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Small Estates Start to Finish

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Chapter 2

Small Estates Start to Finish

Melissa May
Duffy Kekel LLP
Portland, Oregon

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Small Estates Start to Finish

I. Overview

This presentation explores the transfer of probate assets outside of the full probate process described in ORS Chapters 113-116. For our purposes, "probate" property includes real and personal property that does not pass to a surviving joint owner or a designated beneficiary upon the owner's death. Normally, probate is required to transfer to the intended beneficiaries or heirs property in the decedent's sole name, except property "automatically" transferred by contract or operation of law. However, a full probate proceeding is not required if the person who possesses the property (the "holder") is willing to transfer it to the heirs or beneficiaries outside of the probate process.

A small estate affidavit (ORS 114.505 through 114.560) allows the appropriate person to initiate a court procedure to collect and disburse probate assets without the time and expense of complying with the requirements of a full probate. Currently, an estate consisting of $75,000 or less in personal property and $200,000 or less in real property, with a total value not exceeding $275,000, can use a small estate affidavit. ORS 114.510

In some cases, an estate with a value within the small estate limits isn't well suited to the small estate affidavit process. For example, if there are disagreements among the heirs or beneficiaries (or between the affiant and an heir or beneficiary), a full probate may be more desirable. Additionally, an affiant cannot defend against or maintain a legal action on behalf of the estate. Full probate should be pursued if the parties anticipate a will contest or other litigation, even if the asset values are within the small estate limits.

In uncontroversial, straightforward cases, with beneficiaries or heirs who want to collect relatively small sums, an alternative to a small estate affidavit may be helpful.

II. Alternatives to a Small Estate Affidavit

There are several alternatives to a small estate affidavit that may be available for certain small estates. Using one of these alternate procedures could save the time and expense of filing a small estate affidavit. However, unlike a small estate affidavit, these procedures do not extinguish the time period for creditors to bring claims against the decedent's assets. Instead, any debts flow with the property to the heirs or

devisees, and a creditor may collect the debt (within the original statute of limitations) from the recipient(s) of estate property.

a. Affidavit of Heirship

Some persons or entities may be amenable to accepting an affidavit of heirship signed by all heirs or beneficiaries, rather than requiring a full probate or small estate affidavit. In some cases, title insurers will accept an affidavit of heirship in lieu of probate or a small estate affidavit. They are likely to charge a higher premium for doing so, and they may impose a waiting period.

In addition to an affidavit of heirship, most persons in possession of a decedent's property (as well as title insurance companies issuing a policy covering the decedent's real property) will require indemnity from the heirs or beneficiaries.

b. DMV Affidavit

Pursuant to ORS 803.094, a decedent's heirs may be able to transfer vehicle titles by filing an affidavit with the Oregon DMV. This affidavit procedure is available only if there is no probate proceeding for the decedent's other property and no small estate affidavit is filed.

The DMV form is available at
https://www.oregon.gov/ODOT/Forms/DMV/516fill.pdf

Additional information and instructions are available at
https://www.oregon.gov/odot/DMV/docs/inherit.pdf

c. ORS 708A.430 and ORS 723.466 Affidavits

ORS 708A.430 authorizes a bank to pay a decedent's funds to a claimant, under certain circumstances, without the formality of filing a small estate affidavit. ORS 723.466 describes parallel provisions for funds held in a credit union account. Many financial institutions maintain pre-printed forms for this purpose.

The affidavits described in these statutes are available when the decedent's funds on deposit in Oregon financial institutions do not exceed $25,000 in the aggregate. The statutes describe the authorized claimants, in order of priority.

- A surviving spouse may file a financial institution affidavit at any time.
- If there is no surviving spouse and the Oregon Health Authority or DHS has a preferred claim, the agency may file a declaration claiming the deposit between 46 and 75 days following the decedent's death.
- The following persons may file the affidavit at least 46 days after the decedent's death, but the financial institution cannot release the funds without

permission of the OHA or DHS until at least 76 days after the decedent's death.

- If there is no surviving spouse and no OHA/DHS claim, the decedent's surviving adult children may file the affidavit.
- If none of the persons listed above survive the decedent and there is no OHA/DHS claim, the decedent's parent may file the affidavit.
- If none of the persons listed above survive the decedent and there is no OHA/DHS claim, the decedent's surviving adult siblings may file the affidavit.
- If none of the persons listed above survive the decedent and there is no OHA/DHS claim, any heir may file the affidavit.

The financial institution may require proof of the claimant's relationship to the decedent. An indemnity agreement may also be required.

The claimant filing an affidavit with a financial institution must agree to pay the decedent's debts and funeral expenses from the amounts on deposit, in the order described in ORS 115.125.

If a probate case is opened after a claimant collects funds under one of these statutes, the claimant must account to the personal representative for the collected funds.

III. When to Recommend a Small Estate Affidavit

a. Definitions.

The person(s) signing the small estate affidavit is the "affiant," and the ultimate recipients of the property are the "claiming successors." ORS 114.505. Claiming successors are:

- The decedent's heirs, if the decedent died intestate (or an estate administrator of the State Treasurer, if there are no heirs)
- The devisee(s), if the decedent died testate
- Any creditor entitled to payment or reimbursement, if payment or reimbursement hasn't been made within 60 days after the decedent's death.

ORS 114.505(2).

b. Probate Property Valued within Statutory Limits

The small estate affidavit procedure described in ORS 114.505 through 114.560 is available only if the total value of the decedent's probate property is $275,000 or less, with no more than $75,000 in personal property and $200,000 in real property. ORS 114.510.

For purposes of determining eligibility to use a small estate affidavit, calculate these values without regard to any mortgage or other debt secured by the property. ORS 114.510(3). For example, a home with a fair market value of $200,000 will fall within the small estate limit for real property but a home with a fair market value of $450,000 that is encumbered by a $350,000 mortgage will not.

The valuation date for small estate property is the decedent's date of death, unless the affidavit is filed more than one year after the date of death. ORS 114.510(2)(a). If the affidavit is filed more than a year after the decedent's death, determine the fair market value as of a date within 45 days preceding the filing date. ORS 114.510(2)(b).

c. Straightforward Estates

If there is disagreement among the beneficiaries regarding the decedent's property, a dispute about the validity of the decedent's will, or some other controversy, a small estate affidavit proceeding is unlikely to be appropriate. If you anticipate needing court intervention in a dispute or to give the personal representative instructions on an ambiguous or controversial matter, a full probate is a better choice.

d. Suitable Affiant

The affiant must meet the requirements of ORS 114.515(1) and (2), discussed in section IV.a below.

IV. How to Prepare and File a Small Estate Affidavit

a. Affiant Requirements

Pursuant to ORS 114.515(1), the affiant may be any of the following:

- Any claiming successor(s)
  - If the claiming successor is a creditor, see special requirements of ORS 114.520 (applicable to a creditor who wants to file a small estate affidavit for a decedent who died intestate and without heirs).
- Any person named as personal representative in the decedent's will
- If the decedent received public assistance or medical assistance, or care at an Oregon State Hospital or correctional facility, the Director of Human Services, the Director of the OHA, or an approved attorney may file the affidavit. *See* ORS 114.517 regarding approval of an attorney eligible to file a small estate affidavit for a decedent who received such assistance or care.

A person who otherwise qualifies as an affiant under ORS 114.515(1) is prohibited from filing a small estate affidavit that person would be disqualified from acting as personal representative under ORS 113.095 or if he or she has been

convicted of a felony in any jurisdiction. The persons disqualified under ORS 113.095 include the following:

- An incapacitated or financially incapable person
- A person who is a minor
- A suspended or disbarred lawyer who has not been reinstated
- A person who resigned from the Oregon State Bar while professional misconduct is under investigation or disciplinary proceedings are pending, and who has not been reinstated
- A licensed funeral service practitioner, unless:
    - The decedent was a relative of such practitioner, or
    - The decedent was a partner, employee, or employer in such licensed funeral service practitioner's practice.

ORS 114.515(2).

b. Venue and Timing

File the small estate affidavit with the probate clerk in any county where a person could file a petition for appointment of a personal representative for the decedent's estate. ORS 114.515(1). Appropriate venues include:

- A county where the decedent had a domicile or place of abode at death
- A county where the decedent's property was located at the time of the decedent's death, or at the time the affidavit is filed
- The county where the decedent died
- The county where a personal injury or wrongful death claim could be maintained.

ORS 113.015(1).

The affiant may not file the small estate affidavit until at least 30 days after the decedent's death. ORS 114.515(3).

c. Affidavit Requirements

The required contents of a small estate affidavit are described in ORS 114.525 and reproduced here:

114.525 Content of affidavit; rules. (1) A small estate affidavit must:

(a) Contain a notice in substantially the following form, printed in at least 14-point bold type immediately below the caption on the first page of the small estate affidavit:

NOTICE OF DUTY TO PAY DEBT OR
TURN OVER PROPERTY

To: Any person to whom a copy of this small estate affidavit is mailed or delivered.

Under ORS 114.535, if you owe a debt to the decedent or have personal property of the decedent, you must pay the debt or turn over the property to the affiant. If you refuse, the affiant may ask the court to compel you to pay the debt or turn over the property and you could be responsible for the affiant's attorney fees.

(b) State the name and post-office address of the affiant.

(c) State the authority under which the affiant is filing the small estate affidavit, as provided in ORS 114.515.

(d) State that the small estate affidavit is made under ORS 114.505 to 114.560.

(e) State the name, age, domicile and post-office address and last four digits of the Social Security number of the decedent.

(f) State the date and place of the decedent's death.

(g) Describe and state the fair market value of all property in the estate, valued as provided in ORS 114.510, including a legal description of any real property.

(h) State that no personal representative of the estate has been appointed in Oregon, that there is no pending petition for appointment of a personal representative of the estate in Oregon and that the estate is not currently being administered in Oregon.

(i) State whether the decedent died testate or intestate.

(j) List the heirs of the decedent and the last address of each heir as known to the affiant, and state that a copy of the affidavit showing the date of filing and a copy of the will, if the decedent died testate, will be delivered to each heir or mailed to the heir at the last-known address.

(k) If the decedent died testate, list the devisees of the decedent and the last address of each devisee as known to the affiant and state that a copy of the will and a copy of the affidavit showing the date of filing will be delivered to each devisee or mailed to the devisee at the last-known address.

(L) State the interest in the property described in the affidavit to which each heir or devisee is entitled and the interest, if any, that will escheat.

(m) State that reasonable efforts have been made to ascertain creditors of the estate.

(n) List the claims against the estate that are undisputed by the affiant and that remain unpaid or on account of which the affiant or any other person is entitled to reimbursement from the estate, including the known or estimated amounts of the claims and the names and addresses of the creditors as known to the affiant, and state that a copy of the affidavit showing the date of filing will be delivered to each creditor who has not been paid in full or mailed to the creditor at the last-known address.

(o) Separately list the name and address of each person known to the affiant to assert a claim against the estate that the affiant disputes and the known or estimated amount of the claims disputed by the affiant and state

that a copy of the affidavit showing the date of filing will be delivered to each such person or mailed to the person at the last-known address.

(p)(A) State the mailing address for presentment of claims; and

(B) If the affiant wishes to authorize creditors to present claims by electronic mail or facsimile communication, state the electronic mail address or facsimile number for presentment of claims.

(q) List anticipated administrative expenses and attorney fees, if any.

(r) State that the affiant is not disqualified from acting as an affiant under ORS 114.515 (2).

(s) State that a copy of the affidavit showing the date of filing and a copy of the death record will be mailed or delivered to the Department of Human Services or to the Oregon Health Authority, as prescribed by rule by the department or authority.

(t) State, to the best of the affiant's knowledge, whether the decedent was incarcerated in a correctional facility in this state at any time in the 15 years before the decedent's death and, if the decedent was incarcerated in a correctional facility in this state at any time in the 15 years before the decedent's death, state that a copy of the affidavit showing the date of filing and a copy of the death record will be mailed or delivered to the Department of Corrections.

(u) State that undisputed claims against the estate will be paid as provided in ORS 114.545.

(v) State that claims against the estate not listed in the affidavit or in amounts larger than those listed in the affidavit may be barred unless:

(A) A claim is presented to the affiant within four months of the filing of the affidavit or amended affidavit at the address, electronic mail address or facsimile number stated in the affidavit for presentation of claims; or

(B) A petition for appointment of a personal representative of the estate is filed within the time allowed under ORS 114.555.

(w) If the affidavit lists one or more claims that the affiant disputes, state that any such claim may be barred unless:

(A) A petition for summary determination is filed within four months of the filing of the affidavit; or

(B) A petition for appointment of a personal representative of the estate is filed within the time allowed under ORS 114.555.

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[1973 c.710 §6; 1977 c.239 §3; 1979 c.340 §2; 1989 c.228 §3; 1991 c.191 §3; 1995 c.453 §1; 2001 c.104 §35; 2001 c.620 §2; 2001 c.900 §18a; 2003 c.196 §1; 2003 c.395 §16; 2005 c.22 §93; 2009 c.595 §79; 2013 c.14 §2; 2013 c.366 §60; 2017 c.169 §53; 2019 c.165 §7]"

In addition to paying the filing fee, the affiant must file, as a confidential document, a certified copy of the death certificate. ORS 114.525(2). The affiant also must file the following for a decedent who died testate:

- The decedent's original will, or a certified copy if the original will has been filed in an estate matter in another jurisdiction.
- Proof of the will, as described in ORS 113.055 (witness affidavit or alternative testimony as described in the statute)

ORS 114.525(3).

The Oregon Judicial Department has published a small estate affidavit form with instructions, available at https://www.courts.oregon.gov/forms/Pages/small-estate.aspx

V. Affiant's Duties, Powers, and Liabilities

a. Fiduciary Duties

The affiant is "a fiduciary who is under a general duty to administer, preserve, settle and distribute the estate in accordance with the terms of the will, the law of intestate succession and ORS 114.505 to 114.560 as expeditiously and with as little sacrifice of value as is reasonable under the circumstances." ORS 114.545(1)(a).

An affiant must take control of estate property and the income therefrom. ORS 114.515(1)(c). The affiant may not commingle estate property with the affiant's or anyone else's property. ORS 114.545(1)(b). To carry out these duties, the affiant may open bank or credit union accounts for the estate. ORS 114.545(1)(e).

b. Additional Duties

Many of the affiant's duties are described in ORS 114.545. For example, the affiant must mail or deliver, within 30 days after filing the affidavit, the documents that the affidavit states will be mailed or delivered. ORS 114.545.

The affiant collects estate property (including debts owed to the estate) by presenting a certified copy of the small estate affidavit to the person(s) in possession of the property, or to the transfer agent for any security registered to the decedent. ORS 114.535. In addition to collecting and safeguarding estate property, the affiant must pay expenses and allowed claims (as discussed in section VI of this outline). The affiant must retain records of the estate administration for at least two years (or until the conclusion of any summary review proceeding, whichever is later). ORS 114.545(1)(i). Summary review proceedings are described in section VII.d.

After fulfilling the duties described in ORS 114.505-114.555, the affiant must transfer the estate property to the claiming successor(s).

c. Affiant's Power of Sale

The affiant has the authority to sell or transfer estate property as described in ORS 114.547. Such property is subject to any liens and encumbrances against the decedent or estate. However, estate property is not subject to the heirs' or devisees' creditors, liens, and encumbrances. ORS 114.545(3). Sales or transfers must take place within two years after filing the affidavit. ORS 114.547(1).

ORS 114.547(1)(a) allows an affiant to transfer or sell real property with the agreement of each heir or devisee who would receive an interest in the property. The affiant may convey personal property that is not specifically devised to a person without anyone's consent. ORS 114.547(1)(c). If personal property is specifically devised to an individual, the affiant may sell it with the beneficiary's consent. ORS 114.547(1)(b). However, no consent is needed if the transfer is required to implement abatement of an heir's or devisee's share pursuant to ORS 116.133. ORS 114.547(2). The net proceeds of any sale become part of the estate. ORS 114.547(3).

d. Affiant's Liability

The affiant "may be liable for and is chargeable in the accounts of the affiant with:"

- All estate property that comes into the affiant's possession
- All income from estate property
- Any non-estate property if:
    - The affiant has commingled the property with estate assets, or
    - The affiant received the property under a duty imposed on the affiant by law
- Any loss to the estate due to:
    - Neglect or unreasonable delay in collecting estate assets
    - Neglect in delivering estate property or paying money from the estate
    - Failure to pay taxes
    - Failure to close the estate within a reasonable time
    - Embezzlement or commingling of estate assets
    - Unauthorized self-dealing
    - "Any other negligent or willful act or nonfeasance in the administration of the estate" that causes loss to the estate.

ORS 114.549.

VI. Creditor Claims

a. How Creditors File Claims

Creditors must present claims against the estate within four months after the affiant files the affidavit, or within four months after the affiant files an amended affidavit. ORS 114.540(1)(a).

Claims are presented to the affiant by mail or personal delivery to the address specified in the affidavit, unless the affidavit authorizes creditors to present claims by email or fax. ORS 114.540(1)(d). The creditor must demonstrate that the email or fax was properly addressed and sent, if the affiant denies receiving the claim. ORS 114.540(d)(B). Filing a claim with the probate court is not sufficient presentation of the claim to the affiant. ORS 114.540(1)(c).

b. Form and Contents of Claim

Claims must be presented in the same form as claims in full probate, as described in ORS 115.025. ORS 114.540(e). In other words, a claim must:

- Be in writing
- Describe the nature and amount of the claim (if ascertainable), and
- List the name & address of the claimant and claimant's attorney (if any)

ORS 115.025.

c. Allowance or Disallowance

The affiant must disallow a claim within 60 days after it is presented, or it is considered allowed. ORS 114.540(2)(a). An affiant must mail or deliver a notice of disallowance to the claimant and the claimant's attorney (if any). The notice must state that the claim is disallowed (in whole or in part), describe the reason for the disallowance, and inform the claimant that the claim will be barred unless one of the following occurs:

- The claimant files a petition for summary determination (described in ORS 114.542 and discussed in section VI.d below), or
- Someone files a petition for appointment of a personal representative within four months after the small estate affidavit is filed.

ORS 114.540(2)(a).

d. Summary Determination of Claims

A creditor whose claim is disallowed may file a petition for summary determination of the claim. The petition must be filed within 30 days after the date of mailing or delivery of the notice of disallowance. ORS 114.542(1)(a).

A creditor whose claim is listed as "disputed" in the small affidavit may file a petition for summary determination within four months after the affidavit (or amended affidavit) is filed. ORS 114.542(1)(b).

The court will hold a hearing on the petition and take testimony from any interested person. ORS 114.542(2). Proof of the claim is presented in the same manner as proof of a claim in probate, as described in ORS 115.195. ORS 114.542(3). This requires "some competent, satisfactory evidence other than the testimony of the claimant." ORS 115.195(1). There are separate, more specific rules for proof of a claim for recovery of public assistance or medical assistance. ORS 115.195(2).

The court will "determine the claim in a summary manner" and enter an order allowing or disallowing the claim, in whole or in part. ORS 114.542(4). The order is not appealable. ORS 114.542(5). The creditor may enforce the order only by filing a petition for summary review, as described in ORS 114.550 and discussed in section VII.d below. ORS 114.542(5).

VII. Special Issues

a. Property in a Safe Deposit Box

If a prospective affiant *already knows* that the decedent was the sole lessee of a safe deposit box or otherwise owned the contents of a safe deposit box at the time of death, the affiant may not file the small estate affidavit without first following the procedure described in ORS 114.537(1). The affiant must request an inventory from the lessor. The bank or other lessor will provide a copy of the inventory to the prospective affiant. If the estate is still within the small estate limits, taking the value of the safe deposit box contents into account, the affiant may file the small estate affidavit. The affidavit must include a statement of value of the box contents. ORS 114.537(1).

An affiant who files a small estate affidavit and *later learns* that the decedent was the sole lessee of a safe deposit box or owner of the contents of a box, the affiant must request an inventory from the lessor. ORS 114.537(2). If the value of the estate is still within the small estate limits, taking the contents of the box into account, the affiant must file an amended affidavit as described in ORS 114.515(6). ORS 114.537(2). If the addition of the value of the safe deposit box contents causes the estate value to exceed the small estate limits, the affiant must notify the court and serve a copy of the notice to the lessor. After receiving the notice, the lessor must deliver the safe deposit box contents to the personal representative "or to such other person as may be provided for under the terms of the lease of the box." ORS 114.537(2).

b. Amending a Small Estate Affidavit

The affiant must file an amended small estate affidavit if property was omitted from the previous affidavit or there was a material error or omission in the previous affidavit. ORS 114.515(6)(a). The amended affidavit must state (or restate) all information described in ORS 114.424. The affiant must use the same valuation date in the amended small estate affidavit that was used in the original small estate affidavit. ORS 114.515(6)(b). These rules apply if the value of the estate is still within the small estate limits. ORS 114.515(6)(a).

If the value of the estate exceeds the small estate limits, after the value of omitted property is taken into account, the affiant is not authorized to file an amended small estate affidavit. ORS 114.515(7). Instead, the affiant's powers are terminated, and the affiant must deliver all estate assets in his possession to the personal representative, upon request. ORS 114.515(7). In addition, the affiant must notify the court that the estate is not subject to the small estate affidavit statutes, and must serve a copy of the notice on each recipient of the previous small estate affidavit. ORS 114.515(7).

c. Holder's Refusal to Pay or Deliver Property

If a person fails to transfer or deliver estate property to the affiant, after the affiant has delivered a certified copy of the small estate affidavit, the affiant's remedies are described in ORS 114.535(6).

First, the affiant must make a written demand, by certified mail. The demand must include a statement that if the property is not delivered, paid, or transferred to the affiant, the affiant may file a motion to compel the delivery, payment, or transfer. ORS 114.535(6)(a).

The affiant may file a motion to compel if the person fails to deliver, pay, or transfer the property within 30 days after the demand is served. If the court finds that the respondent did not have an objectively reasonable basis for the failure to deliver, pay or transfer the property, the court may award reasonable attorney fees to the affiant. If the court finds that the affiant did not have an objectively reasonable basis for filing the motion to compel, the court may award reasonable attorney fees to the respondent. ORS 114.535(6)(b)

d. Affiant who Fails to Perform Duties – Summary Review

An affiant or any unpaid claiming successor may file a petition for summary review of the estate administration. The petition must be filed within two years of the date the small estate affidavit is filed. ORS 114.550(1)(a). An additional 60 days are allowed for petition filed to compel the affiant to distribute estate

property. ORS 114.550(1)(b). A creditor is prohibited from filing a petition for summary review if:

- The claim is listed in the small estate affidavit as disputed, the creditor received a copy of the affidavit within 30 days after filing, and the creditor has not filed a petition for summary determination, or
- The affiant disallowed the creditor's claim and the creditor did not file a petition for summary determination of the claim.

ORS 114.550(1)(c) and (d).

The affiant must file an answer within 30 days after the petition for summary review is filed. ORS 114.550(2). The court will hold a hearing and receive testimony from any interested person. ORS 114.550(3).

The court will "review administration of the estate in a summary manner and may order" any of the following:

- The court may order the affiant to
  - Sell estate property and pay creditors
  - Pay creditors from estate property
  - To distribute estate property to the claiming successors.

  ORS 114.550(4)(a).
- The court may order any person who has received estate property to pay part or all of the amounts owed to claiming successors. ORS 114.550(4)(a).
- If the court allows a creditor's claim, the court will order the affiant to pay the claim from estate property, and will order any claiming successor who has received estate property to pay the creditor (up to the amount distributed to that claiming successor). ORS 114.550(4)(b).
- The court may remove the affiant for failure to comply with the small estate affidavit statutes, and may surcharge the affiant for any loss caused by the affiant's failure to comply with those statutes. ORS 114.550(4)(c).
- When removing an affiant, the court may authorize a new affiant to be substituted for the original affiant. ORS 114.550(4)(c).

e. Remedies Recap

ORS 114.560 states that "[t]he exclusive remedy of a person injured by the failure of the affiant or any claiming successor to comply with the requirements of ORS 114.505 to 114.560 is a summary determination under ORS 114.542, a summary review of administration under ORS 114.550, or the filing of a petition for appointment of a personal representative for the estate within the time allowed by ORS 114.555."