264.

219 HEARING NO OBJECTIONS, CHAIR COHEN SO ORDERS. SENATORS BUNN, HAMBY, AND SPRINGER WERE EXCUSED.

221 SEN. HILL: Moves HB 2264, as amended, to the floor with a "do pass" recommendation.

231 MOTION CARRIES UNANIMOUSLY, WITH SENATORS BUNN, HAMBY, AND SPRINGER EXCUSED.

HB 2266, A-Engrossed, 1991 Session
Contract to Make a Will/Will Contest Bill
Objectives and Bill Outline

Warren C. Deras
Estate Planning and Administration Section
Oregon State Bar

- I. **GOAL:** Establish notice rights and time limits for will contests which meet Tulsa due process requirements. The present limit in ORS 113.075 does not meet Tulsa standard.
- A. In Tulsa Professional Collection Services v. Pope, 485 US _____, 108 S Ct 1340, 99 L Ed 565 (1988), the U.S. Supreme Court held that claims of "known or reasonably ascertainable creditors" of an estate could not be defeated in probate without "actual notice" to them. The same due process principles apply here.
- B. **Section 1** requires that known potential contestants be listed in the probate petition, and **Section 3** requires notice to them in the form of a copy of the notice to heirs and devisees. No search required for ascertainable contestants, but if any come to the attention of the personal representative during administration, notice must be given.
- C. **Section 2** establishes that the limit for will contests by persons given notice will be four months after notice. If no notice was required the limit is four months after publication.
- II. **GOAL:** Establish a clear time limit and procedure for claims based on contracts to make a will. The law is presently unclear.
- A. **Sections 1 and 3** bring contract to make a will cases into the same procedures as are applicable to will contests.
- B. **Section 2** establishes two different rules for contract to make a will cases, as opposed to will contests:
1. Contract to make a will cases are subject to a one year statute of ultimate repose.
 - a. Anyone asserting such a contract should be aware of the death and should act within a year of death, even if no one else files a probate.
 - b. Since probate may ordinarily be filed years after death (for example, to clear title to property in the decedent's name where there was no timely probate), the time limit on disputing a will has to be open for a comparable period of time.
 2. Contract to make a will cases may be brought in circuit court and heard by a jury at the option of the person bringing the action. This conforms to present practice.

- III. **GOAL:** Assure constitutionally required notice to interested persons whose existence comes to the attention of the personal representative after probate is commenced.
- A. Under existing ORS 113.145(1) notice of the commencement of probate need only go to heirs, devisees, and (now) contestants if they are "named in the petition". Under ORS 113.035 the petition need name only those persons "so far as known". It is not at all unusual to have a need to file the petition before all heirs are known, particularly for a single person dying without children.
 - B. **Section 3** amends ORS 113.145 to require that notice go to those required to be listed in the petition--i.e., all those known to the petitioner--even if they are not listed, and the time limitations in **Section 2** do not begin to run against someone known to the petitioner to have an interest, but not listed, until notice is given. Furthermore **Section 3** adds a new subsection (5) to ORS 113.145 requiring notice to heirs and devisees whose existence comes to the attention of the personal representative prior to the filing of the final account. It does not require an active search for such persons.
- IV. **GOAL:** Relax the evidentiary standards for contract to make a will cases to protect persons who reasonably rely on oral promises and to eliminate the need to bring fraud claims under Hocks v. Hocks, 95 Or App 40 (1989).
- A. This goal has been eliminated from the revised bill.
- V. **GOAL:** Apply the new time limits to existing rights after a reasonable waiting period:
- A. Section 4(2) accomplishes this. Pre-existing will contests and contract to make a will cases may be foreclosed on July 1, 1992, if not commenced before that date.

Bill No. HB 2266 Pages 1
Exhibit D Date 6/3/91
Presented by STAFF

HB 2266-A3
(LC 1818)
6/3/91 (DH/sm)

**PROPOSED AMENDMENTS TO
A-ENGROSSED HOUSE BILL 2266**

1 On page 2 of the printed A-engrossed bill, delete lines 40 through 42.

2

CONFERENCE COMMITTEE ON HB 2266

June 20, 1991
8:30 a.m.

Hearing Room E
Tapes 1 - 2

SENATE MEMBERS PRESENT: Sen. Cohen
Sen. J Hill
Sen. Shoemaker

HOUSE MEMBERS PRESENT: Rep. Parks, Chair
Rep. R Johnson
Rep. Mason

STAFF PRESENT: Greg Chaimov, Committee Administrator
Jeff Steve, Committee Assistant

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 1, SIDE A

Technical Difficulties

- 001 **CHAIR PARKS:** We are back on the record.
- 042 **JOHNSON:** For the record. Trying to identify where statute of limitations that deals with fraud is.
- 043 **CHAIMOV:** ORS 12.110(1). Which includes from date of discovery.
- 055 **CHAIR PARKS:** One year can expire and no estate have been filed and a claimant's rights can be barred. That is a departure from existing law.
- 073 **CHAIMOV:** In the original bill it did say the "earlier of" but in the original bill it was going to make it easier to bring this kind of law suit.
- 077 **SEN. COHEN:** The Senate wanted greater flexibility for people to come in and not have lawyers deal with another time line.
- 082 **CHAIR PARKS:** What is the reason for reducing the time line to one year?
- 085 **GREG CHAIMOV:** This was because these cases are hard on families and the intent was to get these cases done as soon as possible.
- 087 **CHAIR PARKS:** Paints a scenario. A person comes to him and said he had an estate to probate. It is his uncle's, but has a niece who thinks that something should have been left to her. As a lawyer Parks would tell the person to wait a year and the niece's right to bring the case is

- barred. Does not understand why the claims could not be brought during the proceedings of the estate. Is that a compromise?
- 104 **CHAIMOV:** Is it your intention to have four months or whatever is later?
- 107 **CHAIR PARKS:** Yes.
- 110 **SHOEMAKER:** Not sure whether leaving it open for the entire length of the probate proceeding is the best way to do that. There should be some deadline within the probate proceeding to bring the claim against the will.
- 127 **JOHNSON:** It is possible under normal probate law for a creditor of an estate to initiate a probate proceeding.
- 135 **SHOEMAKER:** What was the problem with the law as it was?
- 137 **COHEN:** There was testimony that it presented an unwary trap for lawyers.
- 146 **PARKS:** Do you want to leave it at the one year?
- 148 **JOHNSON:** Understood that the rationale for the bill was to get around the problem of the statute of frauds.
- 165 **CHAIMOV:** There were originally two parts to the bill. The first part said that to make it easier to sue in these types of cases we should just bring breach of contract claims. The second part pertained to notice.
- 173 **PARKS:** Understands that when there is an approval of the final accounting as far as the estate goes that is it. This only addresses the issue of the estate. If the estate is closed, what difference does it make?
- 210 **PARKS:** 4 months is a realistic time.
- 227 **CARL MEYERS, OSB:** Warren Deras of the OSB asked that Section 5 be removed. Not sure what the rationale behind it was.
- 243 **PARKS:** When the estate is closed what is the difference if what is at issue is the right to sue the estate?
- 255 **MEYERS:** Understands that the assets are still attachable by a creditor who did not have actual knowledge.
- 268 **CHAIMOV:** Spoke with Deras. He wanted Subsection 5 out because he believed that claimants should be able to bring a fraud claim under the regular two year statute of limitations because that is what people were used to doing.
- 318 **PARKS:** What is the proposal?

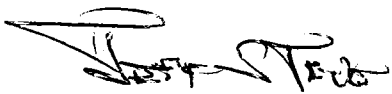
- 319 **SHOEMAKER:** To leave Subsection 5 out and go with the Senate version.
- 330 **CHAIMOV:** The way these claims are brought now is a fraud claim. There is a two year statute of limitations on the fraud claim. Do it that way and don't shorten it.
- 332 **JOHNSON:** Understands that the ordinary contract statute of limitations is 6 years. If a person had a regular contract claim against a decedent not based upon any will, is it not true that that claimant under the regular existing law would have to bring it within 4 months, not six years. This is an established practice. Does not see that there would be much conflict in extending fraud claims out to 1 year.
- 374 **MEYERS:** Understands that is what Mr. Deras's intention is in asking the Senate to remove Section 5. This is a fraud claim and it should be brought like a fraud claim.

TAPE 2, SIDE A

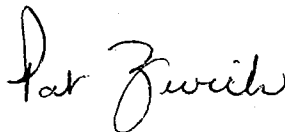
- 005 **MEYERS:** A person may not know until an estate is filed.
- 014 **MASON:** Which version would limit or discourage litigation?
- 016 **MEYERS:** Cannot answer that.
- 019 **PARKS:** If we do nothing with HB 2266 then the statute of limitations stays at two years.
- 022 **CHAIMOV:** The bill needs to go forward in some form.
- 023 **MASON:** Should try to cut down on litigation.
- 038 **SEN. HILL:** We decided this on the basis of what was done by others who have studied the issue.
- 069 **PARKS:** Recesses hearing until later at 9:17 a.m.

Submitted by:

Reviewed by:



J. Kennedy Steve, Assistant



Pat Zwick, Office Manager

EXHIBITS LOG:

- A Written Material on HB 2266 - Staff - 4 pages.

CONFERENCE COMMITTEE ON HB 2266

June 22, 1991
8:30 a.m.

Hearing Room E
Tape 3

SENATE MEMBERS PRESENT: Sen. Cohen
Sen. J Hill
Sen. Shoemaker

HOUSE MEMBERS PRESENT: Rep. Parks, Chair
Rep. R Johnson

MEMBERS EXCUSED: Rep. Mason

STAFF PRESENT: Greg Chaimov, Committee Administrator
Jeff Steve, Committee Assistant

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 3, SIDE A

001 **CHAIRS PARKS:** Opens Conference Committee on HB 2266.

004 **CHAIMOV:** Mr. Deras said Section 5 needs to come out of the bill.

Section 4 of the B Engrossed bill provides an action has to be filed within four months of notice or one year of death of the decedent, whichever is earlier.

Recommends we achieve the limiting of the time limit by enacting subsection four, and making subsection 5 unnecessary.

022 **CHAIRS PARKS:** If we eliminate section 5 that would make the statute of limitations one year at the outside.

025 **CHAIMOV:** Under either version of the bill the statute of limitations is one year.

028 **REP. JOHNSON:** If our goal is to make it so that someone wants to bring a claim based on fraud, they are not touched by this.

038 **CHAIMOV:** Understands that it is the understanding of the proponent and the intention of the House Committee that the language on lines 16 and 17 be a description for the conduct that would be alleged in an action or fraud.

048 **SEN. SHOEMAKER:** Wants to make sure that under the Senate version a fraud action has the benefit of the later of one year after the death or four months after the petition is filed.

Is everyone satisfied it does?

058 **CHAIRS PARKS:** I am not.

059 **CHAIMOV:** It does not under the current language.

064 **SEN. SHOEMAKER:** Does it under the House language?

065 **CHAIMOV:** Under either version it is the earliest of four months notice or one year from the death.

069 **CHAIRS PARKS:** The Senate wanted to have the longest possible access. The House wanted to have a short access. A compromise between those two positions will be to make it the longer rather than the earlier.

070 **SEN. SHOEMAKER:** Is concerned that in a fraud action, since there is no deadline for filing a probate petition, as I read the statute, if you want to carry out your fraud you simply postpone the filing of the petition for a year after the death and you have made it. Do not think we can allow that to happen.

072 **CHAIR PARKS:** That is why I did not like the earlier. As a practical matter, if you use the later date, you don't expand it beyond the time of the administration of the estate because you don't have a viable defendant to sue.

079 **SEN. SHOEMAKER:** Can simply go with "the later of" for all these actions.

084 **CHAIRS PARKS:** Are you willing to accept "the later"?

Concerning the issue of failure to abide by the agreement to make the will, thinks the House would accept changing "earlier" to "later".

100 **SEN. COHEN:** Believes the Senate would accept that.

102 **CHAIR PARKS:** How does a person who contends that he is holding a will challenge another will at probate until it is filed?

103 **CHAIMOV:** Subsections 3 provides that if you want to bring one of those kind of claims, you have four months after notice. There is no one year time limit.

123 **SEN. SHOEMAKER:** Is there any risk that the person claiming that another will is the will would not receive that notice because it is not required to be delivered to them pursuant to the statute, nor was it required that they be named in the petition?

137 **REP. JOHNSON:** If you are a person who thinks you are going to get a great amount of money when someone dies, you might keep track of that person's health and death.

145 **CHAIRS PARKS:** The concern of the House was that they wanted a finality to the trauma of the family.

159 **SEN. SHOEMAKER:** Perhaps the one year should be available only to those not receiving notice.

175 **REP. JOHNSON:** Could also add same provision for those covered by paragraph four.

180 **CHAIMOV:** We first have to have the House concur in the Senate amendment taking out subsection five.

185 **MOTION: SEN. SHOEMAKER:** Moves conceptual amendment that the time limit for asserting an interest in the estate in each of the three situations described in paragraphs a, b, and c, of subsection 1 be the later of two four month choices, except that if the person asserting an interest did not receive the subsection a notice, that person would have up to a year from the date of death or the closure of the estate, whichever first occurs.

233 **VOTE:** Without objection, Chair Parks declares the motion adopted.

224 **SEN. COHEN:** Asks that the conceptual amendment be taken to Legislative Counsel and passed it by other appropriate people.

237 **SEN. SHOEMAKER:** There should be a cross reference to this within the statute of limitations.

MOTION: SEN. SHOEMAKER: Moves Mr. Chaimov's hand engrossed ORS 12.110 (1).

252 **VOTE:** Without objection, Chair Parks declares the motion adopted.

253 **MOTION: SEN. SHOEMAKER:** Moves to add the words "or revoke" after the word "make" on line 16.

Speaks to his motion. A contract to revoke a will would result in intestacy, but a contract to revoke a devise would not.

274 **VOTE:** Without objection, Chair Parks declares the motion passed.

277 **REP. JOHNSON:** Questions whether 1(c) is now adequate to cover intent.

294 **CHAIMOV:** Suggests taking out "entered into a contract" and putting in "agreed or represented that the decedent would".

Say "the decedent agreed, promised or represented that the decedent would make or revoke a will or devise, or not revoke a will or devise, or die intestate".

300 **MOTION: REP. JOHNSON:** Moves adoption of amendment previously stated by Counsel.

313 **VOTE:** Without objection, Chair Parks declares the amendment adopted.

319 **MOTION: CHAIRS PARKS:** Moves that the House concur in the Senate amendments dated 6/10/91 and that the bill be further amended and repassed.

331 **CHAIMOV:** Restates amendments.

That page 2, lines 16 and 17 of the bill be rewritten to say "the decedent agreed, promised, or represented that the decedent would make or revoke a will or devise, or not revoke a will or devise or die intestate". That we add a new line at the beginning of ORS 12.110 that states "except as provided in ORS 113.075 (3). That lines 22 through 38 on page 2 of the B Engrossed bill be rewritten so that any of the claims alleged in this section would be brought the later of four months after the date of delivery or mailing of notice, four months after publication, except that if you did not get the delivery or mailed notice, you would have one year from the date of death of the decedent or the closure of the estate whichever occurs first.

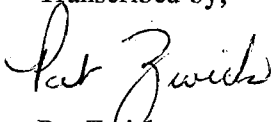
359 **REP. JOHNSON:** Does not think publication has meaning since the amendments.

360 **CHAIR PARKS:** Accepts that as a friendly amendment.

380 **VOTE:** On a roll call vote, motion passes with Sen. Cohen, Sen. Hill, Rep. R. Johnson, Sen. Shoemaker, Chair Parks voting Aye. Rep. Mason is excused.

386 **CHAIRS PARKS:** Adjourns Conference Committee on HB 2266.

Transcribed by,


Pat Zwick

CONFERENCE COMMITTEE ON HB 2266

June 26, 1991
9:30 a.m.

Hearing Room 137
Tape 2

SENATE MEMBERS PRESENT: Sen. Cohen
Sen. Shoemaker

HOUSE MEMBERS PRESENT: Rep. Parks, Chair
Rep. R. Johnson

MEMBER EXCUSED: Sen. J. Hill
Rep. Mason

STAFF PRESENT: Greg Chaimov, Committee Administrator
Evie Redler, Committee Assistant

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

⁴
TAPE 2, SIDE A

Staff submits SMS (**EXHIBIT A**), Hand Engrossed version of proposed conference committee amendments (**EXHIBIT B**), and a letter from Warren Deras (**EXHIBIT C**).

Chair Parks convenes conference committee at 9:45 a.m.

MOTION: Sen. Cohen moves to adopt the amendments in the hand engrossed version of HB 2266 (**EXHIBIT B**).

VOTE: Hearing no objection, Chair Parks so moves. Rep. Mason and Sen. Hill absent.

SEN. COHEN: Warren Deras feels that we need to pass the original bill before the amendments. The only way to deal with subsection five is to make a complete new section.

SEN. SHOEMAKER: Agrees with the two points that Deras makes. However, not sure about the new section five. Will accept the judgement of Deras.

-Two ways in which he differs from us:

1. Whether or not a person who claims that there is an agreement should be limited to the one year notice.
2. Talked about having limitations fall four months after public notice.

REP. PARKS: Agreed with first point made by Sen. Shoemaker. Doesn't understand second point. Don't want people to wait out one year and then file the estate and have claims barred.

SEN. SHOEMAKER: Not comfortable with making it a one year law.

REP. PARKS: Can see the logic of four months. Forgery should be handled within the context of the estate. If you have a contested will, you have to bring that out within one year from the date of death.

SEN. COHEN: That is the way both chambers passed the bill. Those things are not an issue.

REP. JOHNSON: Summarizes the intent of the amendments.

128 **SEN. COHEN:** Not willing to renegotiate with the bar association.

GREG CHAIMOV, Committee Counsel: You could put in a statement to not have the one year cap, only the four months notice.

REP. JOHNSON: If it was a contract issue you would have six years to bring it to court.

REP. PARKS: Prefers the alternative of the four months. If we take the year out it is a compromise.

196 **SEN. SHOEMAKER:** Another possibility would be to have the latter of the four months or one year.

GREG CHAIMOV, Committee Counsel: Take out lines 30-38 and add subsection 3.

SEN. SHOEMAKER: Take out section four completely. In line 22 refer to section 2.

Discussion on whether these amendments would be suitable for Warren Deras.

GREG CHAIMOV, COMMITTEE COUNSEL: States the amended motion. Line 25 page 1 "the decedent agreed, promised or represented that the decedent would make or revoke a will or devise, or not to revoke a will or devise or die intestate" that same language would need to be in lines 16 and 17 on page two. Line 22 the words "paragraph A or B of" should be deleted. Lines 30-38 on page two would be deleted and would become a new subsection four which reads "a cause of action described in paragraph sub c of subsection one of this section should not be presented as a claim under ORS chapter 115."

245 **MOTION:** Rep. Johnson moves to adopt the above stated motion.

VOTE: In a roll call vote the motion carries with all members present voting AYE. Rep. Mason and Sen. Hill absent.

Adjourned 10:13 a.m.

Submitted by,

Reviewed by,

Evie Redler
Evie Redler

Committee Assistant

Pat Zwick
Pat Zwick

Office Manager

EXHIBIT LOG:

- A: HB 2266, Staff, 1 page
- B: HB 2266, Staff, 2 pages
- C: HB 2266, Staff, 3 pages

**OREGON LEGISLATIVE ASSEMBLY
STAFF MEASURE SUMMARY
Conference Committee**

MEASURE: HB 2266 B-eng.*

Working Title: Revising the Notice Provisions for Will Contests
Meeting Dates: 6/20 (PH/WS)
Action:
Vote:

Ayes:
Nays:
Exc.:

Carrier:
Prepared By: Gregory A. Chaimov, House Committee Counsel

WHAT THE BILL DOES: Requires a personal representative of an estate to give actual notice of the probate of a will to any person the personal representative knows may want to challenge the validity of the will.

ISSUES DISCUSSED:

EFFECT OF SENATE AMENDMENTS: Deleted a provision making a claim in probate proceedings the exclusive remedy of any person asserting rights against the estate of a decedent based upon reliance by that person on a promise of the decedent to make a will or devise, or not to revoke a will or devise, or to die intestate. Deleting this provision allows a claimant to bring an independent action for fraud against the decedent's estate within two years of discovering the fraud.

BACKGROUND: For many years, Oregon probate law allowed personal representatives to publish notices in the local paper. Three years ago, the United States Supreme Court required personal representatives to give actual notice to known claimants in probate proceedings. To comply with this decision, the 1989 Legislative Assembly revised the notice provisions of the probate and small estate laws. HB 2266 makes corresponding changes to the laws about will contests. Under the bill, the personal representative must inform a person that a will is in probate if the personal representative knows that the person may want to challenge the will. A person notified of the probate of a will has four months within which to file a claim that the will is invalid. This is the same time period as in other types of probate proceedings.

BILL # 2266
CONFERENCE COMMITTEE
EXHIBIT A^{05A}
DATE 6-29-91 PAGES 4
SUBMITTED BY CHAIMOV

This summary has not been adopted or officially endorsed by action of the committee.

1 (6) If the decedent died testate, the names and post-office addresses of the devisees, and the ages
2 of any who are minors.

3 (7) The name and post-office address of any person asserting an interest in the estate,
4 or on whose behalf a claim has been asserted, based on a claim that:

5 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
6 or part;

7 (b) There exists a will that has not been alleged in the petition to be the will of the
8 decedent; or

9 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
10 or devise, or to die intestate.

11 [(7)] (8) Whether the original of the last will of the decedent is in the possession of the court
12 or accompanies the petition. If the original will is not in the possession of the court or accompa-
13 nying the petition and an authenticated copy of the will probated in another jurisdiction does not
14 accompany the petition, the petition shall also state the contents of the will and indicate that it is
15 lost, destroyed or otherwise unavailable and that it was not revoked.

16 [(8)] (9) A statement of the extent and nature of assets of the estate, to enable the court to set
17 the amount of bond of the personal representative.

18 **SECTION 3.** ORS 113.075 is amended to read:

19 113.075. (1) *[When a will has been admitted to probate,]* Any interested person may *[at any time*
20 *within four months after the date of the filing of the affidavit under ORS 113.145 or four months after*
21 *the first publication of notice to interested persons, whichever is later,]* contest the probate of the will
22 or the validity of the will by filing a petition for that purpose in the probate proceedings.

23 (2) Proceedings to contest a will shall be commenced within four months after the date
24 of the filing of the affidavit as provided in ORS 113.145 (4), or within one year after the death
25 of the decedent, whichever is earlier, if the contest is based on a claim that:

26 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
27 or part;

28 (b) There exists a will that has not been alleged in the petition to be the will of the
29 decedent; or

30 (c) The decedent entered into a contract to make a will or devise, or not to revoke a will
31 or devise, or to die intestate.

32 (3) Notwithstanding subsection (2) of this section, proceedings to contest the probate of
33 a will shall be commenced within four months after the date of filing of the affidavit as
34 provided in ORS 113.145 (4), or within one year after the death of the decedent, whichever is
35 later, if the contest is based on a claim that:

36 (a) A will exists that was executed after a will that has been admitted to probate; or

37 (b) A will exists and no will has been admitted to probate.

38 (4) For the purposes of this section, proceedings to contest a will shall be deemed com-
39 menced by the filing of the petition as provided in subsection (1) of this section.

40 (5) Proceedings under this section are the exclusive remedy of any person asserting
41 rights against the estate of a decedent based upon reliance by that person on a promise of
42 the decedent to make a will or devise, or not to revoke a will or devise, or to die intestate.

43 **SECTION 4.** ORS 113.145 is amended to read:

44 113.145. (1) Upon appointment a personal representative shall deliver or mail to the devisees

mentioned in ORS 12.070 and 12.110 and except as otherwise provided in ORS 72.7250;

(2) An action upon a liability created by statute, other than a penalty or forfeiture, excepting those mentioned in ORS 12.110;

(3) An action for waste or trespass upon or for interference with or injury to any interest of another in real property, excepting those mentioned in ORS 12.050, 12.060, 12.137 and 273.241; or

(4) An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof, excepting an action mentioned in ORS 12.137;

shall be commenced within six years. [Amended by 1957 c.374 §3; 1971 c.726 §396; 1973 c.363 §1; 1983 c.437 §2; 1987 c.705 §3]

12.085 Action on certain garnishment proceedings. Garnishment proceedings pursuant to ORS 29.285 to 29.345 shall be commenced within one year from the delivery of the writ of garnishment under ORS 29.155. [1977 c.786 §3; 1981 c.883 §29]

12.090 Accounts; accrual of cause of action. In an action to recover a balance due upon an account, the cause of action shall be deemed to have accrued from the time of the last charge or payment proved in the account. Interest, financing and carrying charges shall not be deemed such a charge. [Amended by 1973 c.204 §1]

12.100 Action on official action or penalty. (1) An action against a sheriff or constable upon a liability incurred by the doing of an act in an official capacity and in virtue of the office of the sheriff or constable; or by the omission of an official duty, including the nonpayment of money collected upon an execution, but not including an action for an escape, shall be commenced within three years.

(2) An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, excepting those actions mentioned in ORS 12.110, shall be commenced within three years. [Amended by 1957 c.374 §4; 1965 c.221 §10]

12.110 Actions for certain injuries to person not arising on contract; action for overtime or premium pay; action for professional malpractice; effect of fraud or deceit; action for injuries to person arising from nuclear incident. (1) An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

(2) An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years.

(3) An action for overtime or premium pay or for penalties or liquidated damages for failure to pay overtime or premium pay shall be commenced within two years.

(4) An action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commenced within two years from the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. However, notwithstanding the provisions of ORS 12.160, every such action shall be commenced within five years from the date of the treatment, omission or operation upon which the action is based or, if there has been no action commenced within five years because of fraud, deceit or misleading representation, then within two years from the date such fraud, deceit or misleading representation is discovered or in the exercise of reasonable care should have been discovered.

(5) An action, arising from a nuclear incident, as defined in 42 U.S.C. 2014(q), that involves the release of radioactive material, excluding releases from acts of war, that causes bodily injury, sickness or death, shall be commenced:

(a) Within two years from the time an injured person discovers or reasonably could have discovered the injury and the causal connection between the injury and the nuclear incident; or

(b) Within two years from any substantial change in the degree of injury to the person arising out of a nuclear incident. [Amended by 1957 c.374 §1; 1967 c.406 §1; 1969 c.642 §1; 1971 c.473 §1; 1975 c.796 §10a; 1981 c.149 §1; 1987 c.705 §4]

12.115 Action for negligent injury to person or property. (1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the limitations established by ORS 12.110. [1967 c.406 §2]

12.117 Actions based on child abuse. (1) Notwithstanding ORS 12.110, 12.115 or 12.160, an action based on child abuse or conduct knowingly allowing, permitting or encouraging child abuse accruing while the person who is entitled to bring the action is within 18 years of age shall be commenced not more than five years after that person attains 18 years of age.

Except as provided in
ORS 113.075,

Chair:
Rep. Randy Miller
Vice Chair:
Rep. Tom Mason

Staff:
Holly Robinson, Counsel
Greg Chaimov, Counsel
David Harrell, Office Manager
Kathy Neely, Assistant
Jeff Steve, Assistant

Members:
Rep. Ray Baum
Rep. Judy Bauman
Rep. Marie Bell
Rep. Tom Brian
Rep. Kelly Clark
Rep. Jim Edmunson
Rep. Rod Johnson
Rep. Kevin Mannix
Rep. Del Parks
Rep. Ron Sunseri

HOUSE COMMITTEE ON JUDICIARY

354 State Capitol
Salem, Oregon 97310
(503) 378-5962

ALTERNATIVE NO.2

ORS 12.110(6). Notwithstanding section (1), an action asserting rights against the estate of a decedent based upon reliance by that person on a promise of the decedent to make a will or devise, or not to revoke a will or devise, or to die intestate shall be commenced within the period prescribed by ORS 113.075.

**OREGON LEGISLATIVE ASSEMBLY
STAFF MEASURE SUMMARY
Conference Committee on HB 2266**

MEASURE: HB 2266 B-eng. *

BILL # 2266
CONFERENCE COMMITTEE
EXHIBIT A
DATE 6/20/91 PAGES
SUBMITTED BY Staff

Working Title: Revising the Notice Provisions for Will Contests
Meeting Dates: 6/20 (PH/WS), 6/22 (PH/WS)
Action: Do pass as amended
Vote: 5 - 0
Ayes: Reps. R. Johnson, Parks; Sens. Cohen, Hill, Shoemaker
Nays:
Exc.: Rep. Mason
Carriers: Rep. R. Johnson/Sen. Shoemaker
Prepared By: Gregory A. Chaimov, House Committee Counsel

WHAT THE BILL DOES: Requires a personal representative of an estate to give actual notice of the probate of a will to any person the personal representative knows may want to challenge the validity of the will. Sets deadlines for filing will contest claims.

ISSUES DISCUSSED: How long a person should have to bring a claim that a decedent broke a promise to leave the person something in a will.

EFFECT OF CONFERENCE COMMITTEE AMENDMENTS: Required a person contesting a will (or complaining about being left out of a will) to file a claim within four months after receiving notice of the probate of the will. If the person does not receive notice, the person must file a claim by (1) one year from the death of the decedent or (2) by the time the estate closes, whichever is earlier. Clarified that these time limits apply no matter what legal theory the person uses to support the claim. Added a cross-reference to this new probate time limit in the general statute of limitation for fraud claims so that claimants will not lose their rights because of some oversight by an attorney.

BACKGROUND: For many years, Oregon probate law allowed personal representatives to publish notices in the local paper. Three years ago, the United States Supreme Court required personal representatives to give actual notice to known claimants in probate proceedings. To comply with this decision, the 1989 Legislative Assembly revised the notice provisions of the probate and small estate laws. HB 2266 makes corresponding changes to the laws about will contests. Under the bill, the personal representative must inform a person that a will is in probate if the personal representative knows that the person may want to challenge the will. A person notified of the probate of a will has four months within which to file a claim that the will is invalid. This is the same time period as in other types of probate proceedings.

**B-Engrossed
House Bill 2266**

Ordered by the Senate June 10
Including House Amendments dated May 21 and Senate Amendments
dated June 10

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Representative Tom Mason for Oregon State Bar Estate Planning Section)

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.

Specifies that persons may assert interest in estate by reason of claim that will is ineffective, that another will exists, or that there exists contract to make will or other contract relating to will. Modifies period in which such actions may be brought. [*Establishes proceedings under Act as exclusive remedy for asserting such claims.*] Prescribes effective date.

A BILL FOR AN ACT

1 Relating to wills; creating new provisions; and amending ORS 113.035, 113.075 and 113.145.

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

3 **SECTION 1. ORS 113.035 is amended to read:**

4 113.035. Any interested person or executor named in the will may petition for the appointment
5 of a personal representative and for the probate of a will. The petition shall include the following
6 information, so far as known:
7

8 (1) The name, age, domicile, post-office address, date and place of death, and social security ac-
9 count number or taxpayer identification number of the decedent.

10 (2) Whether the decedent died testate or intestate.

11 (3) The facts relied upon to establish venue.

12 (4) The name and post-office address of the person nominated as personal representative and the
13 facts that show the person is qualified to act.

14 (5) The names, relationship to the decedent and post-office addresses of persons who are or
15 would be the heirs of the decedent upon the death of the decedent intestate, and the ages of any
16 who are minors.

17 (6) If the decedent died testate, the names and post-office addresses of the devisees, and the ages
18 of any who are minors.

19 (7) The name and post-office address of any person asserting an interest in the estate,
20 or on whose behalf an interest has been asserted, based on a contention that:

21 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
22 or part;

23 (b) There exists a will that has not been alleged in the petition to be the will of the
24 decedent; or

25 "(c) The decedent agreed, promised or represented that the decedent would
26 make or revoke a will or devise, or not revoke a will or devise, or die
27 intestate."

... in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

1 or accompanies the petition. If the original will is not in the possession of the court or accompa-
2 nying the petition and an authenticated copy of the will probated in another jurisdiction does not
3 accompany the petition, the petition shall also state the contents of the will and indicate that it is
4 lost, destroyed or otherwise unavailable and that it was not revoked.

5 [(8)] (9) A statement of the extent and nature of assets of the estate, to enable the court to set
6 the amount of bond of the personal representative.

7 SECTION 2. ORS 113.075 is amended to read:

8 113.075. (1) [When a will has been admitted to probate,] Any interested person may [at any time
9 within four months after the date of the filing of the affidavit under ORS 113.145 or four months after
10 the first publication of notice to interested persons, whichever is later,] contest the probate of the will
11 or the validity of the will or assert an interest in the estate for the reason that:.]

12 (a) The will alleged in the petition to be the will of the decedent is ineffective in whole
13 or part;

14 (b) There exists a will that has not been alleged in the petition to be the will of the
15 decedent; or

4 "(c) The decedent agreed, promised or represented that the decedent would
5 make or revoke a will or devise, or not revoke a will or devise, or die
6 intestate."

18 (2) An action described in subsection (1) of this section shall be commenced by the filing
19 of a petition in the probate proceedings, except that an action described in paragraph (c) of
20 subsection (1) of this section may be commenced by the filing of a separate action in any
21 court of competent jurisdiction.

22 (3) An action described in paragraph (a) or (b) of subsection (1) of this section shall be
23 commenced before the later of:

24 (a) Four months after the date of delivery or mailing of the information described in ORS
25 113.145 if that information was required to be delivered or mailed to the person on whose
26 behalf the petition is filed; or

27 (b) Four months after the first publication of notice to interested persons if the person
28 on whose behalf the petition is filed was not required to be named in the petition as an in-
29 terested person.

30 (4) An action described in paragraph (c) of subsection (1) of this section shall be com-
31 menced before the earliest of:

32 (a) Four months after the date of delivery or mailing of the information described in ORS
33 113.145 if that information was required to be delivered or mailed to the person on whose
34 behalf the action is commenced;

35 (b) Four months after the first publication of notice to interested persons if the person
36 on whose behalf the action is commenced was not required to be named in the petition as
37 an interested person; or

38 (c) One year after the death of the decedent.

paragraph (c) of subsection (1) of this section shall
not be presented as a claim under ORS Chapter 115."

sees
the

42 petition for appointment of a personal representative, at the addresses therein shown, information
43 that shall include:

44 (a) The title of the court in which the estate proceeding is pending and the clerk's file number;

WARREN C. DEBAS
 ATTORNEY AT LAW
 1400 S. W. MONTGOMERY
 PORTLAND, OREGON 97201-6093
 TELEPHONE (503) 222-0106

FAX (503) 228-3028

June 24, 1991

Mr. Greg Chaimov

FAX to 378-3541

Subject: HB 2266

BILL # 2266
 CONFERENCE COMMITTEE
 EXHIBIT C
 DATE 6/26/91 PAGES 3
 SUBMITTED BY Staff

Dear Greg:

I just arrived at the office and discovered your fax from Saturday. I have serious concerns about the proposed conference committee amendments to B-Engrossed HB 2266.

Generally with regard to the addition of the amendment to ORS 12.110 in proposed new section 5, I cannot see that it does any specific damage. However, it is inconsistent with the basic structure of ORS Chapter 12, which under ORS 12.010 applies "except where a different limitation is prescribed by statute." ORS Chapter 12 provides general time limits, subject to numerous exceptions throughout ORS. In probate, for example, ORS Chapter 115 provides a separate system for processing claims, including time limits. There is no reference to these limits in Chapter 12. If the legislature starts trying to make specific references to the exceptions to the limits created in ORS Chapter 12, I suspect it will make a mess of Chapter 12 and create a great deal of uncertainty.

The proposed change on page 2, lines 16 and 17, is all right. However, if that is changed, the same change should be made on page 1 at lines 25 and 26.

The proposed change embodied in the Proposed Conference Committee Amendments at page 1, lines 7 through 12, is of great concern to me. In addition to changing the substance of the time limit, the conference committee proposes that there be a single time limit for will contests and for contract to make a will cases. That will not work, and the substance of the proposed limit creates problems.

Our objective with respect to contract to make a will cases was to impose an absolute bar at one year after death. Anyone with such a cause of action would be close to the decedent, and it was and is our feeling that they should act within a reasonable period of time after the decedent dies to resolve their rights, even if no one files a probate.

It is not workable to apply that one year limit to will contests. It is not at all unusual to find situations in which the commencement of probate is delayed for years after death. For example, when one of a couple dies, the widow or widower may not commence probate because of poor advice or because he or she

Mr. Greg Chaimov
June 24, 1991
Page 2

mistakenly thinks everything was jointly owned. A probate may be commenced years later to clear title to property. It is not unusual to see probate delayed simply because of a desire not to notify persons who would be entitled to a share of the estate. A one year from date of death bar in these situations would mean that whoever got to the courthouse first after the year was up could file the estate as intestate, even if there is a will, or file an earlier will, even though it was revoked or there is a later will, and there would be no means of challenging the filing.

Furthermore the proposed wording creates confusion about the effect of failure to give notice. Our language in paragraphs (a) and (b) of subsections (3) and (4) of section 2 was built around whether notice was "required", not whether it was actually given. I view this as necessary to comply with the mandate of Tulsa. The conference would leave that in its proposed paragraph (3)(a), but would not include it in its proposed paragraph (3)(b) at lines 9-10 of the Proposed Conference Committee Amendments. This will invariably create confusion. What would happen in the situation where the notice is required, but it simply is not given until after the year is up or is not given at all? If probate is filed more than a year after death, what limit applies?

In addition, the reference at page 1, line 12, of the Proposed Conference Committee Amendments to the "closure of the estate" causes me concern. I am not sure when that is, since the probate code does not so far as I can find refer to "closure" other than in the title to ORS Chapter 116. Limits are commonly tied to the filing of the final account, since that provides a vehicle for resolving disputes. A limit could be tied to entry of the decree of distribution under ORS 116.113 or a decree of discharge under ORS 116.213, but I do not believe those would be appropriate or that this would be consistent with ORS 116.123.

In summary, I urge that:

1. The amendment to ORS 12.110 should not be made.
2. If the language at page 2, lines 16 and 17 is to be changed, a similar change should be made on page 1, lines 25-26.
3. The separate time limits for will contests and contract to make a will cases be retained, with the one year from date of death limit applied only to contract to make a will cases.
4. The time limit language in subsections (3) and (4), which is identical in both the House and Senate passed bills, not be changed.

Finally, let me comment on what I understand to be the underlying point of contention between the House and the

Mr. Greg Chaimov
June 24, 1991
Page 3

Senate. I understand that the House wants to restrict Hocks-type claims, and the Senate wants to preserve them. Regardless of which version of the bill passes, such claims would not have a two-years from discovery statute applicable to them. The original intent of subsection (5) of section 2 in the House passed A-Engrossed bill was to eliminate these claims entirely, although that intent did not survive the drafting process very clearly and was intended by us to be part of the softening of the statute of frauds, which was eliminated by the House.

If the intent of the House is to make sure that revised ORS 113.075 would be the only way of bringing Hocks-type claims, what it should do is focus not on the time limit, but on the only other procedure that could possibly be used to such a claim, which is the claims procedure in ORS Chapter 115 (which also has a four-months from notice provision, found in ORS 115.115.005). I agree that it would be beneficial to clarify that such causes cannot be brought by the alternate route. This could be done by modifying the subsection (5) found in section 2 of the House bill to read as follows (adopting the language used at page 1, lines 4-6 of the Proposed Conference Committee Amendments):

"(5) A cause of action based on reliance on an agreement, promise of representation that the decedent would make or revoke a will or devise, or not revoke a will or devise, or die intestate, shall be subject to the procedures set forth in this section and shall not be presented as a claim under ORS Chapter 115."

or, more simply:

"(5) A cause of action described in paragraph (c) of subsection (1) of this section shall not be presented as a claim under ORS Chapter 115."

Please let me know if you wish me to attend a meeting on this bill.

Very truly yours,

