



Intestate Succession, Wills, and Community Property

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[3] Chapter 4: Intestate Succession, Wills, and Community Property¹

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¹ Chapter 4 from *Administering Oregon Estates* (OSB Legal Pubs 2023). Available on [BarBooks™](#) or as [PDF eBook with MSWord forms](#) or [print book](#) from the Online Bookstore.

Chapter 4: INTESTATE SUCCESSION, WILLS, AND COMMUNITY PROPERTY

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§ 4.1 INTESTATE SUCCESSION

§ 4.1-1 Property Passing by Intestate Succession

Any part of the “net estate” of a decedent not effectively disposed of by will passes by intestate succession, as provided in ORS 112.025 to 112.055. ORS 112.015. The term *net estate* is defined in ORS 111.005(23) as “the real and personal property of a decedent, except property used for the support of the surviving spouse and children and for the payment of expenses of administration, funeral expenses, claims and taxes.” The portion of a decedent’s net estate that is subject to intestate succession is referred to as the *net intestate estate*. ORS 112.015; *see* ORS 111.005(24).

If a decedent dies intestate as to all or any of the decedent’s property, the inclusion of a disinheritance clause in the decedent’s will does not operate to prevent the distribution of the decedent’s net intestate estate to the decedent’s intestate heirs. In *McClain v. Hardy (In re Estate of Bartels)*, 184 Or App 448, 450, 56 P3d 501 (2002), the decedent specifically provided in her will that, with the exception of a few items of personal property, nothing was to be distributed to her daughter. Instead, the will provided that the decedent’s net estate was to be distributed to the decedent’s husband, who had predeceased the decedent. The Oregon Court of Appeals held that the disinheritance clause in the decedent’s will did not operate to prevent the decedent’s daughter from taking the decedent’s net estate pursuant to the intestate succession rules of ORS 112.025 to 112.055. *McClain*, 184 Or App at 454.

The general rules of intestate succession do not apply in several situations. First, under ORS 112.047(1), a parent is deemed to have predeceased a child for purposes of intestate succession, and therefore does not take an intestate share, if:

(a) The parental rights of the parent with respect to the decedent were terminated and the parent-child relationship between the parent and the decedent was not judicially reestablished.

(b) The person who would be benefited by the forfeiture is a child or sibling of the decedent, the decedent was an adult when the decedent died and:

(A) The parent of the decedent willfully deserted the decedent for the one-year period immediately preceding the date on which the decedent became an adult; or

(B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the one-year period immediately preceding the date on which the decedent became an adult.

(c) The person who would be benefited by the forfeiture is not a child or sibling of the decedent, the decedent was an adult when the decedent died and:

(A) The parent of the decedent willfully deserted the decedent for the three-year period immediately preceding the date on which the decedent became an adult; or

(B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the three-year period immediately preceding the date on which the decedent became an adult.

(d) The person who would be benefited by the forfeiture is a child or sibling of the decedent, the decedent was a minor when the decedent died and:

(A) The parent of the decedent willfully deserted the decedent for the life of the decedent or for the one-year period immediately preceding the date on which the decedent died; or

(B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the life of the decedent or for the one-year period immediately preceding the date on which the decedent died.

(e) The person who would be benefited by the forfeiture is not a child or sibling of the decedent, the decedent was a minor when the decedent died and:

(A) The parent of the decedent willfully deserted the decedent for the life of the decedent or for the three-year period immediately preceding the date on which the decedent died; or

(B) The parent neglected without just and sufficient cause to provide proper care and maintenance for the decedent for the life of the decedent or for the three-year period immediately preceding the date on which the decedent died.

The intestate share of a parent of a decedent may be forfeited under ORS 112.047 only pursuant to a court order entered after the filing of a petition under

ORS 112.049 (petition for forfeiture of a parent's share). ORS 112.047(4). A petition filed under ORS 113.035 (petition for appointment of a personal representative and probate of a will) “may not request the forfeiture of the intestate share of a parent of a decedent under [ORS 112.047].” ORS 112.047(4).

Second, ORS 112.465 prohibits a “slayer” or an “abuser” of a decedent from inheriting from the decedent (*see* § 4.1-3(g)).

Third, under ORS 112.015(2), a decedent

by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed that individual's or member's intestate share.

§ 4.1-2 Rules of Intestate Succession

§ 4.1-2(a) Surviving Spouse

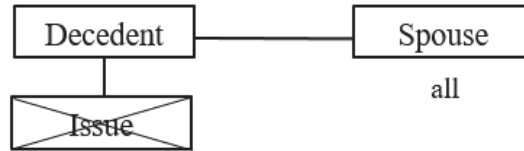
§ 4.1-2(a)(1) *Surviving Spouse* Defined

The 1999 Legislature repealed *former* ORS 112.017, which had defined who was considered the surviving spouse of a decedent for purposes of intestate succession. The former statute underwent various iterations, including defining the term *spouse* to mean any person with whom the decedent cohabited for a period of at least 10 years if certain other conditions were satisfied. *See* Or Laws 1995, ch 235, § 1.

Since 2000, Oregon no longer recognizes the rights of a so-called common-law spouse for purposes of intestate succession. However, a person who is a common-law spouse under the laws of another state may constitute a “spouse” for purposes of ORS 112.025 to 112.045. In addition, pursuant to ORS 106.340(1), a surviving “domestic partner” (as defined by ORS 106.310) will have the same intestate inheritance rights as a surviving spouse.

§ 4.1-2(a)(2) Surviving Spouse's Share, with No Descendant Surviving

If there are no surviving descendants, ORS 112.035 leaves all of the net intestate estate of the decedent to the surviving spouse.

Surviving Spouse; No Surviving Descendant**NOTE**

This diagram and the diagrams in the following sections indicate what part of the intestate estate each heir takes. Heirs with an X through their name are deceased.

ORS 111.005(9) defines the term *descendant* as “a person who is descended from a specific ancestor and includes an adopted child and the adopted child’s descendants.” ORS 111.005(9)(a). The statute further provides that “[w]hen used to refer to persons who take by intestate succession, ‘descendant’ does not include a person who is the descendant of a living descendant.” ORS 111.005(9)(b).

§ 4.1-2(a)(3) Surviving Spouse’s Share, with Descendant Surviving

If the decedent leaves a surviving spouse and one or more descendants, and if all of the decedent’s surviving descendants are also descendants of the surviving spouse, the surviving spouse inherits the entire net intestate estate. ORS 112.025(1).

If the decedent leaves a surviving spouse and descendants, and if one or more of the surviving descendants is not a descendant of the surviving spouse, the surviving spouse inherits one-half of the net intestate estate. ORS 112.025(2).

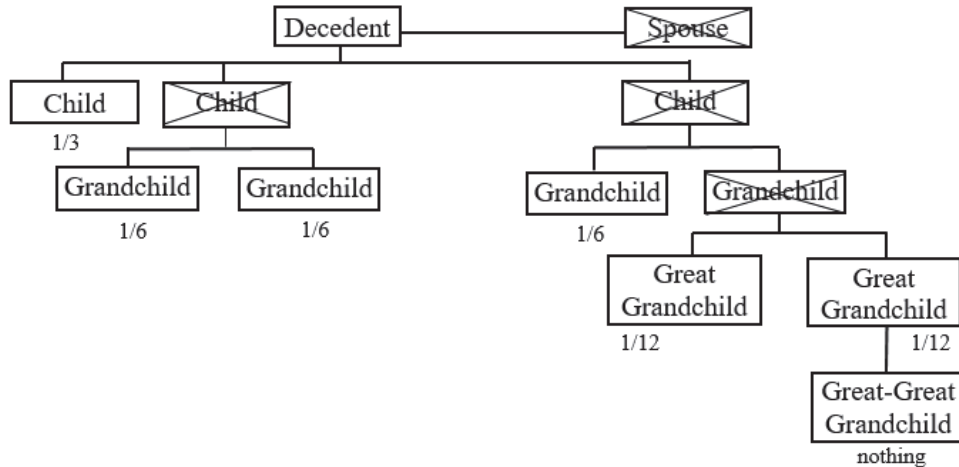
§ 4.1-2(b) Descendant’s Share**§ 4.1-2(b)(1) Descendant’s Share, with Spouse Surviving**

If the decedent’s spouse survives and all of the decedent’s descendants are also descendants of the surviving spouse, the descendants take no part of the net intestate estate. ORS 112.025(1).

If the decedent’s spouse survives, and if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse, then all of the decedent’s descendants take one-half of the net intestate estate. ORS 112.025(2).

§ 4.1-2(b)(2) Descendant’s Share, with No Spouse Surviving

If a spouse does not survive the decedent, the decedent’s descendants take all of the net intestate estate. ORS 112.045(1).

Surviving Descendants; No Surviving Spouse**§ 4.1-2(b)(3) Distribution Method to Descendants**

If the decedent's descendants are all of the same degree of kinship to the decedent, they take equally. But if the descendants are of unequal degree, the descendants of more remote degree take by representation. ORS 112.045(1). See diagram in § 4.1-2(b)(2).

Taking by representation is explained in ORS 112.065 as follows:

“Representation” means the method of determining the passing of the net intestate estate when the distributees are of different generations in relation to the decedent. Representation is accomplished as follows:

- (1) If a distributive share of a wholly or partially intestate estate passes by representation to a person's descendants, the share is divided into as many equal shares as there are:
 - (a) Surviving descendants in the generation nearest to the person that contains one or more surviving descendants; and
 - (b) Deceased descendants, in the generation nearest to the person that contains one or more surviving descendants, who left surviving descendants, if any.
- (2) Each share created for a surviving descendant in the nearest generation is distributed to that descendant. Each share created for a deceased descendant is distributed to the descendants of the deceased descendant by representation as described in this section.

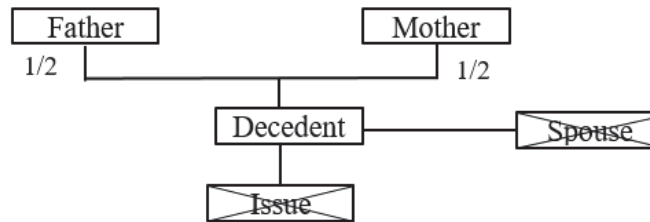
This calculation is similar to, but slightly different than, per stirpes distribution, which divides the estate at every degree of kinship, regardless of whether any

persons survive at that level. As a result, a calculation based on representation can produce a different result than per stirpes.

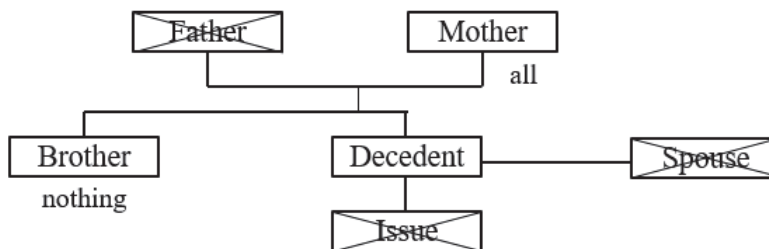
§ 4.1-2(c) Parent's Share

If there is no surviving spouse and no surviving descendants, the decedent's surviving parent or parents take the net intestate estate. ORS 112.045(2).

No Spouse; No Descendants; Two Parents Surviving



No Spouse; No Descendants; One Parent Surviving



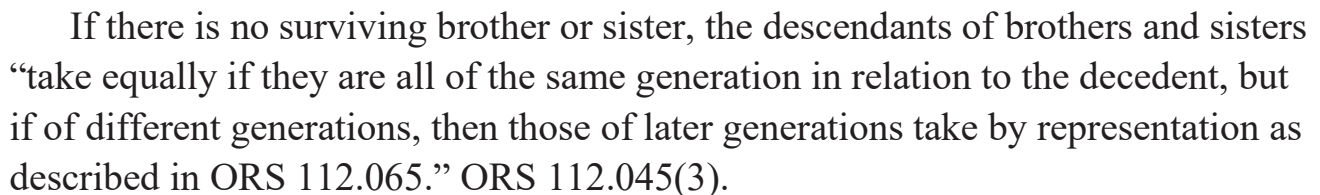
As discussed in § 4.1-1 (property passing by intestate succession), a parent forfeits the parent's share of property passing by intestate succession in several situations, including if the parent "willfully deserted" the decedent child or neglected the child "without just and sufficient cause to provide proper care and maintenance." ORS 112.047(1).

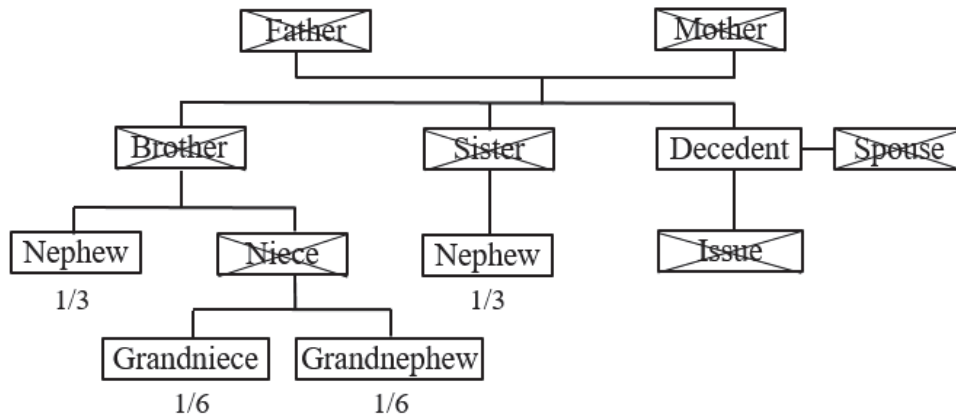
Depending upon whether or not the decedent was an adult when the decedent died, the statute applies if the parent willfully deserted or neglected the decedent for either one or three years preceding the decedent's date of death. If the statute applies, property that would pass by intestate succession under ORS 112.045 from the estate of a decedent to a parent of the decedent "shall pass and be vested as if the parent had predeceased the decedent." ORS 112.047(1).

For purposes of ORS 112.047(1), the court "may disregard incidental visitations, communications and contributions in determining whether a parent willfully deserted the decedent or neglected without just and sufficient cause to provide proper care and maintenance for the decedent." ORS 112.047(2).

The intestate share of a parent of a decedent may be forfeited under the statute only pursuant to a court order entered after the filing of a petition under ORS 112.049. A petition to commence probate filed under ORS 113.035 may not request the forfeiture of the intestate share of a parent of a decedent under ORS 112.047. ORS 112.047(4).

If there are no surviving descendants, spouse, or parent, the decedent's estate passes equally to the decedent's brothers and sisters by right of representation as described in ORS 112.065. ORS 112.045(3).



No Surviving Spouse, Descendant, Parent, Brother, or Sister**§ 4.1-2(e) Grandparents' and Their Descendant's Share**

If there is no surviving descendant, parent, or descendant of a parent, the part of the net intestate estate that does not pass to the surviving spouse passes

equally to the grandparents of the decedent and by representation as described in ORS 112.065 to the descendants of any deceased grandparent of the decedent who left descendants surviving at the time of the decedent's death. If one or more grandparents of the decedent do not survive the decedent, the descendants of each of the deceased grandparents take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as described in ORS 112.065.

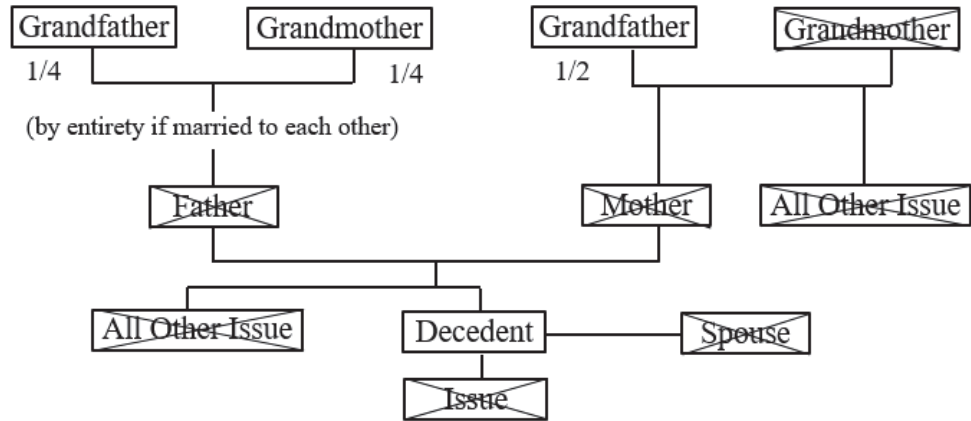
ORS 112.045(4)(a).

If no grandparent survives, the descendants of the deceased grandparents “take equally if they are all of the same generation in relation to the decedent, but if of different generations, then those of later generations take by representation as described in ORS 112.065.” ORS 112.045(4)(b). Thus, if all four grandparents are deceased, leaving two uncles on the paternal side and the children of a deceased aunt on the maternal side, each surviving uncle inherits an undivided one-third share of the net intestate estate, and the descendants of the deceased aunt inherit the other one-third share and take it by representation. See the fourth diagram below.

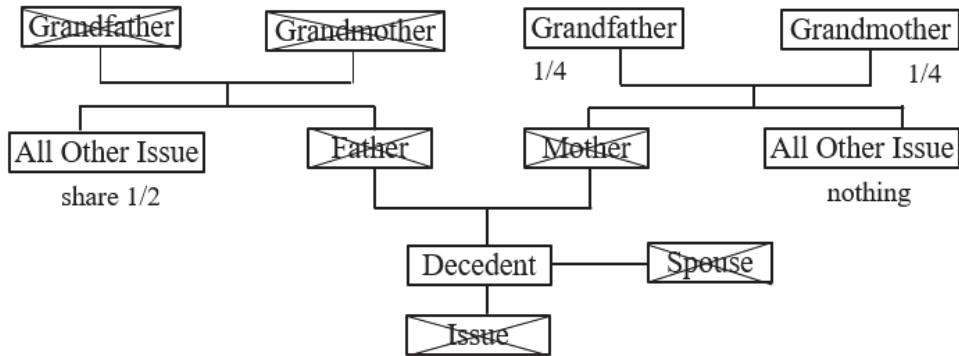
There is no limitation on inheritance by lineal descendants of the intestate's grandparents. ORS 112.045 and ORS 112.055 exclude more remote relatives claiming through great-grandparents.

If, at the time of taking, surviving grandparents are married to each other, they take real property as tenants by the entirety and personal property as joint owners with the right of survivorship. ORS 112.045(5).

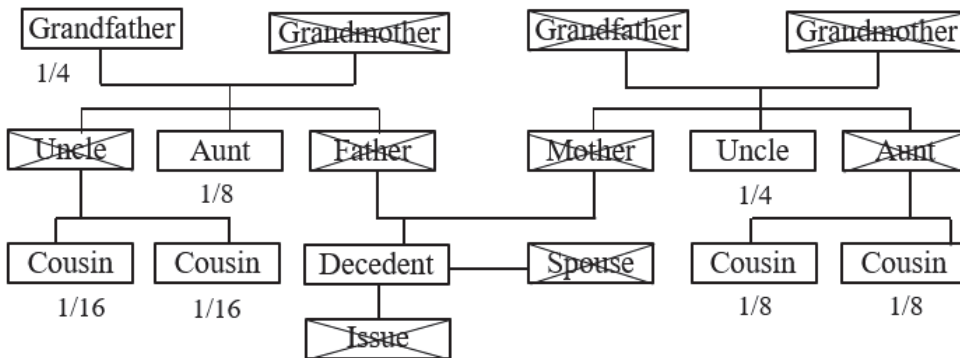
Three Grandparents Survive



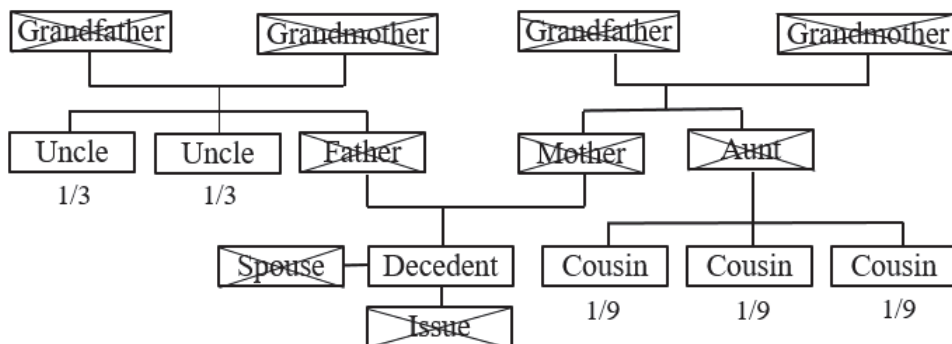
Two Grandparents Survive



One Paternal Grandparent Survives; Maternal Grandparents Do Not Survive



All Grandparents Deceased

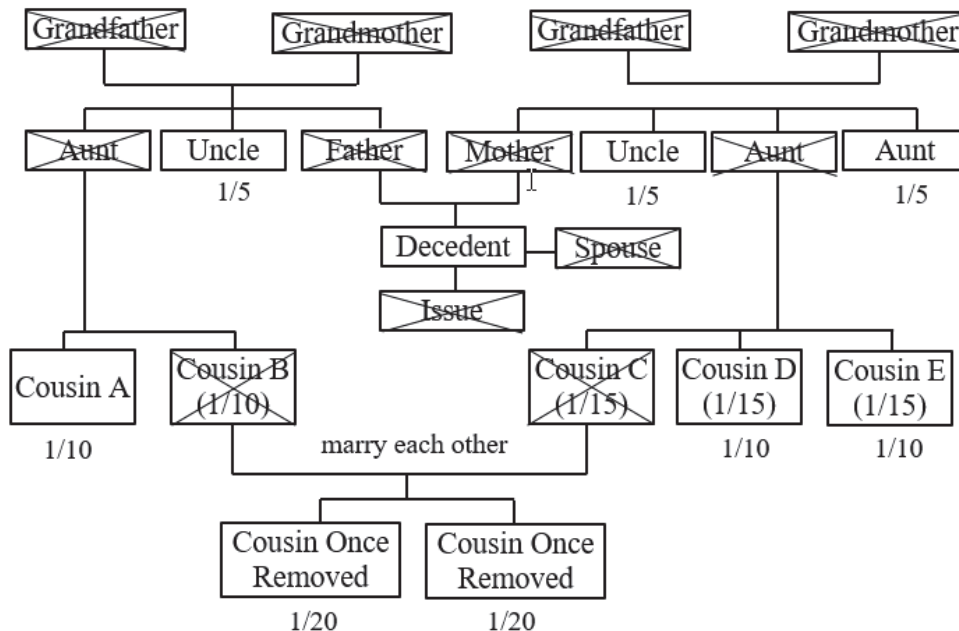


§ 4.1-2(f) Persons Related through Two Lines

“A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.” ORS 112.115.

The clear intent of the statute is that only one intestate share may be inherited. For example, under the provision for inheritance by descendants of grandparents on both the maternal side and the paternal side, the marriage of cousins might otherwise entitle their descendants to inherit from both sets of grandparents.

Inheritance through Two Lines of Relationship



NOTE

The fractions in parentheses indicate the share that would have been received but for the intermarriage of Cousins *B* and *C*. The fractions below each box indicate the share actually received.

The three maternal cousins (Cousins *C*, *D*, and *E*) would have each received a one-fifteenth share, until the two cousins' (*B* and *C*) marriage joined the lines and caused the descendants of that marriage to share the larger (one-tenth) portion coming through Cousin *B*.

Except for the rule stated, the children of the married cousins would have inherited the one-tenth interest of one parent and the one-fifteenth interest of the other parent, thus giving them a larger interest than the children of the other cousins. To carry out the rule, the one-fifteenth interests of Cousins *D* and *E* are

increased to include the one-fifteenth interest (originally to go to Cousin C) that would otherwise be inherited by the children of the cousins' marriage.

PRACTICE TIP

It is crucial for a person to make a will if the person wants to remember a living great-grandparent, a second cousin (a descendant of the great-grandparents), or others who are not otherwise entitled to inherit under the laws of intestate succession.

§ 4.1-2(g) Escheat Estates; Missing Persons

The circumstances under which all or any part of an estate will escheat to the State of Oregon are set forth in ORS 112.055. As an initial matter, an estate will escheat to the State of Oregon “[i]f, after diligent search and inquiry that is appropriate to the circumstances, taking into account the value of the decedent’s estate,” no person takes under ORS 112.025 to 112.045. ORS 112.055(1). If a devisee is not identified or cannot be found, the share of that devisee escheats to the State of Oregon, “and the share must be delivered to the State Treasurer for deposit into the Unclaimed Property and Estates Fund and subject to claims under ORS 116.253.” ORS 112.055(2). See § [5.2-3](#) (escheat).

COMMENT

Presumably, the share of any such devisee will escheat only if applicable antilapse rules fail to give the property to someone else. See § 4.2-7(h) for a discussion of the antilapse statute.

The statute also provides that if a person entitled to take under ORS 112.025 to 112.045 (i.e., a person who is an intestate heir) cannot be identified or found, the intestate heir’s share will escheat to the State of Oregon. Escheat of an intestate heir’s share can thus occur even if other intestate heirs can be found. ORS 112.055(2).

PRACTICE TIP

Because the results from the application of this statute might not conform to the testator’s wishes, the drafter should always specifically state those wishes in the testator’s will. Resorting to the statutory presumptions is not a good practice.

ORS 112.058 provides presumptions regarding missing persons. “After diligent search and inquiry appropriate to the circumstances” (ORS 112.058(1)(b)), the following presumptions apply in a proceeding to determine whether a missing person has died:

(1) A missing person whose death cannot be proved by any other means is presumed to live to 100 years of age. ORS 112.058(1)(b)(A).

(2) A missing person who was exposed to a specific peril when the person became missing is presumed deceased if “it is reasonable to expect from the nature of the peril that proof of death would be impractical.” ORS 112.058(1)(b)(B).

(3) A missing person whose absence is unexplained is presumed deceased if “the character and habits of the person are inconsistent with a voluntary absence for the time that the person has been missing.” ORS 112.058(1)(b)(C).

(4) A missing person known to have been alive who has not been seen or heard from for seven years is presumed deceased if (a) “the person has been absent from the person’s usual residence,” (b) “the absence is unexplained,” (c) “there are other persons who would have been likely to have heard from the missing person during that period were the missing person alive,” and (d) “those other persons have not heard from the missing person.” ORS 112.058(1)(b)(D).

A missing person who is presumed dead under any of the above presumptions is also presumed to have had two children in addition to any known descendants, unless the presumption of death arises by reason of the application of subsection (B) or (C) of ORS 112.058(1)(b) (see presumptions (2) and (3) above). ORS 112.058(2). These two presumed children have rights as intestate takers and, if they cannot be found, their share of the estate is subject to escheat.

If a devisee or an intestate heir is not identified or found, the estate administrator of the State Treasurer may

- (a) [i]ncur expenses for the funeral of the decedent in a manner suitable to the condition in life of the decedent;
- (b) [i]ncur expenses for the protection of the property of the estate;
- (c) [i]ncur expenses searching for a will or for heirs or devisees of the decedent;
- (d) [h]ave access to the property and records of the decedent other than records that are made confidential or privileged by statute;

(e) [w]ith proof of the death of the decedent, have access to all financial records of accounts or safe deposit boxes of the decedent at banks or other financial institutions; and

(f) [s]ell perishable property of the estate.

ORS 113.242(2).

The State Treasurer will also have the same preference that the missing devisee or intestate heir would have had for the purpose of appointment as a personal representative, contesting a will of the decedent, and receiving information concerning the estate. ORS 112.055(3).

For further discussion of escheat, see § [5.2-3](#).

§ 4.1-3 Rules Governing Heirs

§ 4.1-3(a) Time of Determining Relationship; After-Born Heirs

The relationships existing at the time of the decedent's death govern the passing of the net intestate estate. However, ORS 112.077 provides that a posthumous child (one conceived before the death of the decedent and born alive thereafter) inherits as though the child were alive at the time of the decedent's death.

Furthermore, ORS 112.077 includes provisions relating to when a child “conceived from the genetic material of a decedent who died before the transfer of the decedent's genetic material into a person's body” is entitled to an interest in the decedent's estate. ORS 112.077(4). *See LaDu v. Oregon Clinic, P.C.*, 165 Or App 687, 692, 998 P2d 733, *rev den*, 331 Or 244 (2000) (“although the probate code is silent as to the distribution of the estate of a stillborn fetus, it clearly indicates that a stillborn fetus is incapable of *inheriting* by intestate succession”). A posthumous child might be a child of the decedent, or might be the child of an intestate heir.

§ 4.1-3(b) Uniform Simultaneous Death Act

When the disposition of property depends on whether a specified person survives the death of another person, Oregon's Uniform Simultaneous Death Act (USDA), ORS 112.570 to 112.590, creates a presumption that the specified person died before the other person. ORS 112.572. This presumption may, however, be rebutted, and is subject to certain exceptions. ORS 112.572; ORS 112.586.

The presumption under the USDA may be rebutted if “it is established by clear and convincing evidence that the specified person survived the other person by at

least 120 hours.” ORS 112.572. In the absence of contradicting evidence, the time of death set forth in a certified or authenticated death record or government agency report constitutes conclusive proof of the time of death. ORS 112.582(2)(a), (5).

A person whose death is not otherwise established under ORS 112.582, but who has been absent for a continuous period of five years, is presumed to be deceased if the person made no contact with another person during that five-year period, and the person’s absence “cannot be satisfactorily explained after diligent search or inquiry.” ORS 112.582(4). A person presumed deceased under ORS 112.582(4) is presumed to have died at the end of the five-year period unless “it is proved by a preponderance of the evidence that death occurred at a different time.” ORS 112.582(4).

Except as provided in ORS 112.586, ORS 112.580 describes the devolution of property held by two or more co-owners:

(1) If two co-owners hold property with right of survivorship (e.g., as joint tenants or tenants by the entirety, *see* ORS 112.570(1)) and both co-owners die, half of the property passes as if one co-owner had survived the second co-owner by 120 hours or more, and half of the property passes as if the second co-owner had survived the first co-owner by 120 hours or more, “unless it is established by clear and convincing evidence that one of two co-owners survived the other co-owner by at least 120 hours” (in which event the survivorship property passes to the heirs or devisees of the co-owner who survived the other by at least 120 hours). ORS 112.580(1).

(2) If more than two co-owners hold the property and “it is not established by clear and convincing evidence that at least one of the owners survived the others by at least 120 hours, the property passes in the proportion that one bears to the whole number of co-owners.” ORS 112.580(2).

However, the survivorship rules of ORS 112.570 to 112.590 do not apply if

(1) a “governing instrument” contains a simultaneous-death clause or expressly provides that a person is required or not required to survive the death of another person, ORS 112.586(2)–(4); or

(2) application of the statute would result in (a) the escheat of an intestate estate, (b) the possible invalidity of an interest under the rule against perpetuities, or (c) there are multiple governing instruments and the application of the

survivorship rules “would result in an unintended failure or duplication of a disposition,” ORS 112.586(1), (5)–(6).

NOTE

The term *governing instrument* means (1) a deed; (2) a will; (3) a transfer on death deed under ORS 93.948 to 93.979 (*see* § [1.5-9](#)); (4) a trust; (5) an insurance or annuity policy with a payable-on-death designation; (6) a pension, profit-sharing, retirement, or similar benefit plan; (7) an instrument creating or exercising a power of appointment or a power of attorney; or (8) any other similar instrument. ORS 112.570(2).

Unless a payor or other third party has received written notice of a claim under ORS 112.588(2), “the payor or other third party is not liable for making a payment to, transferring property to, or conferring any other benefit on a person who appears to be entitled to the payment, property or benefit under a good faith reading of a governing instrument.” ORS 112.588(1). However, the third party is liable for a payment, transfer, or other benefit conveyed after receiving such a notice. ORS 112.588(1).

ORS 112.588(2) establishes procedures for providing a payor or other third party with written notice of a claim that a person is not entitled to receive payment, property, or other benefit by reason of the survivorship rules set forth in ORS 112.570 to 112.590. On receipt of such notice, the payor or other third party may deposit the disputed money or property with any court conducting probate proceedings for one of the decedents’ estates or, if probate proceedings have not been commenced, with the probate court in the county in which one of the decedents resided. ORS 112.588(3).

If a person who has no notice of a claim under ORS 112.588 purchases property for value or receives payment, property, or other benefit in full or partial satisfaction of a legally enforceable obligation, the person is not liable to another person with a claim to the payment, property, or benefit by reason of the operation of the survivorship rules set forth in ORS 112.570 to 112.590. ORS 112.590(1). Such a person need not return the payment, property, or other benefit. ORS 112.590(1).

A person who receives payment, property, or other benefit to which the person is not entitled by reason of the survivorship rules must return the payment, property, or other benefit if

(1) the person was aware of a claim to the payment, property, or other benefit under the survivorship rules at the time the purchase, payment, or delivery was made; or

(2) the person received the payment, property, or other benefit “for no value.”

ORS 112.590(2).

A person who receives “any payment, property or other benefit to which the person is not entitled because any part of ORS 112.570 to 112.590 is preempted by federal law must return the payment, property or other benefit if the person received the payment, property or other benefit for no value.” ORS 112.590(3).

Any person who is required to, but who fails to, return any payment, property, or other benefit under ORS 112.590 is personally liable to a person with a right to the property under the survivorship rules established under ORS 112.570 to 112.590, or with a right to the property by reason of federal preemption of all or part of the survivorship rules. ORS 112.590(4).

§ 4.1-3(c) Persons of the Half-Blood

“Persons of the half blood inherit the same share that they would inherit if they were of the whole blood.” ORS 112.095.

§ 4.1-3(d) Adopted Persons

The law relating to the status of adopted persons provides that inheritance rights are derived from the adoptive parents, rather than from the biological parents. These inheritance rights are set forth explicitly in ORS 112.175 to 112.195.

Under ORS 112.175(1),

[a]n adopted person, the descendants and kindred of the adopted person shall take by intestate succession from the adoptive parents, their descendants and kindred, and the adoptive parents, their descendants and kindred shall take by intestate succession from the adopted person, the descendants and kindred of the adopted person, as though the adopted person were the biological child of the adoptive parents.

Furthermore,

[a]n adopted person shall cease to be treated as the child of any person other than the adopted person's adoptive parents for all purposes of intestate succession except in the following circumstances:

(a) If a person is adopted by a stepparent or a domestic partner of a parent in a domestic partnership registered under ORS 106.300 to 106.340 or under a similar law in another state, the adopted person shall continue also to be treated, for all purposes of intestate succession, as the child of the parent who is the spouse of, or other domestic partner in the domestic partnership with, the adoptive parent.

(b) If a parent of a person dies, and the other parent of the person marries or enters into a domestic partnership [as just described], and the person is adopted by a stepparent or the other domestic partner, the adopted person shall continue also to be treated, for all purposes of intestate succession, as the child of the deceased parent.

ORS 112.175(2).

In the case of sequential adoptions, ORS 112.185 provides that, for all purposes of intestate succession,

a person who has been adopted more than once shall be treated as the child of the parents who have most recently adopted the person and, except as otherwise provided in this section, shall cease to be treated as the child of the previous adoptive parents. The person shall continue also to be treated as the child of a previous parent or previous adoptive parent other than the most recent adoptive parents only to the extent provided in ORS 112.175(2), and for the purpose of applying that subsection with reference to a previous adoptive parent, "parent" in that subsection means the previous adoptive parent.

Unless a contrary intent is established by the instrument, all references in a will, deed, trust instrument, or other instrument to "children, issue, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, grandparents, brothers, nephews or other relatives" of a particular person includes any person who would be treated as so related for all purposes of intestate succession. ORS 112.195. However, in order for an adopted person to be so included, that person must have been adopted as a minor or after having been a member of the household of the adoptive parent while a minor. ORS 112.195.

§ 4.1-3(e) Succession When Parents Not Married

Pursuant to ORS 112.105, relationships described in ORS 109.060 (legal status and legal relationships when parents not married) govern for all purposes of

intestate succession, except as otherwise provided by law regarding adoption. However, in order for this provision to be given effect, (1) the parentage of the child must have been established under ORS 109.065 during the child's lifetime; and (2) "[t]he parent must have acknowledged being the parent of the child in writing, signed by the parent during the lifetime of the child." ORS 112.105. Pursuant to ORS 112.105, the right of inheritance extends to and from children born out of wedlock, as described in ORS 109.060, which gives such children the same legal status as those born in wedlock.

Pursuant to ORS 109.065(1), parentage may be established between a person and a child by:

- (a) [t]he person having given birth to the child;
- (b) [a]n un rebutted presumption of parentage under ORS 109.070;
- (c) [a]n adjudication of the person's maternity or paternity;
- (d) [a]doption of the child by the person;
- (e) [a]n effective acknowledgement of paternity by the man under ORS 109.070 or pursuant to the laws of another state, unless the acknowledgement has been rescinded or successfully challenged;
- (f) [e]stablishment of paternity by an administrative order issued pursuant to ORS 25.501 to 25.556;
- (g) [f]iliation proceedings; or
- (h) [p]arentage being established or declared by another provision of law.

Furthermore, "[a] person is the mother of a child to whom the person gives birth." ORS 109.065(2).

§ 4.1-3(f) Advancements

If a person dies intestate as to all or part of the person's estate, a lifetime transfer by the decedent to an heir is treated as an advancement against the heir's share of the estate, if (1) the decedent declared, in writing, that the transfer was an advancement; or (2) the heir acknowledged, in writing, that the transfer was an advancement. ORS 112.135(1)(a).

The property advanced is to be valued as of the time that the heir "came into possession or enjoyment of the property," or the date of the decedent's death, whichever occurs first, "unless otherwise directed in the decedent's writing." ORS 112.135(1)(b).

Except as provided in ORS 112.385 (nonademption of specific devises), property that a testator gives during the testator's lifetime to a devisee "is treated as an advancement of the devisee's share in whole or in part" if

- (1) "[t]he will provides for deduction of the gift";
- (2) "[t]he testator declared in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise"; or
- (3) "[t]he devisee acknowledges in writing, before or after the testator's death, that the gift was made in satisfaction of the devise or that its value was to be deducted from the value of the devise."

ORS 112.135(2)(a).

For purposes of applying the gift against the devisee's share of the testate estate, "the property advanced must be valued as of the time the devisee came into possession or enjoyment of the property or as of the time of the testator's death, whichever occurs first, unless otherwise directed in the testator's will or a writing described in [ORS 112.135(2)(a)(B)]." ORS 112.135(2)(b).

"Property not subject to probate administration, the transfer of which is intended by the decedent to take effect on death," is treated as "an advancement against the heir's share of the estate or the devisee's devise under the will if declared in writing by the decedent, or acknowledged in writing by the heir or devisee, to be an advancement." ORS 112.135(3)(a). Examples of such transfers "include but are not limited to beneficiary designation, right of survivorship and transfer on death deed or transfer on death designation." ORS 112.135(3)(a). The property transferred under this provision "must be valued as of the time of the decedent's death, unless otherwise directed in the testator's will or in a writing by the decedent." ORS 112.135(3)(b).

If the value of the advancement exceeds the value of the heir's or devisee's share of the estate, the heir or devisee is not required to refund the difference to the estate. ORS 112.145(1).

If the value of the advancement is less than the value of the heir's or devisee's share of the estate, the heir or devisee is entitled to receive "such additional amount as will give the heir or devisee the heir's or devisee's share of the estate." ORS 112.145(1).

If the recipient of the property advanced fails to survive the decedent, the amount of the advancement is “taken into account in computing the share of the descendants of the recipient, whether or not the descendants take by representation.” ORS 112.155.

Although the property advanced is not a part of the estate, the advancement is added to the value of the estate “for the purpose of determining the shares of the heirs or devisees.” ORS 112.145(2). That sum is then “divided among the heirs or devisees according to the laws of intestate succession or the testator’s will and the advancement then deducted from the share of the heir or devisee to whom the advancement was made.” ORS 112.145(2).

§ 4.1-3(g) Effect of Homicide or Abuse on Inheritance

ORS 112.465 prohibits a “slayer” or an “abuser” of a decedent from inheriting from the decedent as follows:

(1) Property that would have passed by reason of the death of a decedent to a person who was a slayer or an abuser of the decedent, whether by intestate succession, by will, by transfer on death deed or by trust, or otherwise, passes on death and vests as if the slayer or abuser had predeceased the decedent.

(2) Property that would have passed by reason of the death of an heir or devisee of a decedent to a person who was the slayer or abuser of the decedent, whether by intestate succession, by will, by transfer on death deed or by trust, passes and vests as if the slayer or abuser had predeceased the decedent unless the heir or devisee specifically provides otherwise in a will or other instrument executed after the death of the decedent.

For purposes of ORS 112.455 to 112.555, *abuser* means “a person who is convicted of a felony by reason of conduct that constitutes physical abuse as described in ORS 124.105 [physical abuse subject to an action] or financial abuse as described in ORS 124.110 [financial abuse subject to an action].” ORS 112.455(1). A *slayer* is person who, “[w]ith felonious intent, takes or procures the taking of a person’s life”; “[i]s found guilty except for insanity of taking a person’s life”; or “[i]s found responsible except for insanity of taking a person’s life.” ORS 112.555(3).

Although neither a slayer nor an abuser may receive the slayer’s or abuser’s intestate share from the person who was slain or abused, the slayer’s or abuser’s descendants, or other persons taking through the slayer or abuser, take that share as if the slayer or abuser had predeceased the decedent.

§ 4.2 WILLS

§ 4.2-1 Who May Make a Will

Any person who is 18 years of age or older or who has been lawfully married, or who has been emancipated in accordance with ORS 419B.550 to 419B.558, and who is of sound mind, may make a will. ORS 112.225.

Marriage is “a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.” ORS 106.010.

NOTE

The Oregon Family Fairness Act (ORS 106.300–106.340) recognizes “domestic partnerships” for same-sex couples, which gives same-sex couples the same rights, benefits, and obligations enjoyed by married couples under state law. *See* ORS 106.340. *But see Geiger v. Kitzhaber*, 994 F Supp 2d 1128, 1144 (D Or 2014) (although the “state created domestic partnerships to ‘ensur[e] more equal treatment of gays and lesbians and their families’” (*see* ORS 106.305(6)), the state “also recognized domestic partnerships are not equal to civil marriage” (*see* ORS 106.305(7)), *stay den*, 2014 US App LEXIS 11687, 2014 WL 2566885 (9th Cir), *appeal dismissed*, 2014 US App LEXIS 24837, 2014 WL 8628611 (9th Cir 2014), *cert den*, 575 US 963 (2015). In *Geiger*, 994 F Supp 2d at 1133, the United States District Court for the District of Oregon ruled that “[b]ecause Oregon’s marriage laws discriminate on the basis of sexual orientation without a rational relationship to any legitimate government interest, the laws violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”

As required by ORS 112.225, a person must be of “sound mind” to make a will. The requirements for testamentary capacity are well settled and have been stated by the Oregon Court of Appeals in *Golden v. Stephan*, 5 Or App 547, 550, 485 P2d 1108 (1971), as follows:

- (1) the person “must be able to understand the nature of the act in which [the person] is engaged,” that is, the execution of a will;
- (2) the person must “know the nature and extent of [the person’s] property”;

- (3) the person “must know, without prompting, the claims, if any, of those who are, should or might be, the natural objects of the [person’s] bounty”; and
- (4) the person must “be cognizant of the scope and reach of the provisions of the document.”

Whether a testator has testamentary capacity is determined at the precise moment that the testator executes a will. *See, e.g., Perry v. Adams*, 112 Or App 77, 81, 827 P2d 930 (1992); *Hurd v. Mosby (In re Estate of Unger)*, 47 Or App 951, 955, 615 P2d 1115 (1980).

A will is not executed until all the requirements of ORS 112.235, which are discussed in § 4.2-3(a), have been satisfied. *Perry*, 112 Or App at 81. In other words, a will is not executed when the testator signs the will unless that act is done in the presence of witnesses, and the witnesses then sign the will before the testator loses testamentary capacity. *Perry*, 112 Or App at 81–82. But see ORS 112.238 for an exception for a will that is not executed in compliance with ORS 112.235. *See* § 4.2-2(a) (testator’s intention), § [4.2-3\(a\)](#) (formalities).

“The testimony of the subscribing witnesses, aided by the presumption of competency which accompanies a will that has been duly executed, carries great weight in the determination of [a] decedent’s testamentary capacity.” *Hurd*, 47 Or App at 955. *See also Bigej v. Boyer (In re Estate of Olsen)*, 108 Or App 663, 669, 817 P2d 760 (1991), *rev den*, 313 Or 74 (1992).

PRACTICE TIP

In light of the above rule, the lawyer should take care in choosing subscribing witnesses when the capacity of the testator might be questioned later. In *Bigej*, 108 Or App at 669, the Oregon Court of Appeals discounted the testimony of the subscribing witness (the lawyer who drafted the will), because the lawyer had only minimal contact with the testator and was not familiar with the testator’s mental or medical condition. Similarly, in *Hurd*, 47 Or App at 955–58, the Oregon Court of Appeals discounted the testimony of the subscribing witnesses (the lawyer who drafted the will and his secretary), and relied on the testimony of medical experts who had extended contact with the testator before and after she signed the will.

PRACTICE TIP

When questions exist regarding a person's testamentary capacity, the lawyer preparing the will should, before the execution of the will, consult with any family members, friends, and healthcare professionals who have had an opportunity to interact with and to observe the person on a continuing basis regarding the person's testamentary capacity. It may also be advisable to videotape the execution of the will or the testimony of the subscribing witnesses, but that technique could backfire. Another way to prepare for a potential will contest is to obtain affidavits of long-time friends of the decedent who have no stake in the inheritance, and who can attest to the testator's mental acuity on or near the day of signing.

§ 4.2-2 Effect of Testator's Intent and Local Law

§ 4.2-2(a) Intention of Testator Expressed in Will as Controlling

The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions. ORS 112.227. The rules of construction expressed in ORS 112.227, ORS 112.230 (*see* § 4.2-2(b)), and ORS 112.410 (effect of a general disposition or residuary clause on a testator's power of appointment) apply unless a contrary intention is indicated by the will. ORS 112.227. If a provision in a will disposing of property is ambiguous, the courts may interpret the will so as to resolve the ambiguity. *McClain v. Hardy (In re Estate of Bartels)*, 184 Or App 448, 453, 56 P3d 501 (2002). Conversely, if a provision in a will disposing of property is unambiguous, the inclusion of a dispute-resolution provision in the will that gives the personal representative the authority to resolve disputes arising out of the distribution of the estate does not trump the court's authority to enforce the unambiguous intent of the testator. *Roley v. Sammons*, 215 Or App 401, 408, 170 P3d 1067, *rev den*, 343 Or 690 (2007).

ORS 112.238 establishes a procedure allowing the court to admit for probate a writing that does not comply with the formalities of a validly executed will. *See* § 4.2-3(a) (formalities). The proponent of the writing must establish "by clear and convincing evidence that the decedent intended the writing to constitute: (a) [t]he decedent's will; (b) [a] partial or complete revocation of the decedent's will; or (c) [a]n addition to or an alteration of the decedent's will." ORS 112.238(1).

§ 4.2-2(b) Local Law of State Selected by Testator Controlling unless against Public Policy

The meaning and legal effect of a disposition in a will are determined by the local law of the state selected by the testator in the will, unless the application of that law is contrary to Oregon’s public policy. ORS 112.230. The construction of a will is governed by the law in effect on the date of its execution, unless the will expresses a contrary intent. Jeffrey A. Schoenblum, 4 *Page on Wills* § 30.27, LEXIS (database updated May 2023).

§ 4.2-2(c) Uniform International Wills Act

The Uniform International Wills Act (UIWA), which has been codified in ORS 112.232, prescribes the requirements that must be met for a will to qualify as an international will in terms of format and formalities of execution. The validity of an international will that complies with the requirements of the UIWA is not affected by the location of assets, or by the nationality, domicile, or residence of the testator. ORS 112.232(2)(a). However, a statutory certificate must be attached to the will, and the certificate must be signed by an “authorized person” (which includes certain members of the diplomatic and consular service of the United States, as well as Oregon lawyers). ORS 112.232(1)(b), (5), (9).

A will executed in compliance with the UIWA is deemed to have complied with the formalities of ORS 112.235. ORS 112.235(3). A will is lawfully executed if it complies with the UIWA. ORS 112.255(2).

§ 4.2-3 Execution of a Will

§ 4.2-3(a) Formalities, Signing, and Attestation

Under ORS 112.235, “[e]xcept as provided in ORS 112.238” (a procedure allowing the court to admit for probate a writing that does not comply with the formalities of a validly executed will), a will must be in writing and must be executed in accordance with the formalities described below. Note that a “writing” under this section “does not include an electronic record, document or image.” ORS 112.235(4).

Those formalities include the following. First, “[t]he testator, in the presence of each of the witnesses,” must either (1) “[s]ign the will,” (2) “[d]irect one of the witnesses or some other person to sign the name of the testator and the signer’s own name on the will,” or (3) “[a]cknowledge the signature previously made on the will by the testator or at the testator’s direction.” ORS 112.235(1)(a)(A)–(C).

Second, at least two witnesses must each

- (1) “[s]ee the testator sign the will”;
- (2) “[h]ear the testator acknowledge the signature on the will”; or
- (3) “[h]ear or observe the testator direct some other person to sign the name of the testator.”

ORS 112.235(1)(b)(A)(i)–(iii).

Third, at least two witnesses must each “[a]ttest the will by signing the witness’ name to the will within a reasonable time before the testator’s death.” ORS 112.235(1)(b)(B).

Finally, the “signature by a witness on an affidavit executed contemporaneously with execution of a will is considered a signature by the witness on the will in compliance with [ORS 112.235(1)(b)(A)(iii)] if necessary to prove the will was duly executed in compliance with this section.” ORS 112.235(2).

In *Kirkeby v. Covenant House*, 157 Or App 309, 313, 970 P2d 241 (1998), *rev den*, 328 Or 365 (1999), the decedent acknowledged her previously made signature on her will to a witness during a telephone conversation. After the telephone conversation, a representative of the decedent delivered the decedent’s will to the witnesses to sign. The Oregon Court of Appeals held that the decedent’s telephonic acknowledgment of her signature did not satisfy the “in the presence” requirement, because the decedent’s will was not before the witnesses at the time of the acknowledgment. *Kirkeby*, 157 Or App at 319–20. The court reasoned that without having the decedent’s will in front of them, the witnesses could not have known whether the instrument that was later presented to them was, in fact, the instrument that contained the signature that the decedent had previously acknowledged, or whether the decedent had actually signed the instrument at the time she stated in her acknowledgment. *Kirkeby*, 157 Or App at 320.

In *Perry v. Adams*, 112 Or App 77, 81, 827 P2d 930 (1992), the Oregon Court of Appeals held that the execution of a will is not complete until all of the formalities of execution set forth in ORS 112.235 are satisfied. Thus, testamentary capacity may not be determined when a testator signs a will unless that act is done in the presence of witnesses, and the witnesses then attest the will. *Perry*, 112 Or App at 82. It therefore follows that, although ORS 112.235 does not require

witnesses to sign a will at the time and place it is signed by the testator, witnesses must sign the will before the testator loses testamentary capacity or dies. *See Perry*, 112 Or App at 82; *Rogers v. Rogers*, 71 Or App 133, 136, 691 P2d 114 (1984), *rev den*, 298 Or 704 (1985) (the requirements of execution were not satisfied when a witness attested the will 11 months after the testator died).

Under ORS 112.238, a writing not executed in compliance with ORS 112.235 can be treated as if it had been executed in compliance with ORS 112.235 “if the proponent of the writing establishes by clear and convincing evidence that the decedent intended the writing to constitute: (a) [t]he decedent’s will; (b) [a] partial or complete revocation of the decedent’s will; or (c) [a]n addition to or an alteration of the decedent’s will.” ORS 112.238(1).

Such a writing may be filed with the court for administration as the decedent’s will pursuant to ORS 113.035 if the proponent of the writing gives notice of the filing of the petition under ORS 113.035 to those persons identified in that section. Persons receiving notice under this subsection have 20 days after the notice was given to file written objections to the petition. The court may make a determination regarding the decedent’s intent after a hearing or on the basis of affidavits. ORS 112.238(2)

The proponent of such a writing

may file a petition with the court to establish the decedent’s intent that the writing was to be a partial or complete revocation of the decedent’s will or an addition to or an alteration of the decedent’s will. The proponent shall give notice of the filing to any personal representative appointed by the court, the devisees named in any will admitted to probate and those persons identified in ORS 113.035(5) [petition for appointment of a personal representative and probate of a will]. Persons receiving notice under this subsection shall have 20 days after the notice was given to file written objections to the petition.

ORS 112.238(3).

“The court may make a determination regarding the decedent’s intent after a hearing or on the basis of affidavits.” ORS 112.238(3).

If the court determines that clear and convincing evidence exists showing that a writing described in [ORS 112.238(1)] was intended by the decedent to accomplish one of the purposes set forth in [ORS 112.238(1)], the court shall:

(A) Prepare written findings of fact in support of the determination; and

(B) Enter a limited judgment that admits the writing for probate as the decedent's will or otherwise acknowledges the validity and intent of the writing.

ORS 112.238(4).

Such a determination “does not preclude the filing of a will contest under ORS 113.075, except that the will may not be contested on the grounds that the will was not executed in compliance with ORS 112.235.” ORS 112.238(4)(b). *See* [chapter 15](#) (litigation).

§ 4.2-3(b) Witness as a Beneficiary

An interested person may serve as an attesting witness without invalidating the will. An interested witness is one to whom a personal and beneficial interest in the estate is devised. ORS 112.245.

§ 4.2-3(c) Validity of Execution of a Will

A will is lawfully executed if it is:

- (1) in writing;
- (2) signed by, or at the direction of, the testator; and
- (3) otherwise executed in accordance with the law of (a) this state at the time of execution or at the time of the testator's death, (b) the domicile of the testator at the time of execution or at the time of the testator's death, or (c) the place of execution at the time of execution. ORS 112.255(1).

Furthermore, a will is lawfully executed if it complies with the Uniform International Wills Act (UIWA). ORS 112.255(2). *See* § 4.2-2(c) (UIWA).

The 2015 Legislature added the following provisions to ORS 112.255:

(3) A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

(4) A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

§ 4.2-4 Testamentary Additions to Trusts

Under Oregon's Uniform Testamentary Additions to Trusts Act (ORS 112.265), a devise may be made by a will to a trustee of a trust if (1) the trust “is

established or will be established by the testator, or by the testator and some other person or persons, or by some other person or persons”; (2) the trust “is identified in the testator’s will”; and (3) the terms of the trust “are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator’s will, or in the valid last will of a person who has predeceased the testator.” ORS 112.265(1).

The trust may be funded during the testator’s lifetime or upon the testator’s death by the testator’s devise to the trustee. ORS 112.265(2). Thus, the trust need not be funded during the testator’s lifetime and may acquire assets solely from a testamentary devise. Unless the testator’s will provides otherwise, all property devised to such a trust will be administered and disposed of in accordance with the provisions of the trust instrument or will setting forth the terms of the trust, including any amendments made to it before or after the death of the testator. ORS 112.265(4)(b).

§ 4.2-5 Contracts to Make a Will

Pursuant to ORS 112.270(1), “[a] contract to make a will or devise, or not to revoke a will or devise, or to die intestate, executed after January 1, 1974,” may be established only by

- (1) “[p]rovisions of a will stating material provisions of the contract”;
- (2) “[a]n express reference in a will to a contract and extrinsic evidence proving the terms of the contract”; or
- (3) “[a] writing signed by the decedent evidencing the contract.”

“The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.” ORS 112.270(2).

ORS 112.270 applies only to wills executed after January 1, 1974. ORS 112.270(1). For wills executed before 1974, no specific guidelines establish what is required to show the existence of such a contract; however, it has been held that when a person seeks specific performance of a contract to make mutual wills, and the contract was entered into before the effective date of ORS 112.270, the person seeking specific performance must show that it is much more probable than not that the parties to the alleged contract manifested the essential mutual assent. *See Willbanks v. Goodwin*, 300 Or 181, 202, 709 P2d 213 (1985); *DeLaMater v. DeLaMater*, 69 Or App 40, 44, 688 P2d 1350 (1984).

In *Estate of Krueger v. Ropp*, 282 Or 473, 478 & n 2, 579 P2d 847 (1978), the court mentioned ORS 112.270, but did not apply the statute in determining whether an oral contract existed. The court stated that an “oral contract to devise or bequeath property must be proved by clear, concise, and convincing evidence.” *Estate of Krueger*, 282 Or at 478. In *Lawrence v. Ladd*, 280 Or 181, 188 n 11, 570 P2d 638 (1977), the court noted the applicability of ORS 112.270 but, because the statute was not raised as a bar by the defendant, the court did not apply it. See *Richardson v. Richardson*, 58 Or App 338, 648 P2d 377, *rev den*, 293 Or 634 (1982).

The procedures for contesting a will are set forth in ORS 113.075. See § [15.3-1\(a\)](#) to § 15.3-2(g) (will contests). If the will contest involves a contract to make a will, the action must be commenced by the filing of a separate action, outside the probate court, to enable either party to demand a jury trial. ORS 113.075(2).

A petition for the probate of a will must name any person known to the petitioner as having a potential interest in the estate that arises out of a contract to make a will or devise. ORS 113.035(8)(c). Furthermore, the personal representative must deliver to any such person a copy of the information required to be given to the devisees and heirs of the estate. ORS 113.145(1). If, during the administration of the estate, the personal representative receives actual knowledge that a person has a potential interest in that estate, based on a contract to make a will or devise, the personal representative must make reasonable efforts to ascertain the name and address of the person and notify that person of the probate proceedings. ORS 113.145(5). See § [2.5](#) (notice).

§ 4.2-5(a) Contract Law Governs

In general, contracts to make a will or not to revoke a will, or to die intestate, are governed by the principles of contract law, and not by the principles of probate law. *Florey v. Meeker*, 194 Or 257, 280, 240 P2d 1177 (1952); see ORS 112.270. Therefore, once a contract has been established, the law of contracts governs its interpretation and application. *Florey*, 194 Or at 280–81. See [Contract Law in Oregon](#) (Oregon CLE 2003 & Supp 2008) (discussing principles of contract law). Thus, a contract to make a will, or not to revoke a will, will be binding if the parties are competent to contract with one another, and if there is no fraud, undue influence, duress, or mistake. *In re Marriage of Ellinwood*, 59 Or App 536, 539, 651 P2d 190 (1982), *rev den*, 294 Or 460 (1983). In addition, the fairness of the

contract will usually be determined as of the date of the contract. *Ellinwood*, 59 Or App at 539.

An action for breach of a contract to make a will may be brought during the life of the promisor. *Dickie v. Dickie*, 95 Or App 310, 314 & n 5, 769 P2d 225, *rev den*, 308 Or 33 (1989) (“when the promisor in a contract to devise specified real property sells it instead, the promisee may sue for breach of contract”).

§ 4.2-5(b) Statute of Limitations

As stated in § 4.2-5(a), the principles of contract law govern the interpretation and application of a contract to make a will or not to revoke a will, or to die intestate. *See* ORS 112.270. The statute of limitations for contracts is generally six years. *See* ORS 12.080. In the past, the statute of limitations did not begin to run until the death of the promisor-testator. *Catching v. Lashway*, 84 Or App 602, 606, 735 P2d 13 (1987); *Schaad v. Lorenz (In re Estate of Kottmeier)*, 69 Or App 16, 26, 688 P2d 1342, *rev den*, 298 Or 37 (1984). The reasoning for the rule was that the will is an ambulatory document, and therefore, the promisor-testator is able to perform the contract until the promisor-testator’s death. *Schomp v. Brown*, 215 Or 714, 723, 335 P2d 847, *clarified on denial of reh’g*, 337 P2d 358 (1959). It could also be argued that the promisee may or may not have known of the conveyance and, in the case of a third-party beneficiary of a contract to make a will, may not even have known of the existence of the contract, or of the will, until after the death of the promisor-testator.

For estates of decedents dying after July 1, 1992, an action to contest a will, including a will contest based on a contract to make a will or not to revoke a will, or to die intestate, must be commenced before the later of:

(1) “[f]our months after the date of delivery or mailing of the information described in ORS 113.145 [information to devisees, heirs, and interested persons] if that information was required to be delivered or mailed to the person on whose behalf the action . . . is filed”; or

(2) “[f]our months after the date of publication of notice to interested persons if the person on whose behalf the action . . . is filed was not required to be named in the petition for probate as an interested person.”

ORS 113.075(3), *as amended by* Or Laws 2023, ch 18, § 5 (effective January 1, 2024).

A will contest “must be commenced by the filing of a petition in the probate proceedings, except that [a will contest based on a contract to make a will] may be commenced by the filing of a separate action in any court of competent jurisdiction.” ORS 113.075(2).

A cause of action based on a decedent’s promise that the decedent would make or revoke a will or devise, or not revoke a will or devise, or to die intestate may not be presented as a claim under ORS chapter 115 (claims against estates). ORS 113.075(5).

§ 4.2-5(c) Problems of Proof

Contracts to make a will or not to revoke a will, or to die intestate, may take numerous forms, including the following:

(1) a contemporaneous written agreement embodying the contract that may appear as part of a joint or mutual will or as a separate written agreement, *Ricks v. Brown*, 15 Or App 160, 515 P2d 206 (1973);

(2) a separate agreement regarding wills in the form of a reconciliation agreement or a divorce settlement, *see In re Marriage of Ellinwood*, 59 Or App 536, 651 P2d 190 (1982), *rev den*, 294 Or 460 (1983);

(3) an oral agreement asserted by a party to the agreement or a third-party beneficiary to establish that mutual wills were executed pursuant to a contract, *Parker v. Richards*, 43 Or App 455, 602 P2d 1154 (1979), *rev den*, 288 Or 527 (1980); *Woelke v. Calfee*, 45 Or App 459, 608 P2d 606 (1980);

(4) a claim to a will based on services performed for the decedent, *Musselman v. Mitchell*, 46 Or App 299, 305–06, 611 P2d 675 (1980); *Estate of Krueger v. Ropp*, 282 Or 473, 579 P2d 847 (1978); and

(5) actual contractual language contained within a joint or mutual will that can support a binding and enforceable contract, *Shea v. Begley*, 94 Or App 554, 766 P2d 418 (1988), *rev den*, 307 Or 514 (1989); *Schaad v. Lorenz*, 69 Or App 16, 19–20, 688 P2d 1342, *rev den*, 298 Or 37 (1984).

NOTE

Some of these methods of proof, such as those in items (3) and (4) above, may be barred by the provisions of ORS 112.270(1) (procedures for

establishing a contract to make a will or devise, or not to revoke a will or devise, or to die intestate).

In cases in which a contemporaneous written agreement embodying the contract appears as part of a joint or mutual will, or exists as a separate written agreement, Oregon courts have enforced the will as if it were a contract, although the courts have held that a subsequent will is entitled to probate. In this latter situation, the promisee's remedy lies in a separate suit in equity to impose a constructive trust on the assets, rather than a will contest. *Catching v. Lashway*, 84 Or App 602, 606, 735 P2d 13 (1987); *Ankeny v. Lieuallen*, 169 Or 206, 218, 113 P2d 1113, *suit dismissed*, 127 P2d 735 (1942).

When two parties enter into a joint and mutual will, and then one of the parties dies, the surviving party is typically free to revoke that joint and mutual will. However, if it can be established that the joint and mutual will is contractual in nature, the surviving party is not free to repudiate the underlying contract. *Schaad*, 69 Or App at 21.

In *Catching*, 84 Or App at 605 (citations omitted, emphasis added), the Oregon Court of Appeals discussed problems of proof that arise in many cases regarding contracts to make or not to revoke wills, and stated:

Plaintiffs acknowledge that they must prove the existence of a contract to make a will by *clear and convincing* evidence. . . . The mere existence of a joint will or mutual reciprocal wills is not sufficient to prove that there was a contract to make those wills. On the other hand, the existence of mutual wills, coupled with extrinsic evidence of an oral agreement between the testators, has led the Supreme Court to decide that there was a contract to make the wills.

In the absence of either a separate written document or contractual language in the will, the extrinsic evidence adduced to support the claim of an existing contract to make a will must be strong. Because a contract to make a will is generally covered by the same principles of law that apply to other types of contracts, extrinsic evidence is admissible to show that the will was only part of the agreement between the testators. The question of whether a contract exists depends on the particular facts of each case.

In *DeLaMater v. DeLaMater*, 69 Or App 40, 688 P2d 1350 (1984), a husband and wife had executed joint and mutual wills, and both parties were aware of the mutual testamentary provisions at the time of execution. The court held that those facts alone did not establish the existence of a contract to make a will. *DeLaMater*, 69 Or App at 43–46. The court cited Bertel M. Sparks, *Contracts to Make Wills*

27–28 (1956), for the rule that a contract not to revoke a will is not established by the fact that the parties had agreed to make mutual wills. *DeLaMater*, 69 Or App at 46 n 3.

The fact that such wills are usually executed as a result of a common intention does not in any way mean that they were executed pursuant to a contract between the parties regarding the making of such wills. Their execution does not give rise to a presumption or inference that they were made pursuant to a contract. *American National Red Cross v. Wilson*, 274 Or 237, 240, 545 P2d 883 (1976).

However, a joint and mutual will that contains specific contractual language within its four corners will generally be held to be an enforceable and binding contract. *Shea*, 94 Or App at 557–58; *Schaad*, 69 Or App at 19–21.

In *Baker v. Mohr ex rel. Adams*, 111 Or App 592, 596, 826 P2d 111 (1992), the Oregon Court of Appeals held that the requirement in ORS 112.270(1)(c) that a contract to make a will or devise be both in writing and signed by the decedent did not bar a claim to enforce a contract to make a will that “was in writing and signed by the decedent but was subsequently destroyed or concealed by the person seeking to evade its provisions.”

Thus, contracts to make or not to revoke wills may take numerous forms, and the problems of proof that need to be addressed depend on the form by which the contract has arisen.

§ 4.2-6 Revoking or Altering a Will

§ 4.2-6(a) Governing Statutes Are Exclusive

Pursuant to ORS 112.275, “[a] will may be revoked or altered only as provided in ORS 112.238, 112.260 or 112.285 to 112.315.”

§ 4.2-6(b) Express Revocation or Alteration

A will may be revoked or altered by another will. ORS 112.285(1).

A will may be revoked “by one or more physical acts by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator, or by another person at the direction of the testator and in the presence of the testator.” ORS 112.285(2). The injury or destruction by a person other than the testator at the direction and in the presence of the testator must be proved by at least two witnesses. ORS 112.285(2).

The 2015 Legislature added a new provision to ORS 112.285 regarding a partial revocation of a will:

A partial revocation of a provision in a will by one or more physical acts as described in [ORS 112.285(2)] is not a valid revocation. One or more physical acts that affect one or more provisions of a will but not the entirety of the will are not effective to revoke those provisions, but clear and convincing evidence may show that the testator intended by the physical act or acts to revoke the entirety of the will.

ORS 112.285(3).

The same degree of mental capacity is required to revoke a will as is required to execute one. *Wood v. Bettis (In re Estate of Cooper)*, 130 Or App 140, 143, 880 P2d 961 (1994). See § 4.2-1 for a discussion of testamentary capacity. In *Wood*, 130 Or App at 143–46, for example, the Oregon Court of Appeals held that the testator lacked the testamentary capacity to revoke his will when he tore it up because at that time the testator did not understand the value and extent of his property, the natural objects of his bounty, or the nature of the business in which he was engaged.

§ 4.2-6(c) Revival of Revoked or Invalid Will

If a will or a part of a will has been revoked or is invalid, it may be revived by “re-execution of the will or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.” ORS 112.295.

Under the doctrine of “dependent relative revocation,” a court can probate a will that was revoked by a testator through the execution of a subsequent will if the subsequent will is later declared to be invalid, and if the court determines that the testator did not intend to die intestate. *Kirkeby v. Covenant House*, 157 Or App 309, 314–15, 970 P2d 241 (1998), *rev den*, 328 Or 365 (1999).

If a testator destroys a valid will, the testator’s prior will is not revived. Instead, the person then has no valid will. ORS 112.295.

§ 4.2-6(d) Revocation by Marriage

Under ORS 112.305, the subsequent marriage of the testator revokes a prior will only if the spouse of that subsequent marriage survives the testator. Thus, if after making a will, the testator marries and the spouse of that marriage predeceases the testator, the prior will of the testator will not be deemed to have been revoked by the subsequent marriage. However, if the spouse of the subsequent marriage survives the testator, the marriage is deemed to revoke the

testator's prior will, unless the will expresses a contrary intent, the will was drafted under circumstances indicating that it was in contemplation of the marriage, or an antenuptial agreement between the testator and the testator's spouse dealt with the decedent's estate.

Note further that the testator's subsequent marriage does not revoke a will if "[t]he testator executed the will after entering into a registered domestic partnership under ORS 106.300 to 106.340 or a similar law in another state and the testator subsequently marries the domestic partner." ORS 112.305(3).

Unless an exception to ORS 112.305 applies, a subsequent marriage of the testator will revoke the testator's will and the surviving spouse is entitled to an intestate share of the decedent's estate, notwithstanding that the surviving spouse did not bring any property into the marriage, or that the marriage lasted only for a short period of time, or even that divorce proceedings are pending. In *Stevenson v. U. S. National Bank of Oregon*, 72 Or App 39, 41, 695 P2d 77, *rev den*, 299 Or 203 (1985), the testator and his fiancée entered into a prenuptial agreement, which provided that the parties could dispose of their respective properties as they wished, and that, "should the marriage be terminated by death or dissolution, each party would retain the property owned by the party prior to the marriage." They were married the next day. Ten months later, the wife sued the testator for divorce. While the divorce was pending, the testator executed a will leaving all his property to his children. The testator and the spouse then entered into a property-settlement agreement that specifically superseded the prenuptial agreement. Ten months after the divorce, the parties remarried and a short time thereafter the testator filed a petition for divorce. Shortly after the petition was filed, the testator was killed, and his will was entered into probate. The court ruled that neither of the exceptions under ORS 112.305 applied because the will did not evidence an intent that it was not to be revoked by the marriage, and the prenuptial agreement of the testator and his spouse had been superseded by the property-settlement agreement. Accordingly, the testator had no valid will at the time of his death, and the surviving spouse was entitled to an intestate share of the decedent's net estate.

§ 4.2-6(e) Revocation by Dissolution or Annulment of Marriage

Unless a will evidences a different intent of the testator, the divorce or annulment of the testator's marriage after the execution of the will "revokes all provisions in the will in favor of the former spouse of the testator and any

provision in the will naming the former spouse as personal representative, and the effect of the will is the same as though the former spouse did not survive the testator.” ORS 112.315.

§ 4.2-6(f) Executory Contract of Sale of Devised Property Not a Revocation

Under ORS 112.385, specific devises will not fail or be extinguished by the “encumbrance . . . or change in form of the property specifically devised.”

§ 4.2-7 Effect of Will Provisions

§ 4.2-7(a) Will Governs Disposition of Estate

ORS 112.415 is designed to create certainty that, except as otherwise expressly provided by law, no person is entitled to take any portion of the estate of a testator disposed of by the will other than as provided in the will. Statutes expressly providing otherwise include the antilapse statute (ORS 112.395), the pretermitted child statute (ORS 112.405), the statutes governing elective rights of a surviving spouse (ORS 114.600–114.725), and other comparable laws of a specific nature.

§ 4.2-7(b) Devise Passes All Interests of Testator

A devise of property passes the testator’s entire interest in the property at the time of the testator’s death, unless the will evidences a different intent. ORS 112.355. Consistent with ORS 114.205, this statute applies without distinction between real property and personal property.

§ 4.2-7(c) Encumbrance or Disposition of Devised Property

“[S]pecific devises will not fail or be extinguished by the encumbrance, destruction, damage, sale, condemnation or change in form of the property specifically devised.” ORS 112.385(1).

The Oregon Supreme Court has held that, in the absence of a clear expression of intent to the contrary in a will or otherwise, the decedent’s estate is not liable for contribution to a surviving joint tenant toward debt secured by real property that passes to the surviving joint owner and obligor by right of survivorship. *Bonner v. Arnold*, 296 Or 259, 265, 676 P2d 290 (1984).

PRACTICE TIP

If the testator has an interest in real property securing a debt that is held as joint tenants with the right of survivorship, and the testator wants the

estate to be liable, in whole or in part, for the debt, the will should specifically provide for contribution by the estate.

§ 4.2-7(d) Devise of a Life Estate

“A devise of property to any person for the term of the life of the person, and after the death of the person to the heirs of the person, vests an estate or interest for life only in the devisee and remainder in the heirs.” ORS 112.345.

The purpose of ORS 112.345 was to abolish, and to some extent enlarge, the ancient Rule in Shelley’s Case. See *Wolfe v. Shelley*, 1 Co Rep 93b, 76 Eng Rep 206 (CP) (1579–1581), discussed at <https://legal-dictionary.thefreedictionary.com/Rule+in+Shelley’s+Case>. The statute has the effect of abolishing the Rule in Shelley’s Case as to wills, but not as to deeds.

§ 4.2-7(e) Property Acquired after Making Will

“Any property acquired by the testator after the making of a will passes pursuant to the will as if title to the property were vested in the testator at the time of making the will, unless the intent expressed in the will is clear and explicit to the contrary.” ORS 112.365.

The statute is designed to make clear that after-acquired property can pass by will. It applies with equal force to real property and personal property.

The following testamentary provision is in keeping with the statute:

I give and devise to my son, Jacob, all real property that I may own at the time of my death.

§ 4.2-7(f) Direction to Pay Debts, Taxes, and Other Charges

Most wills contain general testamentary directions to pay debts, charges, taxes, and administration expenses. Varying interpretations of such directions have been arrived at by the authorities in response to specific problems.

ORS 115.255 to 115.275 set forth rules for paying encumbrances on devised property, and ORS 116.303 to 116.383 deal with the apportionment of estate taxes. All of these statutes are conditioned on the fact that the will does not provide otherwise.

A common form of testamentary direction for payment of debts and other charges follows:

I direct my personal representative to pay from my estate all my just debts; the expenses of my last illness, funeral, and final interment; and the expenses of administration of my estate.

This language would not be considered a direction of exoneration from encumbrances or against apportionment of estate taxes. If exoneration from encumbrances is desired by the testator, the will should specifically state so. The following is an example of a provision for exoneration from encumbrances:

I give and devise to my son, Jacob, all real property that I may own at the time of my death. If any of this real property is subject to encumbrances of any kind, whether voluntary or involuntary, I direct my personal representative to pay and fully satisfy such encumbrances from my estate.

If the testator also desires that death taxes be paid from the residue of the estate without apportionment, the will should specifically state so, for example:

I direct my personal representative to pay from my estate all inheritance, estate, transfer, and succession taxes that become payable by reason of my death, and I authorize my personal representative to contest or compromise any claims for such taxes. I further direct that all such taxes will be paid without apportionment thereof and without withholding or collecting any part thereof from any beneficiary under my will or under any life insurance of mine that may be subject to such tax or from the surviving owner of any property owned jointly with me, it being my intention that all such taxes will be paid from my estate as an expense of administration.

§ 4.2-7(g) Nonademption of Specific Devises

Rules for nonademption of specific devises are set forth in ORS 112.385.

At common law, what was known as the doctrine of ademption by extinction applied without regard to the testator's intent. Under this doctrine, if real or personal property was specifically given by will to a named person, and the property was destroyed or sold between the time of execution of the will and the testator's death, the devise or bequest failed. The reasoning behind the failure of the devise or bequest was that there was no property in the estate to satisfy the specific gift.

ORS 112.385 changes the common law. It is specific in its approach to the many situations covered under the statute. It avoids the adoption of a broad

approach that would abolish the doctrine of ademption by extinction entirely, and it is intended to carry out the normal intent of the testator.

§ 4.2-7(h) Devises to Testator's Descendants; Antilapse

At common law, a devise or bequest to a person who predeceased the testator would lapse in the absence of a special provision in the will preventing it. ORS 112.395 changes the common law. Under the statute, when property is devised to any person who is related to the testator by blood or adoption, and that person dies before the testator and leaves lineal descendants, the descendants take by representation the property that the devisee would have taken if the devisee had survived the testator, unless otherwise provided in the testator's will. The statute covers a devisee under a class gift if the devisee's death occurred after the execution of the will.

Although the language of the statute is of a mandatory nature, a testator using appropriate words can prevent the statute from operating. For example, the testator can provide for a substitute devise, such as the one below, in the event that the devisee predeceases the testator, or the testator can simply provide that in such event, the devise will lapse:

I devise to my brother, John Doe, the sum of \$5,000. If my brother does not survive me, the foregoing devise to him will lapse, and in lieu thereof I devise the sum of \$5,000 to Mary Doe, wife of my brother, John Doe.

If the foregoing will provision had not specified otherwise, and if the brother had predeceased the testator, and had been survived by descendants, those descendants would take the \$5,000 bequest by representation under the antilapse statute. Because the brother is related to the testator by blood or adoption, ORS 112.395 would apply. In this example, mention of what would happen if the brother's wife failed to survive the testator has been omitted intentionally, because she is not related to the testator by blood or adoption, and if she failed to survive, whether or not she was survived by descendants, the bequest to her would lapse.

The following provision is another example that may slightly alter the effect of the statute:

I devise to my brother, John Doe, the sum of \$5,000. If my brother does not survive me, the foregoing devise to him will lapse and in lieu thereof I devise the sum of \$5,000 in equal shares to the children of my brother, John Doe, who are living at the time of my death.

The antilapse statute is an example of a statute intended to carry out the assumed desire of the testator. As always, the drafter of the will should use specific language that carries out the actual intent of the testator, rather than relying on the statute.

§ 4.2-7(i) Effect of Failure of Devise

Except as provided in the antilapse statute (ORS 112.395; *see* § 4.2-7(h)), which is concerned exclusively with devises to persons who are related by blood or adoption to the testator, ORS 112.400(1) declares that “[i]f a devise other than a residuary devise fails for any reason, it becomes a part of the residue.” Regarding the residue, if there are two or more residuary devisees and the share of one of them fails, that share “passes to the other residuary devisee or to other residuary devisees in proportion to their interests in the residue.” ORS 112.400(2).

PRACTICE TIP

As always, the lawyer should determine the wishes of the testator and, if the results flowing from application of this statute do not conform with those wishes, the lawyer must take care in expressing the testator’s wishes in the will.

§ 4.2-7(j) After-Born and After-Adopted Children: Pretermitted Children

A *pretermitted child* means “a child of a testator who is born, adopted, or conceived as described in ORS 112.077(3) or (4), after the execution of the will of the testator, who is neither provided for in the will nor in any way mentioned in the will and who survives the testator.” ORS 112.405(1).

Under ORS 112.405, if the will makes no provision for a child who is living at the time of the execution of the will, that child does not qualify as a pretermitted child. The statute further specifies that if the testator made no provision for children who were living when the testator executed the will, it is reasonable to assume that the testator had no desire to provide for after-born children. ORS 112.405(2).

Conversely, if the testator provided for children who were living when the testator executed the will, it is assumed that the testator also wanted to provide for pretermitted children. ORS 112.405(3). The share to which the pretermitted child

is entitled in this instance is computed in accordance with the formula set forth in ORS 112.405(3)(b).

If a testator has no child living when the testator executes a will, a pretermitted child “shall take a share of the estate as though the testator had died intestate, unless the will devised all or substantially all of the estate to the other parent of the pretermitted child and that other parent survives the testator and is entitled to take under the will.” ORS 112.405(4). As always, the lawyer should address such a possibility in the will, rather than allow the statute to control.

Special rules apply dealing with children born of “genetic material” of a person. *See* ORS 112.077. For purposes of ORS 112.077, “an embryo that exists outside a person’s body is not considered to be conceived until the embryo is implanted into a person’s body.” ORS 112.077(1).

ORS 112.077(3) provides that “[a] person conceived before the death of the decedent and born alive thereafter inherits as though the person was a child of the decedent and alive at the time of the death of the decedent.”

Pursuant to ORS 112.077(4),

[a] child conceived from the genetic material of a decedent who died before the transfer of the decedent’s genetic material into a person’s body is not entitled to an interest in the decedent’s estate unless:

(a) [t]he decedent’s will or trust provided for posthumously conceived children; and

(b) [t]he following conditions are satisfied:

(A) [t]he decedent, in a writing signed by the decedent and dated, specified that the decedent’s genetic material may be used for the posthumous conception of a child of the decedent, and the person designated by the decedent to control use of the decedent’s genetic material gives written notice to the personal representative of the decedent’s estate, within four months of the date of the appointment of the personal representative, that the decedent’s genetic material is available for the purpose of posthumous conception; and

(B) [t]he child using the decedent’s genetic material is in utero within two years after the date of the decedent’s death.

§ 4.2-7(k) Effect of General Disposition or Residuary Clause on Testator's Power of Appointment

A general residuary clause in a will or a will making general disposition of all of the testator's property does not exercise a power of appointment held by the testator, unless specific reference is made to the power in the will or there is some other indication of intention in the will to include the property subject to the power. ORS 112.410.

§ 4.2-8 Disposition of Wills

§ 4.2-8(a) Exclusive Manner of Disposing of Wills

ORS 112.800 to 112.830 set forth the exclusive manner for disposing of a will.

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.

ORS 112.805(1).

See § 4.2-8(b) to § 4.2-8(e) (disposition of wills).

§ 4.2-8(b) Duties of Custodian of Will

ORS 112.810 describes the duties of the custodian of a will. Under that statute, any person having custody of a will

(1) must deliver the will to the testator upon the testator's demand, unless the person is a lawyer and is entitled to retain the will pursuant to ORS 87.430 (attorney's possessory lien);

(2) may at any time deliver the will to the testator;

(3) must deliver the will to the testator's conservator upon the conservator's demand;

(4) upon demand from the attorney-in-fact, must deliver the will to "an attorney-in-fact acting under a durable power of attorney signed by the testator expressly authorizing the attorney-in-fact to demand custody of the will";

(5) may deliver the will to "any attorney licensed to practice law in Oregon willing to accept delivery of the will if the person does not know or cannot ascertain, upon diligent inquiry, the address of the testator"; or

(6) must, within 30 days after receiving information that the testator is deceased, deliver the will to a court with jurisdiction over the testator's estate or to a personal representative named in the will.

ORS 112.810(1).

Oregon law sets forth a procedure for gaining access to the safe-deposit box of a decedent for the purpose of obtaining the decedent's will. *See* ORS 112.810(2). Subject to ORS 114.537, after receiving a certified copy of the decedent's death record or other evidence of death satisfactory to the Oregon operating institution, the operating institution must permit the box to be opened and make any will available to an interested person who furnishes an affidavit that satisfies the statute. An interested person includes the personal representative named in the decedent's will. ORS 708A.655(2)–(5); ORS 723.844(2)–(5).

For further discussion of the procedure to transfer the contents of a safe-deposit box, see § [3.4-1](#).

If the decedent's will fails to name a personal representative or if the financial institution, despite reasonable efforts, cannot determine the location of the personal representative, the institution may either retain the will or deliver it to a court having jurisdiction of the decedent's estate. ORS 708A.655(4); ORS 723.844(4).

§ 4.2-8(c) Procedure for Destruction of a Will

Under ORS 112.815,

[a]n attorney who has custody of a will may dispose of the will in accordance with ORS 112.820 [procedure for the destruction of a will] if:

- (1) [t]he attorney is licensed to practice law in the State of Oregon;
- (2) [t]he will is not subject to a contract to make a will or devise or not to revoke a will or devise;

and [either]

(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.

ORS 112.815.

A lawyer who is authorized to destroy a will under ORS 112.815 must

(a) [p]rovide 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) [d]eliver 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.

ORS 112.820(1).

Such notice

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.

ORS 112.820(2).

If the testator (if living) fails to contact the attorney, or if the personal representative (and any successor personal representative) fails to accept delivery of the will, within 90 days of the date of the notice, the attorney may destroy the will. ORS 112.820(3).

At the time the attorney destroys the will, the attorney must 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.

ORS 112.820(4)(a).

This 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.

ORS 112.820(4)(b).

No earlier than 20 years after the date of the affidavit, the lawyer, without notice to any person or court, "may destroy the electronic copies of the affidavit and the will and any affidavit of attesting witnesses or codicils to the will." ORS 112.820(4)(c).

§ 4.2-8(d) Liability for Destruction of Will

A person who violates any provision of the statutes governing the disposition of a will (ORS 112.800–112.830; *see* § 4.2-8(a) to § 4.2-8(c)) is "liable to any person injured by such violation for any damages sustained thereby." ORS 112.825. A lawyer who destroys a will in accordance with ORS 112.800 to 112.830 is not liable to the testator or any other person for its destruction or disposal. ORS 112.825.

§ 4.2-8(e) Court May Order Delivery of Will

The court with jurisdiction over the decedent's estate may order a person to deliver the decedent's will to the court. ORS 112.830.

§ 4.2-9 Elective Share of Surviving Spouse

For estate planning purposes, a lawyer must be cognizant of the fact that if a decedent is domiciled in this state at the time of death and dies with a valid will, the surviving spouse has a right to an elective share. *See* ORS 114.600–114.725.

For further discussion of the elective share of the surviving spouse, *see* § [8.2-5\(a\)](#) to § 8.2-5(i)(2).

§ 4.3 UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

In 1973, the legislature passed the Uniform Disposition of Community Property Rights at Death Act, ORS 112.705 to 112.775. See § 4.3-1 to § 4.3-5 for further discussion.

§ 4.3-1 Property Subject to Uniform Act

The Uniform Disposition of Community Property Rights at Death Act (the “Uniform Act”) applies to the disposition at death of all personal property that was acquired by a married person, including (1) all property that “was acquired as or became, and remained, community property under the laws of another jurisdiction”; (2) all property (including Oregon real property), or the proportionate part of it, that was acquired with the income of or proceeds from community property; and (3) all property that is otherwise traceable to community property. ORS 112.715(1). The Uniform Act also applies to all real property in this state (or the proportionate part of it) that was acquired by a married person “with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.” ORS 112.715(2).

The following rebuttable presumptions apply in determining whether the Uniform Act applies to specific property:

(1) Property acquired during marriage by a spouse while domiciled in a community-property state is rebuttably presumed to be subject to the Uniform Act. ORS 112.725(1).

(2) Real property located in Oregon, and any personal property wherever located acquired by a married person while domiciled in a noncommunity-property state, are not subject to the Uniform Act, if title to the property “was taken in a form which created rights of survivorship.” ORS 112.725(2).

§ 4.3-2 Effect of Uniform Act on Decedent’s Estate

§ 4.3-2(a) Distribution and Disposition of Community Property

Upon the death of a married person, one-half of the community property to which the Uniform Disposition of Community Property Rights at Death Act (ORS 112.705–112.775) applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under Oregon’s laws of intestate succession. ORS 112.735.

The other half of the property is the decedent's property and is subject to testamentary disposition (or intestate succession distribution), unless it is held under a limitation imposed by law that would prevent such disposition. ORS 112.735; ORS 112.775(3).

The decedent's half of the property is not subject to the surviving spouse's right to elect against the will. ORS 112.735.

§ 4.3-2(b) Perfection of Title to Community Property

If the title to any property to which the Uniform Disposition of Community Property Rights at Death Act (the "Uniform Act") applies was held by the decedent at the time of death (*see* § 4.3-1), "title of the surviving spouse may be perfected by an order of the probate court or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the court." ORS 112.745.

Neither the court nor the personal representative has a duty to discover whether any of the decedent's property is subject to the Uniform Act, unless a written demand is made by the spouse or the spouse's successor in interest. ORS 112.745. Similarly, the personal representative has no duty to discover whether any of the survivor's property is subject to the Uniform Act, except on written demand by an heir, a devisee, or a creditor of the decedent, but the personal representative may institute an action to perfect title to the decedent's half of such property. ORS 112.755.

§ 4.3-3 Rights of Third Parties to Community Property

The Uniform Disposition of Community Property Rights at Death Act (the "Uniform Act") protects third persons in their dealings with community property on the basis of its apparent title. *See* ORS 112.705–112.775. If a surviving spouse has apparent title to property to which the Uniform Act applies, a purchaser for value or a lender taking a security interest in the property takes their interest in the property free of any rights of the personal representative, an heir, or a devisee. ORS 112.765(1).

If the personal representative, an heir, or a devisee has apparent title, a purchaser for value or a lender taking a security interest takes their interest free of any rights of the surviving spouse. ORS 112.765(2).

The Uniform Act does not define rights of creditors with respect to property to which the Uniform Act applies. ORS 112.775(1).

§ 4.3-4 Right to Sever Interests in Community Property

The Uniform Disposition of Community Property Rights at Death Act (ORS 112.705–112.775) does not affect the right of married persons to sever or alter their community-property interests. ORS 112.775(2).

§ 4.3-5 Effect of Uniform Act

The Uniform Disposition of Community Property Rights at Death Act (the “Uniform Act”) can have a major impact on the disposition of a married person’s property at death. Accordingly, a lawyer should review ORS 112.705 to 112.775 whenever the decedent has lived at any time during marriage in a community-property jurisdiction. That review is particularly important because the person interested in a determination of community-property status has the responsibility for asserting the claim by making a written demand on the personal representative. *See* ORS 112.745; ORS 112.755. In the absence of such demand by the surviving spouse; the successor in interest to the surviving spouse; or an heir, devisee, or creditor of the decedent, neither the personal representative nor the court has any duty to discover or to attempt to discover whether any of the decedent’s property qualifies under the Uniform Act. *See* § 4.3-2(b) (perfection of title to community property).

PRACTICE TIP

Caution is the byword when working with clients who own community-property assets, or who have moved to Oregon from a community-property state. At last count, 10 states have a form of co-ownership of property known as community property. These states are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Oregon is surrounded by four of these states.

Accordingly, a lawyer cannot rely entirely on the rebuttable presumption in ORS 112.725(2), which provides that real property located in Oregon “acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship,” is presumed not to be property to

which the Uniform Act applies. First, the presumption is rebuttable, and second, the authors of the Uniform Act, in their prefatory notes, state that severance or alteration of community-property interests, which is allowed by the Uniform Act (*see* ORS 112.775(2)), should follow the procedures provided in the law of the community-property state. *See* <https://www.uniformlaws.org/home>.

For instance, under Idaho law, “neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered.” Idaho Code § 32-912. *See Lowry v. Ireland Bank*, 116 Idaho 708, 779 P2d 22, 27 (1989) (“community real property can be validly encumbered only if both spouses join in executing the instrument of encumbrance”). In Texas, community property “is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.” Tex Fam Code § 3.102(b). *See Muller v. Evans*, 18 Tex Sup J 85, 516 SW2d 923 (1974).

PRACTICE TIP

Estate planning lawyers with clients who have moved to Oregon from community-property states must be aware of all of the requirements for the alteration of community-property interests.

Ch. 4

Intestate Succession, Wills, & Community Property

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Agenda

INTESTATE SUCCESSION

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§4.1 Intestate Succession

- PROPERTY PASSING
 - RULES
 - EXCEPTIONS

§4.1-1 Property Passing by Intestate Succession

- Define “net estate”
- Define “net intestate estate”
- Discuss when Decedent Dies intestate
- Exceptions to the general rule

Exceptions to the general rule

- **First:** ORS 112.047 (1), Parent is deemed to have predeceased a child for purposes of intestate succession
- **Second:** ORS 112.465, Prohibits a “slayer” or an “abuser” of a decedent from inheriting from the decedent
- **Third:** ORS 112.015 (2), a decedent may exclude or limit

§4.1-2 Rules of Intestate Succession

- a. Surviving Spouse
- b. Descendant's share
- c. Parent's Share
- d. Parent's Descendant's Share
- e. Grandparents' and Their Descendant's Share
- f. Persons Related through Two Lines
- g. Escheat Estates; Missing Persons

§ 4.2 WILLS

- WHO MAY MAKE A WILL
- EFFECT OF TESTATOR’S INTENT & LOCAL LAW
 - EXECUTION OF A WILL
- TESTAMENTARY ADDITIONS TO TRUSTS
 - CONTRACTS TO MAKE A WILL
- REVOKING OR ALTERING A WILL
 - EFFECT OF WILL PROVISIONS
 - DISPOSITION OF WILLS
- ELECTIVE SHARE OF SURVIVING SPOUSE

§ 4.2- 1 WHO MAY MAKE A WILL

- Any person who is 18 years of age or older or who has been lawfully married, or who has been emancipated in accordance with ORS 419B.550 to 419B.558, and who is of sound mind, may make a will. ORS 112.225.
- Defining Marriage in accordance with ORS 106.150
- “Domestic Partnerships” – same-sex couples
- Define “sound mind” in accordance with ORS 112.225
- When is a Will considered **NOT** executed

WILLS

- **Be cognizant** in choosing subscribing witnesses when the capacity of the testator might be questioned later.
- **Consult** with any family members, friends, & healthcare professionals who know the person on a continuing basis regarding the person's testamentary capacity.
- **Obtain** affidavits of long-time friends who can attest to the mental acuity on or near the day of signing



§ 4.2-2

EFFECT OF TESTATOR'S INTENT & LOCAL LAW

- a. Intention of Testator Expressed in Will as Controlling
- b. Local Law of State Selected by Testator Controlling unless against Public Policy
- c. Uniform International Wills Act

§ 4.2-3

Execution of a Will

- a. Formalities, signing, & Attestation
- b. Witness as a Beneficiary
- c. Validity of Execution of a Will

§ 4.2-4

Testamentary Additions to Trusts

- Discuss ORS 112.265 Oregon's Uniform Testamentary Additions to Trusts Act

§ 4.2-5

Contracts to Make a Will

- Contract Law Governs
- Statute of Limitations
- Problems of Proof

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§ 4.2-6

Revoking or Altering a Will

- a. Governing Statutes Are Exclusive
- b. Express Revocation or Alteration
- c. Revival of Revoked or Invalid Will
- d. Revocation by Marriage
- e. Revocation by Dissolution or Annulment of Marriage
- f. Executory Contract of Sale of Devised Property Not a Revocation

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§ 4.2-7 Effect of Will Provisions

- a. Will Governs Disposition of Estate
- b. Devise Passes All Interests of Testator
- c. Encumbrance or Disposition of Devised Property

WILLS



If the testator has an interest in real property securing a debt that is held as joint tenants with the right of survivorship, and the testator wants the estate to be liable, in whole or in part, for the debt, the will should specifically provide for contribution by the estate.

§ 4.2-8 Disposition of Wills

- a. Exclusive Manner of Disposing of Wills
- b. Duties of Custodian of Will
- c. Procedure for Destruction of a Will
- d. Liability for Destruction of Will
- e. Court May Order Delivery of Will

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§ 4.2-9 Share of Surviving Spouse

- For estate planning purposes, a lawyer must be cognizant of the fact that if a decedent is domiciled in this state at the time of death and dies with a valid will, the surviving spouse has a right to an elective share.

See ORS 114.600–114.725

- For further discussion of the elective share of the surviving spouse,

See § 8.2- 5(a) to § 8.2-5(i)(2).

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§ 4.3

UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

- PROPERTY SUBJECT TO UNIFORM ACT
- EFFECT OF UNIFORM ACT ON DECEDENT'S ESTATE
- RIGHT TO SEVER INTERESTS IN COMMUNITY PROPERTY
- EFFECT OF UNIFORM ACT

§ 4.3-1

PROPERTY SUBJECT TO UNIFORM ACT

- What does it apply to?
- What are the rebuttable presumptions applicable to specific property?

§ 4.3-2 EFFECT OF UNIFORM ACT ON DECEDENT'S ESTATE

- Property Subject to Uniform Act
- Effect of Uniform Act on Decedent's Estate
- Right to Sever Interests in Community Property
 - Effect of Uniform Act

§ 4.3-3 RIGHTS OF THIRD PARTIES TO COMMUNITY PROPERTY

§ 4.3-4 Right to Sever Interests in Community Property

§ 4.3-5 Effect of Uniform Act

Community Property



- Use **Caution** when working with clients who own community-property assets or who moved to Oregon from community-property states.
- Be **AWARE** of all requirements when clients move to Oregon from community property states

Any Questions?

Thank you
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