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Amendments to the Oregon Probate Code

Work Group Report

SB 379-3

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From the Office of the Executive Director
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I. Introductory summary

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

II. History of the project

In October 2013 the Oregon Law Commission ("OLC") appointed a Work Group to review and recommend changes to the Oregon probate statutes. Lane Shetterly, Chair of the OLC, chairs the Probate Modernization Work Group, Wendy Johnson, Deputy Director and General Counsel of the OLC, staffed the Work Group until her recent departure from the OLC, Susan Gary serves as Reporter, and BeaLisa Sydlik, Deputy Legislative Counsel, has drafted an initial bill based on the work of the Work Group. Members of the Work Group come from the Estate Planning and Administration Section, the Elder Law Section, the Oregon Bankers Association, the Oregon Land Title Association, the Department of Justice (the Charitable Activities and Civil Recovery Sections of the Civil Enforcement Division), and the Circuit Courts (both probate judges and staff).

The Oregon probate statutes are found in Chapters 111 – 118. Chapter 118, the Estate Tax, was thoroughly reviewed and amended in 2011, so the Work Group has not revisited that chapter. The Work Group has also skipped the elective share sections in Chapter 114, which were revised in 2009. The Work Group plans to review all other sections, but at this time is proposing amendments only to Chapter 112. The Work Group will resume meeting after this legislative session and will continue to review and discuss the other probate chapters.

The Work Group members are Lane Shetterley, Chair of the Work Group, OLC Commissioner and Attorney, Susan N. Gary, Reporter for the Work Group, OLC Commissioner and Professor at University of Oregon School of Law, Cleve Abbe, Lawyers Title of Oregon LLC, Kathy Belcher, Attorney, Susan Bower, Department of Justice Charitable Activities Section, Jeff Cheyne, Attorney, Judge Rita Cobb, Washington County, Mark Comstock, OLC Commissioner and Attorney, Judge Claudia Burton, Marion County, John Draneas, Attorney, Heather Gilmore, Attorney, Robin Huntting, Clerk in the Civil Case Unit for Clackamas County, Gretchen Merrill, Department of Justice Civil Recovery Section, Marsha Murray-Lusby, Attorney, Ken Sherman, Attorney, Jennifer Todd, Attorney, Bernie Vail, OLC Commissioner and Professor at Lewis & Clark Law School, Judge Donald Hull, Samuel's Law.

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

Technological and social changes have affected the way people create families and the way they manage and dispose of their property. Chapter 112 provides legal rules for the disposition of property at death by intestacy or by will. The proposal amends Chapter 112 to address issues created by technological and societal changes, to make the rules governing intestacy and wills more likely to carry out the intent of decedents, and to clarify provisions where the language in the current statutes is unclear.

IV. Review of legal solutions existing or proposed elsewhere

The Work Group approached the project by using the ORS provisions as the baseline. The Work Group was provided with a copy of all sections of the Uniform Probate Code that correspond to the topics being discussed. The UPC had been annotated to indicate where the UPC differs from the ORS, so the Work Group could discuss those differences and decide whether to recommend something similar to the UPC for a particular provision. In addition, the Work Group considered statutes from other states and articles written about some of the developments in addressing the definition of parent and child for purposes of the intestacy statutes. Professor Gary and Ms. Johnson were able to provide information about ways in which other states handle many of the issues presented in Chapter 112.

V. The proposal

Section 1: This section repeals 112.075, 112.325, 112.335, 112.435, 112.485 and 112.695.

112.075 (Time of determining relationships; afterborn heirs) is replaced by a new section. See Section 27 of the bill.

112.325 (Contract of sale of property devised not a revocation) and 112.335 (Encumbrance or disposition of property after making will) are deleted because the substance is now covered by 112.385.

112.435 (Disposition of wills deposited with county clerk.). This provision directed the county clerk to deliver original wills placed with the court for safekeeping to the testators of the wills, and provided that after January 1, 2010, the court could destroy any remaining wills. Thus, this section is no longer applicable.

112.485 (Property jointly owned with others) is repealed because it is combined with ORS § 112.475 (Jointly owned property) as a new subsection (2) and does not change existing law (see Section 23 of this Report).

112.695 (Statute of limitations for recovery of dower and curtesy) is repealed because all rights to dower and curtesy expired in 1980.

Section 2: A new subsection added to ORS § 112.015 adopts the concept of a "negative will" from the UPC. Under current Oregon law, the only way to disinherit someone is to give property to someone else. If an unmarried testator wants all her property to go to her daughter, excluding her son from whom she is estranged, she can do that by will. If, however, the daughter predeceases the testator and leaves no descendants, the testator's property will go by intestacy to her son. The testator should provide in the will for the disposition of her property if her daughter predeceases her, but if she does not do so, or if the substitute takers also predecease her, the son will inherit under intestacy. The new provision allows the testator to say that under no circumstances shall her son inherit.

Section 3: ORS § 112.045 provides for the intestate shares of issue of the decedent. The Work Group changed the manner in which shares are created (representation is defined in ORS § 112.065), and in conjunction with that change decided that using the word "generation" rather than "degree of kinship" would be better. In addition, a change to ORS § 112.045(4)(a) clarifies that if the estate will be distributed to collateral relatives descended from the decedent's grandparents, if all relatives are of the same generation with respect to the decedent each will inherit the same size share, but if relatives are of different generations, then the process described in ORS § 112.065 for the division of shares will be followed.

Section 4: ORS § 112.047 provides that a parent will lose any right to an intestate share from a child who dies if the parent deserted the child or neglected to support the child. The proposal adds a subsection making clear that a parent whose parental rights have been terminated and not reinstated cannot inherit as a parent. In addition, minor changes are made for a better structure for the section. The new subsection is based on UPC § 2-114(a)(1).

Section 5: ORS § 112.055 provides for escheat to the state if no heirs can be found. Section 5 of the proposal adds guidance on the appropriate level of searching for heirs required before escheat happens. The search should be "diligent" and appropriate to the circumstances, taking the value of the estate into consideration. The new language clarifies that the estate should not be required to expend excessive amounts of money searching for missing heirs, determined based on the size of the estate and the difficulty of finding the missing persons.

Section 6: ORS § 112.065 defines "representation" for purposes of distributions to issue. This definition is used when an intestate estate is distributed to issue, and to interpret directions to distribute to issue or descendants in wills and trusts. The definition applies whenever one or more of a decedent's children did not survive the decedent, if the child left descendants who survived. Shares go to issue in a direct line from the decedent, and subsequent generations take only when the parent in the generation closer to the decedent did not survive the decedent.

Under current law, the division into shares starts at the first generation below the decedent with a living descendant. Shares are then created, one share for each descendant at that generational level who is alive, and one share for each descendant who is dead but left descendants who are alive. An example will help to illustrate the effect of current law. Assume that a decedent had three children and each of the children had children (the decedent's grandchildren). Child One had one child, Child Two had two children, and Child Three had five children. If all three children predeceased the decedent, under current law a share would be created for each grandchild who survived and one for each grandchild who did not survive but who left children who survived the testator. If all grandchildren survived, eight shares would be created, and each grandchild would receive an equal share.

While there are other methods that could be used for making distributions to descendants, the Commission was concerned that changing the current statutory provisions on distributions to descendants, which have been in effect since 1969, could lead to confusion and litigation over the intent of testators. Consequently, the Commission determined that Section 6 should be modified to modernize the terms used, but that the provision should retain distribution to descendants as current law provides.

It is important to remember that the intestacy statute is default law. Each person can write a will and direct the distribution to descendants in whatever manner she wants. Nonetheless, a goal of the intestacy statute is to make the rules match the wishes of most decedents because many people fail to execute a will. In addition, because people often execute trusts without an explanation of how a distribution to "descendants" should be made, the intestacy rules are important for distributions through trusts as well.

Note concerning intestacy: In some states the intestacy statute provides that if an estate will otherwise escheat, stepchildren of the decedent will be considered heirs. The Work Group discussed whether to include such a provision in the Oregon statutes and decided not to do so.

Section 7: ORS § 112.105 defers to Chapter 109 for determinations of parentage. The proposal deletes a subsection that became unnecessary after revisions to Chapter 109. The Work Group does not intend a change in the law.

Although Chapter 109 does not address issues of maternity and most issues related to children created through assisted reproductive technology, the Work Group decided not to make changes to the definition of parent and child in Chapter 112. The Work Group concluded that those changes belong in Chapter 109, due to concern that changes in Chapter 112 might be used by courts in family law cases, even if the statutes limited application to inheritance matters.

Sections 8 and 9: ORS §§ 112.175 and 112. 185 provide rules related to the status of adopted persons. The changes to this section replace the term "natural parent" with "biological parent" as a more appropriate term and extend the provisions for children adopted by stepparents to children adopted by partners in a registered domestic partnership.

The Work Group discussed whether to treat as a parent someone who had retained contact with a child adopted by someone else, either through a post-adoption contract agreement or otherwise, and discussed a Pennsylvania statute's provision for family members of adopted-out children who have maintained a family relationship with the children. The Work Group decided that keeping the statutes simple is an important policy goal, and therefore decided not to recommend changing the adoption provisions to include family members who maintain functional relationships after an adoption.

Section 10: ORS § 112.225 states who may make a will. The proposal adds language to provide that an emancipated minor may make a will. Under the intestacy rules, a person's estate will go to his parents if the person is unmarried and has no issue. An emancipated minor will likely want his estate to go to someone other than his parents, and the Work Group decided that he should have the right to execute a will and direct where his property should go.

Section 11: ORS § 112.235 sets forth the formalities required for valid execution of a will. In connection with this section, the Work Group discussed the need to balance policy goals. On one side, the statutes should give effect to the intent of a decedent when the intent is clearly known and should not create unnecessary barriers for someone attempting to execute a will. On the other side, the statutes should facilitate quick disposition of estates, with limited use of court resources, and should protect testators from fraud and abuse. With these goals in mind, the Work Group discussed possible modifications to the execution requirements, looking at the UPC and statutes in other states.

The Work Group discussed whether to permit holographic wills (a will in the testator's handwriting but with no witnesses), which are permitted in California, Washington, the UPC, and a majority of states. The Work Group expressed concern about the potential for fraud and elder abuse and concluded that rather than permitting holographic wills, the Work Group would recommend the adoption of the harmless error doctrine. This doctrine, included in the UPC and adopted in a number of states, provides that a document can be established as a will even if all the execution formalities are not met, if clear and convincing evidence establishes the decedent's intent that the document be treated as her will. The goal is to reduce barriers to the creation of a valid will by someone attempting to create a will but making a mistake in execution. The Work Group concluded that the emphasis on intent and the requirement of a judicial determination based on clear and convincing evidence would provide protection against possible fraud or abuse.

Section 29 of the bill sets forth the harmless error provision and will be discussed later in this Report.

In addition to deciding to add the harmless error rule to the statutes, the Work Group made a few changes to the execution formalities. Most testators will execute their wills following these formalities, and making the will execution rules as clear and sensible as possible will aid efficient disposition of estates.

The requirements in connection with a will signed by someone else at the testator's direction were modified so that the person signing the will must sign the testator's name and the signor's name, but need not add a statement on the will that the signor was signing at the testator's direction. The Work Group deleted that requirement due to concern that the provision did not add protection for the testator and probably serves as a trap that could invalidate wills if the signor did not realize that she needed to add that statement on the face of the will.

Section 11 also adds to ORS § 112.235 a provision treating witnesses' signatures on a self-proving affidavit as signatures on the will. This provision comes from Washington statute, RCW 11.12.020. Although harmless error could be used to admit a will executed in this manner, a situation in which the witnesses sign the affidavit instead of the will, by mistake, seems one that can be fixed by statute and not require an evidentiary hearing. Judicial resources will be saved, and the testator's intent preserved without added risk of abuse.

After much discussion of whether the statute should permit electronic wills, the Work Group decided not to permit electronic wills and added a section making clear that an electronic document is not a "writing" for purposes of ORS § 112.235.

The Work Group added language clarifying that a witness can sign as a witness "within a reasonable time before the testator's death." The Work Group discussed whether the statute should permit a signature after the testator's death but decided against doing so. If a witness saw the testator sign the will but did not sign as a witness until after the testator's death, harmless error can be used to admit the document as a will. The Work Group thought that in such a situation judicial oversight would be appropriate. Oregon law currently permits a witness to sign within a reasonable time but not after the testator's death. *See* Rogers v. Rogers, 71 Or. App. 133, 691 P. 2d 114 (1984).

The Work Group decided not to adopt a UPC provision that permits a will to be notarized rather than witnessed. Wills signed by testators and notarized may still be admitted to probate through application of the harmless error doctrine set out in Section 29.

Section 12: Section 12 amends ORS § 112.255 by adding two new subsections to codify common law doctrines. The UPC includes both. New subsection (3) adopts the doctrine of incorporation by reference, which allows a will to identify another

document and make its provisions a part of the will, as long as the other document is in existence when the will is executed. Changes to the other document made after the will is executed are not given effect through this doctrine. The doctrine already exists in the common law in Oregon, but the Work Group thought that codifying the doctrine would improve understanding. The language comes from UPC §2-510.

Similarly, subsection (4) adopts the doctrine of acts or events of independent significance. A will can refer to something outside the will, and as long as the other act or event has significance separate from the testamentary wishes of the testator, the other act or event can be used to convey information in the will. This doctrine is most easily understood by example. A testator might say in her will that she leaves "the car I own at my death" to her favorite nephew. She has not identified a particular car, but if she owns a car when she dies, her nephew will receive the car. Her decision to buy a car is independent from her testamentary wishes. That is, she is unlikely to buy and keep a car so that she can bequeath it to her nephew. If she gives "all the jewelry that I own at my death" to her niece, she may buy more jewelry between the time she executes her will and her death and the additional jewelry will go to her niece. She buys the jewelry for herself, and not merely to make a gift to her niece. Another testator might make a gift of $500 to "the person employed as my housekeeper when I die." Again, the decision to hire a housekeeper has significance independent of the desire to make a gift under the will. Under this doctrine changes over time can be given effect without the execution of codicils to the will, but only if the changes occur for reasons other than testamentary reasons. The language for this subsection comes from the UPC § 2-512.

Section 13: The Work Group spent a great deal of time discussing ORS § 112.272, Oregon's in terrorem clause provision. An in terrorem clause is a clause included in a will that states that if a beneficiary contests the will, the beneficiary loses the gift he would otherwise receive under the will. In Oregon an in terrorem clause will be given effect unless the person contesting the will can show probable cause to believe the will is a forgery or was revoked. In contrast, the majority of states will not enforce an in terrorem clause if probable cause existed for the will contest. The problem with that approach is that probable cause for a contest based on undue influence or lack of capacity, the typical grounds for a will contest, is fairly easy to establish.

In general the Work Group seemed satisfied with the current Oregon statute, based on the view that if a testator wants to use an in terrorem clause to avoid a public airing of dirty laundry, the testator should be able to do that without an easy work-around by a contestant. Work Group members raised three problems, which the amendments to ORS § 112.272 address.

First, the Work Group wanted to clarify that if a will contest is successful, the contest invalidates the in terrorem clause as well as the will or portion of the will that is declared invalid. This provision was thought necessary because some judges have invalidated a will or part of a will (for example, a codicil) but then applied an in

terrorem clause against the successful contestant. The in terrorem clause should not apply if a contest is successful.

Second, although the Work Group thought it best not to define in the statute the types of contests that would trigger the in terrorem clause, the Work Group thought it appropriate to clarify in the statute that an action challenging the acts of the personal representative should not trigger an in terrorem clause. For any other actions, the statute leaves to the court the issue of what is a "contest." For example, a request for instructions, construction, or mediation may not be a "contest" and therefore may not trigger an in terrorem clause.

Third, the proposal adds a provision indicating that the common law on in terrorem clauses will continue to apply except to the extent it is inconsistent with the statute. A court may need to determine whether a clause is an in terrorem clause, and that determination will continue to be based on the common law. Further, it has been argued (successfully) that ORS § 112.272(4) is more narrow than the common law and that the common law enforced a no contest clause but the statute did not. The new subsection clarifies that the common law may still apply.

Section 14: The proposal adds two new ways to revoke a will, so the reference to ways in which a will may be revoked or altered is updated.

Section 15: This section adds some clarifying language to ORS § 112.274. The statute now states that in Oregon a revocation of a will by physical act must revoke the entire will. If a testator crosses out one provision in a will, or crosses out a person's name in a will, the marking will not constitute revocation of that provision. The entire will, including the provision, will continue to be valid. However, even if the crossing out affects only one provision, a person can show that the testator intended to revoke the entire will, but must do so with clear and convincing evidence.

The Work Group discussed including language on revocation from UPC § 2-507(b)-(d) and concluded that the additional language did not add anything substantive and was confusing. No different meaning is intended.

Section 16: ORS § 112.305 provides that a testator's marriage revokes her previously executed will except under circumstances specified in the statute. Section 16 adds as an exception the situation in which the testator marries the person with whom she had entered into a registered domestic partnership.

The Work Group discussed the situation in which an unmarried and unregistered couple executes wills leaving property to each other and then marries. ORS § 112.305 revokes their wills. The Work Group discussed whether to create another exception in the statute, but concluded that the statute as written, with the exception for the marriage of registered domestic partners, was the preferable

default rule. If an unmarried couple provides for each other in wills executed before marriage, they will need to re-execute the wills if they marry.

ORS § 112.315 revokes will provisions for a testator's spouse if the testator and the spouse dissolve their marriage. The UPC also revokes will provisions for step-relatives of the testator, and the Work Group discussed whether to extend the revocation provisions in ORS § 112.315 to include step-relatives. The Work Group concluded that Oregon's current statute provides the better default rule. The UPC also revokes provisions in will substitutes in addition to the will after a divorce. The Work Group concluded that a statute revoking designations in will substitutes would need to be placed in a different chapter in the ORS. The Work Group made no changes to ORS § 112.315.

Section 17: ORS § 112.345 was enacted to provide that the Rule in Shelley's Case does not apply in Oregon. Because the Rule in Shelley's Case applies to a situation in which a devise is made to a person for life, remainder to the person's heirs, the statute is amended to match the Rule in Shelley's case. The deletion of "children" is not intended to change current law. Because the Rule in Shelley's case would not apply to a devise to a person for life with the remainder to the person's children, that gift would vest a remainder interest in the children, without the need for a statute.

Sections 18 and 19: These Sections improve the language in ORS §§ 112.355, 112.365.

Section 20: This Section amends ORS § 112.385, Oregon's nonademption statute, by adding "encumbrance" to the list of situations in which property owned by the testator will not be adeemed. ORS §§ 112.325 and 112.335 can be repealed because the need for those sections is now addressed in ORS § 112.385. If those sections are not repealed, they should be adjusted to cover the different ways an owner might carry back financing when a piece of real estate is sold. The carryback financing could occur through a land sale contract, a note and trust deed, or a note and mortgage.

The Work Group decided not to amend the anti-lapse statute, ORS § 112.395, to include step-children. The UPC covers step-children in its anti-lapse provision, UPC § 2-302(a)(1).

Section 21: ORS § 112.405 provides the rules for pretermitted children – children born after a parent executed his will. The amendment adds a reference to the new statute on posthumously conceived children, to say that a child conceived after a parent's death and treated as a child of that parent under the new statute can be considered a pretermitted child under ORS § 112.405 if the circumstances in that statute apply.

ORS § 112.405 provides that if a parent executes her will when she has no children and then has a child, the child takes an intestate share of the estate. The proposal amends this subsection to provide that the child will not receive an intestate share if the testator's will left substantially all of the testator's estate to the other parent of the child. The change reflects the Work Group's view that most testators would prefer to give the other parent of a child control over the property in the estate rather than have a conservatorship created for the child. This change mirrors the approach taken in the UPC § 2-302(a)(1).

Sections 22-25: These sections make changes to ORS §§ 112.465 – 112.555, the statutes that reduce or deny a share of a decedent's estate to someone who is determined to be a "slayer" or "abuser" under the statute. As defined in ORS § 112.455, a slayer is someone who killed the decedent with felonious intent, and an abuser is someone who was convicted of a felony for physical or financial abuse of the decedent, if the decedent died not more than five years after the conviction.

Section 22: This section clarifies that any property held in the decedent's name or in trust that would have passed to a slayer or abuser by reason of the death of the decedent will pass as if the slayer or abuser predeceased the decedent.

Section 23: This section combines ORS §§ 112.475 and 112.485 into one section, now § 112.475, to deal with situations in which the decedent held property in joint tenancy with right of survivorship with the slayer or abuser. In subsection (1), which had been § 112.475, if the decedent held property with right of survivorship with the slayer or abuser, the property is converted into tenancy in common property, with half being distributed to the decedent's heirs or devisees and half to the slayer or abuser. Because the slayer or abuser might have contributed the entire value of the property, this change seemed more fair than current law, which converts the slayer or abuser's interest into a life estate and converts the decedent's interest into a remainder in the entire property.

New subsection (2) is former § 112.485 and deals with situations in which the decedent held property with multiple other owners. This subsection remains the same as current law.

Section 24: This section amends ORS § 112.535, which states that an insurance company or financial institution will not be subject to liability under ORS §§ 112.455 – 112.555 if the company or institution had no notice of a claim under those sections. Section 24 simply deletes the word "additional" from this section as superfluous and confusing.

Section 25: The Work Group wanted to clarify that property could be distributed under the slayer statutes after a civil determination that someone was a slayer, without waiting for a final determination of the criminal case against the slayer. A final judgment of conviction is conclusive but not necessary for a civil determination.

Section 26: This section introduces Sections 27-30, sections of the Act that will add new sections to Chapter 112.

Section 27: An issue that has arisen around the country is the question of whether a child conceived using genetic material from a deceased person should be considered a child of that person. The determination of status for intestacy purposes may affect the definition of "descendants" or "issue" used in a trust or other dispositive document and will also affect the determination of dependency for social security purposes. The Oregon statute has been silent on this issue. Around the country some states have begun to address the question, and the Work Group reviewed statutes and cases from other states as well as the UPC before making a recommendation for Oregon.

As under current law (ORS § 112.074, which is replaced by the new section), a person conceived before the decedent's death but born thereafter is considered born as of the decedent's death. The statute clarifies that an embryo is not considered "conceived" for this purpose until it is implanted.

The proposed new section treats a child conceived posthumously as a child of the deceased parent only if the parent provided for posthumously conceived children in a will or trust, the deceased parent left a signed and dated writing saying that the decedent's genetic material could be used posthumously, and the child conceived posthumously was in utero within two years of the decedent's death.

A concern with providing for possible posthumously conceived children is the delay for the administration of estates. The statute requires the person with control of the genetic material to notify the personal representative of the decedent's estate within four months of the date of appointment. Thus, if the personal representative has not received notice within four months (which is also the claims period so an estate normally would not be distributed during that period), the personal representative can make distributions without concern that a posthumously conceived child will later surface.

The Work Group's goal was to limit the situations in which a posthumously conceived child could share in an estate but not to preclude a person from planning for posthumous conception and arranging to have his genetic child treated as his child for inheritance and social security purposes.

Section 28: This section creates rules for satisfaction of a devise in a will through a lifetime gift by the testator to the devisee. The doctrine is similar to ORS § 112.135, the doctrine of advancements as applied to intestate estates. The language for the new section follows the language in the UPC § 2-609 and ORS § 130.570, the section of the Oregon Uniform Trust Code (the "OUTC") that adopts rules for satisfaction (termed advancement in the OUTC) for trusts. The new section provides that a gift to a devisee will be treated as satisfying (or reducing) a devise in the will only if the will provides for deduction of the gift, the testator declares in writing that the gift is

in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction of the devise.

The Work Group discussed whether the new section should require the writing by the testator to be "contemporaneous" with the gift. UPC § 2-609 includes the word contemporaneous, and some Work Group members thought the requirement could help address issues of undue influence, but the OUTC does not include the word contemporaneous, and the Work Group concluded that it would be preferable to be consistent with the OUTC provision.

If a gift made before death is intended to satisfy a devise under a will, it will be important for the testator to put that intention in writing. If the gift is a specific item, the devise will be adeemed if the item is no longer in the estate, but a gift of money can lead to questions about whether a gift during life was intended to be in satisfaction of the devise in the will. The new provision makes clear that a gift will be treated as satisfying a devise only if a writing so provides.

Section 29: This section adopts the doctrine of harmless error. This doctrine was developed to address the problems that occur when a person's testamentary wishes are thwarted due to mistakes in the execution of a will, a codicil, or a written revocation of a will. Harmless error requires a determination by the court, based on a clear and convincing evidence standard, that the decedent intended a writing to be a will, codicil or document revoking a will.

Harmless error does not require a particular level of compliance with the execution formalities (i.e., it does not require a "near miss"), and instead focuses on proof of the decedent's intent. The doctrine will be used in situations in which a decedent thought she had executed her will but made a mistake in doing so. A person trying to prepare a will without a lawyer might have the document signed by only one witness, have two witnesses observe her sign but fail to ask the witnesses to sign the document, or have the will notarized but not witnessed. A person might write out her will and sign it but not realize that she needed witnesses.

In order to establish the decedent's intent by clear and convincing evidence, the proponent of the document should have more evidence than simply the document itself. A piece of paper and an authenticated signature should not be sufficient to show the decedent's intent. Additional evidence could include evidence of the circumstances of the creation of the document, testimony of people who heard the decedent discussing his intent to execute a will, testimony of people who saw the decedent prepare or sign the will, or other documents prepared by the decedent that described the will. Any circumstances that suggest fraud in the creation of the document will, of course, lead a court not to admit the document as a will.

The advantage of adopting the harmless error rule rather than relaxing the execution requirements directly or authorizing holographic wills is that a court will oversee the determination of whether a document should be admitted to probate as

a will. The harmless error rule permits the court to fix a number of the problems that occur with will execution, but because the proponent must produce clear and convincing evidence, the change should not lead to a significant number of additional hearings. Most wills, codicils and documents of revocation will still be admitted to probate based on compliance with the statutory execution requirements. These requirements will remain as a safe harbor, and any lawyer assisting a client with a will should follow those requirements when the client executes the will. The Work Group found no information to suggest that states that have adopted harmless error have seen a significant rise in proceedings to establish wills using the doctrine.

Although the concept of harmless error comes from the UPC, the Work Group added several additional provisions to the new section. The section requires the proponent of the document to give notice to heirs and devisees under prior wills and then provides for a 20-day period for any person receiving notice to object before the court makes its determination. Although the document cannot be admitted to probate before the end of the 20-day period, the court can appoint a special administrator if necessary. Also, if the court determines that the writing was a will, codicil or revocation, the court must prepare written findings of fact supporting the determination and enter a limited judgment to that effect.

Section 30: Section 30 adopts a provision based on UPC § 2-513 authorizing a testator to use a separate writing to distribute tangible personal property (sometimes referred to as a "tangibles memo"). The new provision permits a writing to dispose of tangible personal property if the testator signs the writing, even if it does not otherwise meet will execution requirements (i.e., if the document was not signed by two witnesses) and even if it was created or modified after the date of the will (and therefore does not meet the requirements of incorporation by reference). The testator's will must refer to the writing, and the writing must describe the items and devisees with reasonable certainty.

Members of the Work Group noted that decedents already do this both by giving the tangibles to the personal representative to be distributed in accordance with a list providing precatory guidance for the personal representative and by distributing the tangibles through a revocable trust, for which a tangibles list can be used and amended by the settlor. Work Group members also noted that not having statutory authorization for a tangibles memo leads to partial or total revocation of wills, because testators attempt to revise gifts of tangibles made in the will and do so unsuccessfully, sometimes revoking the entire will.

Although the UPC simply uses the term "tangible personal property" without definition, the Work Group thought that term was too broad. The proposal limits the use of a tangibles memo to property described as "household items, furniture, furnishings and personal effects," and the tangibles memo cannot be used for "[m]oney, property used in trade or business and items evidenced by documents or certificates of title." The Work Group thought the tangibles memo would be most

appropriate for items of modest value, although the Work Group recognized that household items could include a Tiffany lamp of great value and personal effects could include valuable jewelry. Nonetheless, the proposal limits the sorts of property that could be distributed this way, especially when compared with the UPC. For example, under the UPC an airplane is an item of tangible personal property and therefore included, but under the proposal an airplane is excluded because it has a certificate of title.

The Work Group noted that because the types of property that can be distributed under the new provision will be more limited than under the UPC and therefore more limited than in a number of states, lawyers will need to be careful about their documents and instructions to clients. Forms from other states may be misleading.

If a testator creates a tangibles memo and includes something in the memo that cannot be distributed because the type of item is not permitted under the statute, the memo may be given effect if it can be incorporated by reference. If the memo was created or modified after the will was executed and cannot be incorporated by reference, the memo can serve as precatory information for the person who receives the items under the will.

Section 31: This section adds a definition of "generation" to ORS § 111.005, the statutory section that provides definitions for use throughout the chapters that comprise the probate code.

Section 32: This section amends ORS § 116.313 a provision in the Oregon Uniform Trust Code that directs the apportionment of estate tax unless the decedent's will provides otherwise. The amendment adds a reference to a revocable trust of the decedent, so that if either the will or revocable trust contains language on apportionment, that instruction can be consulted and applied. This amendment was included at the request of the Estate Planning and Administration Section.

Section 33: This section amends ORS § 419B.552, the provision on emancipated minors, to add making a will to the list of things an emancipated minor can do.

Section 34: ORS § 112.685 currently provides for dower and curtesy rights that expired in 1980. Consequently, the Work Group determined that the first sentence of the section should be left in the statute, but the remainder of the statute should be deleted as no longer necessary. The deletion is not intended to revive any rights.

Section 35: This section provides that the unit captions used are for convenience only and do not become part of the law.

Section 36: This section provides that the amendments made to existing law and the repeal of exiting provisions of law apply to decedents dying and wills and writings executed after the effective date of the proposed bill.

VI. Conclusion

These amendments to Chapter 112 will improve the statutory law that provides rules for intestacy and wills.