WARREN C. DERAS
10559 SW WINDWOOD WAY
PORTLAND, OREGON 97225-7065
TELEPHONE 503-515-8031 *E-MAIL warrenderas@comcast.net*
February 14, 2023

Testimony in opposition to Senate Bill 626 "functional child" bill.

I practiced law in Portland, primarily in estate planning and probate, before I retired twelve years ago. For several years I was also a special assistant attorney general for Oregon representing the Department of State Lands, primarily in administration of escheat estates. I have a long-standing interest in legislation, and I was legislative committee chair for the Oregon State Bar Estate Planning and Administration Section and personally wrote significant revisions of the Oregon Probate Code in the areas of claims, small estates, will contest procedures and escheats, among others. Although retired I have continued to follow and contribute to probate legislation.

I do not look at this proposed legislation from the perspective of a litigator. I seldom dealt with contested probate matters. I bring the perspective of an attorney who attempted to manage routine probate matters as efficiently and inexpensively as practical.

SB 626 deals with intestate estates — estates of those who die with no wills (although section 1 I think erroneously places section 2 in ORS Chapter 112, when it should place it in ORS 112.025 to 112.055, the portion of the chapter dealing with intestacy). Intestacy involves the identification of heirs — relatives of a decedent who take shares of the estate in the proportions clearly set forth in the law. Most substantial estates don't pass by intestacy, but under wills as testate estates to beneficiaries determined by the decedent. However, it is extremely important even for testate estates passing to devisees named in the wills that the law of intestacy be clear and simple, because in every testate probate proceeding notice is required to heirs, even if they don't receive anything under the will. That is because heirs are entitled to contest the will and in the right circumstances force the estate into intestacy. So in every petition to probate an estate — testate or intestate — heirs must be identified.

SB 626 Introduces a New Area of Uncertainty and Expense into Probate Administration

Oregon's laws governing intestacy are, like those of other states, simple and clear, with the basic rules being set forth in ORS 112.025 to 112.045. Shares are allocated first to spouses and/or descendants, if none then to parents and/or their descendants, and if none of those to grandparents and/or their descendants. No heirs are created based on subjective relationships. ORS 112.047 does eliminate intestacy rights for parents who desert or abuse their children, but in many respects it is easier to subtract rights subjectively than to create them.

During my years of practice there was one effort to add a subjective relationship to heirship. In 1993 ORS 112.017 was added to Oregon intestacy law to create a concept of common law marriage. The amendment was jammed through in the last week of the session without adequate consideration and created numerous uncertainties. With the agreement of the primary sponsor of the legislation I for the Estate Planning and Administration Section wrote amendments enacted in 1995 to clarify the statute, but the concept of treating someone as a spouse based on subjective judgments of the relationship rather than a marriage license and a ceremony introduced too much uncertainty into the law. The statute was repealed in 1999.

SB 626 creates the same kind of issues as common law marriage did. If it is enacted then in every probate filed in the future — testate or intestate — the attorney will need to examine the

issue of whether there is someone who might arguable by considered a functional child based on the very subjective standards included in this proposed legislation. If there is that person will have to get notice of the probate, and notice will also have to be sent to any person who would be an heir were there no functional child. This will be required in the simplest of estates not involving any kind of family dispute, and it will add to the cost of probate. This is required because in probate everyone with a potential interest in an estate is entitled by due process to notice and a reasonable opportunity to object to anything that might defeat that interest. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). Probate attorney will of necessity be concerned about protecting their clients serving as personal representatives from personal liability for failure to notify potential functional children.

Reviewing the standards for establishing the existence of a function child/functional parent relationship the only thing that is clear is that they are clear as mud. The court “may” consider any combination of a long list of factors. While one factor seems clear and mechanical — that the person “lived in the purported functional parent’s home for a majority of the person’s first 20 years of live” — that factor is not at all clear when you consider that the court can totally disregard it in favor of other factors, such as that “the person had a parent-child relationship with the purported functional parent”.

SB 626 Will Create New Inequities in Probate

The appeal of SB 626 is that it corrects what seems like a glaring inequity in distribution of estates based on the simple mechanical test of heirship in the Probate Code. There can be no doubt that the rules for determining heirship ignore emotional bonds in favor of marital and biological relationships. Do doubt sometimes emotional bonds are stronger than those relationships. However, sometimes application of SB 626 would create more wrong results of its own.

In adding “functional children” to children in establishing heirship subsection 2(1) of the bill tracks the language of ORS 112.175 respecting the effect of adoption on heirship in most respects, except for one glaring omission. Under ORS 112.175(2) adoption cuts off the adopted child from inheritance by intestacy from the family of the birth parents. This bill does not do that for a “functional child”. As a result you can easily get the kind of inequity described in this (lengthy) hypothetical example that may well occur if SB 626 is enacted:

> Donald and Joe *[to pick two familiar names]* are brothers, both in conventional family relationships with two children each. They have agreed that on the death of either of them and his wife the survivor will take care of the children of the one who died. Donald and his wife have a complete estate plan which includes documents nominating Joe as guardian for their two boys, A and B, and creating trusts to age 25 for A and B.
>
> Donald and his wife are killed in an accident while A and B are 5 and 7. $5 million (after costs) is recovered in a wrongful death case and is divided equally in conservatorships for A and B with Joe as conservator. Joe also becomes guardian for A and B and trustee of their trust, which holds $2 million is assets, mostly life insurance on Donald and his wife. Over time the conservatorship and trust assets grow significantly from Joe’s careful management. Joe is also representative payee managing Social Security

survivor benefits for A and B. Most of their share of household expenses are paid from those benefits with remaining expenses being paid from their trust. Ultimately A and B when they become adults each inherit about $5 million from their parents.

A and B of course were born with the same last names as Donald, satisfying one of the criteria for being his “functional children”. Given their suddenly larger family Joe and his wife Jill are forced to sell their home and move with A and B and their two daughters to a larger home. While family and close friends know their actual family history, Joe, Jill and their daughters and A and B generally act as a family, and many friends and new neighbors do not know the family history. Joe and Jill do not adopt A and B, because Joe feels that would dishonor Donald. The extended family stays together until all four kids are grown and on their own, A and B leaving when they start college.

The family is middle income, but obviously A and B are wealthier than the daughters of Joe and Jill. They have some corresponding advantages in life. They have opportunities to travel. Both go to more prestigious colleges than the Joe’s daughters and on to professional schools. These advantages lead them into successful careers and great wealth. The Joe’s daughters are more middle income working class with limited financial resources and large school loans.

Joe dies. The family home and some retirement savings go to Jill by survivorship. However, he is the sole beneficiary of the pending estate of his late mother, who left her entire $1 million estate to Joe, because she felt Donald’s sons A and B were doing much better financially than Joe’s family. That expectancy is now in Joe’s probate estate. He has no will or other estate planning documents.

Are A and B Joe’s functional children now entitled to have part of Joe’s estate? It appears they meet most or all of the criteria of SB 626 to be considered such.

Being functional children, however, would not make them Joe’s heirs under SB 626, because Joe is survived by Jill, who would ordinarily be his sole heir under ORS 112.025(1), as long has Joe had no children who are not also the children of Jill. However, it is not at all clear that A and B are Jill’s functional children. If they are Joe’s “functional children” and not Jill’s, half of Joe’s probate estate goes in equal shares to the four children under ORS 112.025(2) and 112.045(1).

When she married Joe Jill kept her maiden name, so A and B do not have her last name, defeating one of the criteria for “functional children”. Furthermore Jill has long felt that A and B had acted inappropriately towards her daughters during the last year they lived in the family home, and she had refused to socialize with them after they left the home. Joe had more of a “boys will be boys” attitude about the problems between A and B and his daughters. Joe liked to go fishing with A and B and kept a close relationship with them, even though Jill insisted that their daughters could not go along. So Jill’s status as a functional parent is more questionable and certainly not as clear as is Joe’s.

When she consults an attorney to probate Joe’s estate Jill is told of the functional child rule and that A and B may split a quarter of Joe’s estate. Aghast at the thought of them also sharing in her estate she instructs the attorney to prepare a will for her excluding

A and B from taking a share. Before the will is completed, however, she dies.

So at this point A and B are in line to receive either one-quarter or Joe’s estate or half of Jill’s estate, depending on whether they are found to be functional children of Jill.

This hypothetical situation is not at all far fetched. In every estate plan I prepared for families with significant assets and young children the clients nominated close friends or relatives to be guardians of their children, knowing they themselves would provide financially for their children and that the guardians would not do so.

SB 626 Omits Necessary Provisions to Satisfy Due Process Requirements

SB 626 creates a new category of heir, but does not include the probate procedures necessary to implement that change. Under constitutional due process rules probate cannot take away the potential rights in an estate of a “known or reasonably ascertainable” person without notice and an opportunity to object. *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). If SB 626 is enacted then anyone who might arguably be an heir as either a “functional child” or a “functional parent” is entitled to notice of the proceeding. If the petitioner initiating a probate believes that all or a share of the estate should go to a “functional child” or a “functional parent” and names that person as an heir, then notice would need to go to the person or persons who would otherwise inherit that share.

Probate is initiated by a petition filed in court in accordance with ORS 113.035 naming all “interested persons” (other than creditors of the decedent, who receive notice by another process). Interested persons include heirs and devisees. ORS 113.145 then requires that a formal notice be mailed to the interested persons named in the petition. If SB 626 is to be enacted, it needs to be amended to provided for inclusion in the petition of persons who might inherit as “functional children” or“functional parents” as well as persons who might be excluded from heirship on account of the existence of such persons, and ORS 113.145 needs to be amended to provide for notice to those persons. These changes would be similar to the ones I wrote that were adopted in 1991 for notice to potential will contestants as part of the legislative response to the *Tulsa* case.

SB 626 quite clearly contemplates that a court has to determine whether someone is a “functional child” or a “functional parent”. Any such legislation should include clear direction as to the process by which that will occur. That is also lacking in SB 626.

Conclusion

SB 626 would introduce inappropriate uncertainty and expense to probate administration. It would also create as many inequities as it would cure. It lacks necessary procedures to comply with due process requirement and actually implement the changes it proposes. For these reasons I urge the committee to reject it.

Very truly yours,