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Judiciary Committee
Oregon House of Representatives

Subject: Senate Bill 15 — A-Engrossed
Simple Estate Law amendment

I practiced law in Oregon for 40 years and retired in 2011. My practice was primarily in the estate planning and probate. Over the years I wrote substantial parts of the Oregon Probate Code, including in 1989 the first major revision to what was then called the Small Estate Law.

In addition to my regular practice the Oregon Department of Justice appointed me a special assistant attorney general to represent the Oregon Department of State Lands in escheat cases. In those cases the estates of deceased Oregonians with no wills and no known heirs go to Oregon's Common School Fund. I also was in a group of attorneys used by the Probate Court in Multnomah County to clean up problem probates. In those positions I saw and dealt with many cases in which individuals attempted to abuse the probate process for personal gain. It is unfortunately inherent in probate that assets in transition on account of the death of the prior owner are at high risk of theft, and the probate process is designed in part to prevent that.

Since my retirement I have no financial interest in Oregon's probate system, and I write only for myself as an interested spectator. I have continued to follow probate legislation out of personal interest and to share my experience.

The Small Estate Law was added to Oregon's Probate Code in 1973. So far as I know it is unique to Oregon, although other states have different mechanisms for dealing with estates that are simply too small to afford the expense of fully protecting them from abuse by way of the probate process. The Oregon law is similar to the affidavit process in the Uniform Probate Code, but under that procedure the affidavits are presented to banks or other persons holding estate assets, and they are not filed in court at all. Oregon's small estate law as enacted was limited to estates valued at $10,000 or less in combined real and personal property. With inflation since 1973 that would be about $70,000 today.

In other words the Small Estate Law was not in 1973, and the simple estate law is not now, really designed to deal with assets like the average home in Oregon. It was created as a shortcut probate for really small estates that could not afford all the whistles and bells of probate.

Since the small estate law was enacted the asset values subject to what is now called the simple estate law have grown disproportionately to inflation. The dollar limit is now $275,000 instead of the $70,000 that inflation would justify. A few additional safeguards have been added to the law, but nothing close to the level of protection provided in a full probate. In addition wills "pouring over" a probate estate to a living trust can now pass under the simple estate law with no dollar limit, apparently based on the assumption that these are estates that ordinarily will have professional oversight that can substitute for the court oversight of a full probate. That recent change reflects a common failure of living trusts as a probate avoidance device — that the

trust settlors fail at the outset to put all their assets into the trust or acquire new assets outside the trust.

I have some concerns about A-Engrossed Senate Bill 15 I want to share with you.

Conflict with Enrolled Senate Bill 168

Enrolled Senate Bill 168 is an Oregon State Bar bill cleaning up a number of minor probate code problems and now awaiting the governor's signature. Both it and A-Engrossed Senate Bill 15 amend ORS 114.510. I know that multiple amendments to ORS sections in a single session are a common problem. I am concerned that the changes made to ORS 114.510 by these two bills will be very difficult to resolve. I believe it would be far better now to use the "if" amendment procedure described in section 7 of Chapter 18 of the of the Legislative Counsel *Bill Drafting Manual*. In other words, Senate Bill 15 should be written to amend ORS 114.510 as it is amended by Enrolled Senate Bill 168 if that bill becomes law, as I assume it will. Otherwise I fear the clarification intended by Enrolled Senate Bill 168 will be lost (until next session).

The "sole devisee" standard for avoiding full probate is inappropriate

Both while representing the Department of State Lands and in my private practice I have at various times had to pursue undue influence cases. Invariably when an undue influencer takes advantage of an individual with impaired capacity the result is a will in which the undue influencer is the sole devisee. If wills that are the product of undue influence pass through the simple estate process rather than full probate the odds that the people who really should receive the estate will get notice of what is going on will be greatly reduced. Undue influencers tend to have little respect to due process.

An escheat case comes to mind in which a single childless woman entered a senior foster care home shortly before her death. Within a week of her arrival the operator of the home had an attorney there to prepare a will for the woman leaving her entire substantial estate to the operator. After the full probate was file the Department of State Lands successfully contested the will, and the entire estate went to the Common School Fund. (The attorney who wrote the will, by the way, had his license to practice suspended.) Had the estate qualified for use of the simple estate law I doubt DSL would have gotten notice of it.

Not only does the "sole devisee" category have the potential for facilitating undue influence, it really seems to me arbitrary and inappropriate. If a will leave a few dollars to a friend or charity and the balance to a sole surviving spouse or child, the estate would not be eligible. If instead of there being one child the will divides the estate equally among two or three surviving children, it would not be eligible. What policy difference supports this distinction? I can think of none.

If the Legislative Assembly wishes to expand the categories of estate distributees eligible to use the simple estate process, I would recommend the category chosen be sole heir surviving spouses, not sole devisees.

If the decision is made that the categories of situations eligible for simple estate treatment should be expanded, I would suggest expanding it to cover surviving spouses who are sole heirs,

provided the affidavit expressly confirms that there are no surviving descendants of the decedent who are not also descendants of the surviving spouse (since such descendants would be heirs, but many non-lawyers don't know that) and provided further that the surviving spouse in the simple estate affidavit personally undertake to pay amounts owed creditors of the estate to the extent of the estate assets he or she receives.

Most commonly married couples own everything with the right of survivorship or have beneficiary designations in favor of the other spouse for retirement plans, etc. However, at times that is not the case. For example, one of a couple may inherit property and just never get around to transferring it to a tenancy by the entirety. One may have an expensive hobby that involves collections of vehicles registered to one spouse or untitled personal property. Under ORS 95.920 untitled personal property is not survivorship property absent a written instrument declaring it to be such. Ordinarily the financial affairs of a married couple are so financially intertwined it is hard to sort their properties out. In these cases there may be no will, or there may be a simple will leaving everything to the surviving spouse. As long as the creditors are being paid, and the decedent did not leave surviving children by a prior marriage who have an interest in making sure everything is handled properly, no one is harmed by using a less formal process like the simple estate asset to probate such an estate.

I also see no reason for a dollar limit for use of the simple estate process in such an estate. In other words, estates going entirely to a surviving sole-heir spouse could for simple estate purposes be treated pretty much like estates being distributed to the trustee of the decedent's living trust. With no dollar limit for surviving spouses I see no reason for a CPI indexing arrangement such as that beginning at line 15 on page 2 of A-Engrossed Senate Bill 15. I don't think the remaining dollar limits already in the law should be indexed for inflation, because frankly I think they are already higher than is appropriate, having increased at a pace far faster than the rate of inflation since the small estate law was enacted in 1973.

Nor do I think it appropriate to have a higher court filing fee for estates going to a surviving spouse under the simple estate process, as recommended above. The probate filing fee structure is intended to be somewhat proportionate to the burden imposed on the court (although that proportionality is pretty arbitrary). Ordinarily a simple estate affidavit in any category does not impose a great burden on the court. So I would delete Sections 2, 3 and 4 beginning at page 2, line 34, of A-Engrossed Senate Bill 15.

I appreciate the opportunity to provide you my recommendations respecting this bill. Unfortunately I am dealing with a health issue that likely will prevent my personal attendance at the scheduled hearing.

Very truly yours,