

**Testimony before the  
House Committee on the Judiciary  
Subcommittee on Civil Law  
in support of Senate Bill 182A  
On behalf of the  
Oregon State Bar Estate Planning and Administration Section  
April 28, 2021**

Chair Power and Members of the Committee:

My name is Eric Wieland. I'm a lawyer in private practice in Portland, Oregon and the current chair of the Oregon State Bar's Estate Planning and Administration Section. I am here today in support of Senate Bill 182A.

The Oregon State Bar (OSB) is a public corporation and an instrumentality of the court with over 15,000 active members. The Oregon State Bar serves the public interest by: regulating the legal profession and improving the quality of legal services; supporting the judiciary and improving the administration of justice; and advancing a fair, inclusive and accessible justice system.

The Estate Planning and Administration section of the Oregon State Bar is made of up of over 1,000 attorneys who practice throughout Oregon. Our members represent clients from eastern Oregon to Hood River, to the Portland metro area and out to the coast. The Estate Planning and Administration section's executive committee has 16 members with a wealth of experience throughout the state.

Senate Bill 182A will address three problems.

First the bill will automatically prevent individuals from acting as agents under powers of attorney for their spouse once divorce proceedings begin between the spouses. The question of whether to revoke the agency granted under powers of attorney is not considered in many divorce proceedings, meaning that they remain in force following the divorce even though the parties likely would have revoked them had they considered the issue.

Under this proposal, Oregon would join ten other states in providing a default rule that the agency of an ex-spouse granted under a power of attorney would be revoked upon divorce. While this would be the default rule, the parties would continue to have the power to choose

to leave the power of attorney in effect by so specifying in the divorce proceeding or signing a new power of attorney.

Secondly, this bill addresses liability protection to spouses who place real property in a trust. Currently, when a married couple owns real property jointly as tenant by the entirety, each spouse has liability protection from their partner's creditors with respect to the jointly owned property. However, if they place the real property into a revocable living trust for estate planning purposes, they may unknowingly lose that protection. This bill provides the same protection for property placed into a revocable living trust as spouses would normally enjoy if they did not transfer the property to a revocable living trust.

Finally, the bill streamlines the process that an attorney may use to dispose of an old will that is in their possession. The bill specifies how long an attorney must wait before disposing of a will and requires that the attorney must diligently attempt to locate the testator or named personal representative, sign an affidavit, and make a full digital copy of the will. The attorney must retain the digital copy. The length of time the attorney must keep the original will and the digital copy is the same length of time the attorney is required to maintain the original will under the current law.

On behalf of the Oregon State Bar's Estate Planning and Administration Section, I thank the committee for its consideration and urge the passage of Senate Bill 182A. I am happy to answer any questions.

**SB 182 A STAFF MEASURE SUMMARY****Carrier:** Rep. Wilde**House Committee On Judiciary****Action Date:** 05/18/21**Action:** Do Pass the A-Eng bill.**Vote:** 10-0-0-0**Yeas:** 10 - Bynum, Dexter, Helm, Kropf, Lewis, Morgan, Noble, Power, Wallan, Wilde**Fiscal:** Has minimal fiscal impact**Revenue:** No revenue impact**Prepared By:** Channa Newell, Counsel**Meeting Dates:** 4/28, 5/3, 5/18**WHAT THE MEASURE DOES:**

Restrains spouses from exercising authority under power of attorney, advance directive, or mental health treatment declaration upon filing of petition for separation, annulment, or dissolution. Terminates authority of spouse under power of attorney, advance directive, or mental health treatment declaration upon judgment of dissolution or annulment. Specifies occurrences that terminate the authority of an agent under power of attorney, including death of the principal, revocation of the power of attorney by the principal or court, incapacitation, resignation, or death of the agent, or termination of the power of attorney by its terms. Clarifies liability protections for each spouse when real property held by spouses as tenants in the entirety is subsequently conveyed to trustees of a revocable trust. Modifies process for attorney destruction of wills. Removes requirement that 40 years elapse between execution and destruction of the will. Allows attorney to dispose of will after 20 years if the attorney does not know if testator is deceased and cannot ascertain address of the testator after diligent inquiry. Requires attorney to retain a digital copy of the will and associated affidavits, including affidavit document attorney's diligent efforts to prove notice of destruction to testator or personal representative of testator for at least twenty years after making affidavit.

**ISSUES DISCUSSED:**

- Parties in divorce or separation may not be suitable surrogate decision makers
- Process of placing property in revocable trust
- Benefits of trust
- Current process for destruction of wills

**EFFECT OF AMENDMENT:**

No amendment.

**BACKGROUND:**

The Oregon State Bar was established in 1935 to license and discipline lawyers, regulate the practice of law, and provide services to bar members and the public. The organization lists over 14,000 individuals admitted to practice law in Oregon. Various sections of the Bar propose specific changes to their practice areas.

Senate Bill 182 A is proposed on behalf of the Estate Planning and Administration Section of the Bar. It specifies that the petition for a dissolution, separation, or annulment restrains the other party from acting under authority of a power of attorney, health care representative under an advance directive, or attorney-in-fact under a declaration for mental health treatment and revokes authority under those documents when the dissolution or annulment is complete. The measure clarifies liability protection for spouses when property is held in certain trusts. SB 182 A also specifies particular provisions on the process an attorney must use when destroying wills.

**CHAPTER 272**

AN ACT

SB 182

Relating to estate planning; creating new provisions; and amending ORS 107.093, 107.115, 112.805, 112.815, 112.820, 127.002, 127.005, 127.015, 127.722 and 130.315.

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

**TERMINATION OF AUTHORITY OF SPOUSE AS AGENT UPON DISSOLUTION OF MARRIAGE**

**SECTION 1.** ORS 107.093 is amended to read:

107.093. (1) After a petition for marital annulment, separation or dissolution is filed and upon service of summons and petition upon the respondent as provided in ORCP 7, a restraining order is in effect against the petitioner and the respondent until a final judgment is issued, until the petition for marital annulment, separation or dissolution is dismissed, or until further order of the court.

(2) The restraining order issued under this section shall restrain the petitioner and respondent from:

(a) Canceling, modifying, terminating or allowing to lapse for nonpayment of premiums any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy that names either of the parties or a minor child of the parties as a beneficiary.

(b) Changing beneficiaries or covered parties under any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy.

(c) Transferring, encumbering, concealing or disposing of property in which the other party has an interest, in any manner, without written consent of the other party or an order of the court, except in the usual course of business or for necessities of life. This paragraph does not apply to payment by either party of:

(A) Attorney fees in the existing action;

(B) Real estate and income taxes;

(C) Mental health therapy expenses for either party or a minor child of the parties; or

(D) Expenses necessary to provide for the safety and welfare of a party or a minor child of the parties.

(d) Making extraordinary expenditures without providing written notice and an accounting of the extraordinary expenditures to the other party. This paragraph does not apply to payment by either party of expenses necessary to provide for the safety and welfare of a party or a minor child of the parties.

(e) **Exercising authority as an agent for the other party under a power of attorney described in ORS 127.005 to 127.045, a health care representative for the other party under a form appointing a health care representative described in ORS 127.505 to 127.660 or an attorney-in-fact for the other party under a declaration for mental health treatment described in ORS 127.700 to 127.737, unless the power of attorney, form appointing a health care representative or declaration for mental health treatment otherwise provides.**

(3) Either party restrained under this section may apply to the court for further temporary orders, including modification or revocation of the restraining order issued under this section.

(4) The restraining order issued under this section shall also include a notice that either party may request a hearing on the restraining order by filing a request for hearing with the court.

(5) A copy of the restraining order issued under this section shall be attached to the summons.

(6) A party who violates a term of a restraining order issued under this section is subject to imposition of remedial sanctions under ORS 33.055 based on the violation, but is not subject to:

(a) Criminal prosecution based on the violation; or

(b) Imposition of punitive sanctions under ORS 33.065 based on the violation.

**SECTION 2.** ORS 107.115 is amended to read:

107.115. (1) A judgment of annulment or dissolution of a marriage restores the parties to the status of unmarried persons, unless a party is married to another person. The judgment gives the court jurisdiction to award, to be effective immediately, the relief provided by ORS 107.105. The judgment shall [revoke]:

(a) **Revoke** a will pursuant to ORS 112.315.

(b) **Revoke** a transfer on death deed pursuant to ORS 93.981.

(c) **Terminate the authority of an agent under a power of attorney pursuant to ORS 127.015, a health care representative pursuant to ORS 127.545 (5)(c)(B) or an attorney-in-fact pursuant to ORS 127.722.**

(2) The marriage relationship is terminated when the court signs the judgment of dissolution of marriage.

(3)(a) The Court of Appeals or Supreme Court shall continue to have jurisdiction of an appeal pending at the time of the death of either party. The appeal may be continued by the personal representative of the deceased party. The attorney of record on the appeal, for the deceased party, may be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on appeal may not be awarded to either party.

(b) The Court of Appeals or Supreme Court shall have the power to determine finally all matters presented on such appeal. Before making final disposition, the Court of Appeals or Supreme Court may

refer the proceeding back to the trial court for such additional findings of fact as are required.

**SECTION 3.** ORS 127.005 is amended to read:

127.005. (1) When a principal designates another person as an agent by a power of attorney in writing, and the power of attorney does not contain words that otherwise delay or limit the period of time of its effectiveness:

(a) The power of attorney becomes effective when executed and remains in effect until the power is revoked by the principal **or by the terms of the power of attorney, or until the authority of all agents under the power of attorney is terminated as provided in ORS 127.015;**

(b) The powers of the agent are unaffected by the passage of time; and

(c) The powers of the agent are exercisable by the agent on behalf of the principal even though the principal becomes financially incapable.

(2) The terms of a power of attorney may provide that the power of attorney will become effective at a specified future time, or will become effective upon the occurrence of a specified future event or contingency such as the principal becoming financially incapable. If a power of attorney becomes effective upon the occurrence of a specified future event or contingency, the power of attorney may designate a person or persons to determine whether the specified event or contingency has occurred, and the manner in which the determination must be made. A person designated by a power of attorney to determine whether the principal is financially incapable is the principal's personal representative for the purposes of ORS 192.553 to 192.581 and the federal Health Insurance Portability and Accountability Act privacy regulations, 45 C.F.R. parts 160 and 164.

(3) If a power of attorney becomes effective upon the principal becoming financially incapable and either the power of attorney does not designate a person or persons to make the determination as to whether the principal is financially incapable or none of the designated persons is willing or able to make the determination, a determination that the principal is financially incapable may be made by any physician. The physician's determination must be made in writing.

(4) All acts done by an agent under a power of attorney during a period in which the principal is financially incapable have the same effect, and inure to the benefit of and bind the principal, as though the principal were not financially incapable.

(5) If a conservator is appointed for a principal, the agent shall account to the conservator, rather than to the principal, for so long as the conservatorship lasts. The conservator has the same power that the principal would have to revoke, suspend or terminate all or any part of the power of attorney.

(6) This section does not apply to ORS 127.505 to 127.660.

**SECTION 4.** ORS 127.015 is amended to read:

127.015. (1) **The authority of an agent under a power of attorney terminates upon the occurrence of any of the following:**

(a) **The principal dies.**

(b) **The principal or the court revokes the power of attorney.**

(c) **The agent dies, becomes financially incapable or incapacitated or resigns.**

(d) **The power of attorney by its terms provides that the power of attorney terminates.**

(e) **An action is filed for the dissolution or annulment of the principal's marriage or registered domestic partnership to the agent, or for the separation of the principal and agent, unless otherwise provided by terms of the power of attorney, agreement of the parties or order of the court.**

(2) **A court may order that a power of attorney is revoked upon appointment by the court of a conservator for the principal.**

[(1)] (3) The death of a principal who has executed a power of attorney in writing, or the occurrence of any other event that would otherwise terminate the authority of the agent, does not revoke or terminate the authority of an agent who, without actual knowledge of the death of the principal or other event, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and heirs, devisees and personal representatives of the principal.

[(2)] (4) An affidavit executed by an agent that states that the agent did not have, at the time of doing an act under the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death or other event, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument that is recordable, the affidavit may also be recorded.

[(3)] (5) This section does not alter or affect any provision for revocation or termination contained in the power of attorney.

**SECTION 5.** ORS 127.722 is amended to read:

127.722. (1) A declaration may be revoked in whole or in part at any time by the principal if the principal is not incapable. A revocation is effective when a capable principal communicates the revocation to the attending physician or other provider. The attending physician or other provider shall note the revocation as part of the principal's medical record.

(2) **The authority of the principal's spouse as attorney-in-fact is revoked if a petition for dissolution or annulment of marriage is filed, the principal is not incapable and the principal or the court does not reaffirm the appointment after the filing of the petition.**

**SECTION 6.** ORS 127.002 is amended to read:

127.002. For the purposes of ORS 127.005 to 127.045:

- (1) "Agent" includes an attorney-in-fact; and
- (2) "Financially incapable" has the meaning given that term in ORS 125.005.
- (3) "Incapacitated" has the meaning given that term in ORS 125.005.

### **CONVEYANCE OF PROPERTY HELD AS TENANTS BY THE ENTIRETY**

**SECTION 7. (1) Real property of spouses married to each other that was held as tenants by the entirety and subsequently conveyed to the trustee or trustees of the joint revocable trust of the spouses or of the separate revocable trust of each spouse shall have the same immunity from the claims of a spouse's creditors as would exist if the spouses had continued to hold the property as tenants by the entirety, if:**

(a) The spouses remain married to each other;

(b) The real property continues to be held in trust by the trustee or trustees or the successor trustee or trustees; and

(c) Both spouses are beneficiaries of the trust or trusts, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts.

(2) The protection from the claims of separate creditors under this section may be waived as to any specific creditor, including any separate creditor of either spouse, or any specifically described property, including any former tenancy by the entirety property conveyed into trust, by the trustee acting under the express provision of a trust instrument or with the written consent of both spouses.

**SECTION 8.** ORS 130.315 is amended to read:

130.315. (1) Whether or not the terms of a trust contain a spendthrift provision, **except as provided in section 7 of this 2021 Act:**

(a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(b) A creditor or assignee of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit. If an irrevocable trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) If a trust was revocable at the settlor's death, the property of the trust becomes subject to

creditors' claims as provided in ORS 130.350 to 130.450 when the settlor dies. The payment of claims is subject to the settlor's right to direct the priority of the sources from which liabilities of the settlor are to be paid.

(d) Notwithstanding the provisions of paragraph (b) of this subsection, the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust or any other provision of law to pay the amount of tax owed directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal that is payable or has been paid by the settlor under the law imposing the tax.

(2) For the purpose of creditors' claims, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent property of the trust is subject to the power. The provisions of this subsection apply to the holder of a power of withdrawal only during the period that the power may be exercised.

(3) Upon the lapse, release or waiver of a power of withdrawal, the property of the trust that is the subject of the lapse, release or waiver becomes subject to claims of creditors of the holder of the power only to the extent the value of the property exceeds the greatest of:

(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code, as in effect on December 31, 2012;

(b) The amount specified in section 2503(b) of the Internal Revenue Code, as in effect on December 31, 2012; or

(c) Twice the amount specified in section 2503(b) of the Internal Revenue Code, as in effect on December 31, 2012, if the donor was married at the time of the transfer to which the power of withdrawal applies.

(4) The assets of an irrevocable trust that are attributable to a contribution to an inter vivos marital deduction trust described in section 2523(e) or (f) of the Internal Revenue Code, as in effect on December 31, 2012, after the death of the spouse of the settlor of the inter vivos marital deduction trust shall be deemed to have been contributed by the settlor's spouse and not by the settlor.

(5) The assets of an irrevocable trust for the benefit of a person, including the settlor, are not subject to claims of creditors of the settlor to the extent that the property of the trust is subject to a presently exercisable general power of appointment held by a person other than the settlor.

(6) Subsections (2) and (3) of this section do not apply to a person other than a settlor who is a beneficiary of a revocable or irrevocable trust and who is also a trustee of the trust, if the power to withdraw for the person's own benefit is limited by an ascertainable standard.

## DISPOSITION OF WILLS

### **SECTION 9.** ORS 112.805 is amended to read:

112.805. (1) Any person having custody of a will has a duty to maintain custody of the will and may not destroy or discard the will, disclose its contents to any person or deliver the will to any person except as authorized by the testator or as permitted by ORS 112.800 to 112.830.

(2) Nothing in ORS 112.800 to 112.830 bars a testator from destroying, revoking, delivering to any person or otherwise dealing with the will of the testator.

(3) A will destroyed in accordance with ORS 112.800 to 112.830 *[shall]* is not *[be]* revoked by virtue of such destruction and its contents may be proved by secondary evidence.

### **SECTION 10.** ORS 112.815 is amended to read:

112.815. An attorney who has custody of a will may dispose of the will in accordance with ORS 112.820 if:

(1) The attorney is licensed to practice law in the State of Oregon;

(2) *At least 40 years has elapsed since execution of the will;*

(3) *The attorney does not know and after diligent inquiry cannot ascertain the address of the testator; and*

(4) (2) The will is not subject to a contract to make a will or devise or not to revoke a will or devise[.]; **and**

(3)(a) **If the attorney knows the testator is deceased, at least five years have elapsed since the testator's death and the attorney does not know and after diligent inquiry has been unable to ascertain the addresses for the personal representative and each successor personal representative named in the will or, if the attorney was able to locate the personal representative or one or more of the successor personal representatives named in the will, none will accept delivery of the will; or**

(b) **If the attorney does not know the testator is deceased, at least 20 years have elapsed since execution of the will and the attorney does not know and after diligent inquiry has been unable to ascertain the address of the testator.**

### **SECTION 11.** ORS 112.820 is amended to read:

112.820. (1) An attorney **who intends to destroy a will** as authorized *[to destroy a will]* under ORS 112.815 *[may proceed as follows]* **must:**

(a) *[The attorney shall first publish a notice in a newspaper of general circulation in the county of the last-known address of the testator, if any, otherwise in the county of the principal place of business of the attorney.] Provide notice of the attorney's intent to destroy the will to the testator or, if the attorney knows the testator is deceased, to the*

**personal representative and to each successor personal representative named in the will; and**

(b) **Deliver the notice by mail, electronic mail, telephone and any other method reasonably calculated to convey the notice to the mailing addresses, electronic mail addresses and telephone numbers known to the attorney or reasonably ascertainable through public records or other searches.**

(2) The notice *[shall]* **under subsection (1) of this section must state the name of the testator, the date of the will and the intent of the attorney to destroy the will if, within 90 days after the date of the notice, the testator does not contact the attorney or, if the testator is deceased, the personal representative and each successor personal representative fail to accept delivery of the will** *[within 90 days after the date of the notice].*

*[(b)]* (3) **If the testator fails to contact the attorney within 90 days after the date of the notice or, if the testator is deceased, the personal representative and any successor personal representative fail to accept delivery of the will within 90 days of the date of the notice, the attorney may destroy the will.**

*[(c)]* **Within 30 days after destruction of the will, the attorney shall file with the probate court in the county where the notice was published an affidavit stating the name of the testator, the name and relationship of each person named in the will whom the testator identified as related to the testator by blood, adoption or marriage, the date of the will, proof of the publication and the date of destruction.]**

*[(d)]* **The clerk of the probate court shall charge and collect the fee established under ORS 21.145 for filing of the affidavit.]**

(2) **If a will has not been admitted to probate within 40 years following the death of the testator, an attorney having custody of the will may destroy the will without notice to any person or court.]**

(4)(a) **At the time the attorney destroys a will under this section, the attorney shall sign an affidavit affirming:**

(A) **That despite diligent inquiry, the attorney was unable to locate the testator or, if the testator is deceased, that the attorney has knowledge of the testator's death and, despite diligent inquiry, the attorney was unable to locate the personal representative and successor personal representatives named in the testator's will or, if the attorney was able to locate the personal representative or any successor personal representative, that none would accept delivery of the will;**

(B) **That the attorney has created a complete digital copy of the testator's will, including any affidavit of attesting witnesses and codicils to the will; and**

(C) **That the attorney will retain a digital copy of the affidavit, the testator's will and any affidavit of attesting witnesses and codicils to**

the will for a period of no fewer than 20 years from the date of the affidavit.

(b) The affidavit must include documentation of the attorney's diligent efforts to provide notice to the testator or, if the attorney knows the testator is deceased, the personal representative and successor personal representatives, including but not limited to public records search results, the addresses, electronic mail addresses, telephone numbers or any other methods of contact the attorney used to provide notice of the attorney's intent to destroy the will, a copy of the notice and any other documentation of the attorney's attempts to provide notice to the testator or, if the testator is deceased, to the personal representative and successor personal representatives.

(c) No earlier than 20 years following the date of the affidavit, the attorney may destroy the electronic copies of the affidavit and the will and any affidavit of attesting witnesses or codicils to the will without notice of the destruction to any person or court.

## APPLICABILITY

**SECTION 12.** Section 7 of this 2021 Act and the amendments to ORS 130.315 by section 8 of this 2021 Act apply to tenancy by the entirety property conveyed to a trustee or trustees of a trust or trusts on or after the effective date of this 2021 Act.

## CAPTIONS

**SECTION 13.** The unit captions used in this 2021 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2021 Act.

Approved by the Governor June 11, 2021  
 Filed in the office of Secretary of State June 14, 2021  
 Effective date January 1, 2022