



BIENNIAL REPORT
of the
OREGON LAW COMMISSION
2009-2011



The Oregon Law Commission operates through a public-private partnership between the State of Oregon and Willamette University. The Commission is housed at the Oregon Civic Justice Center, adjacent to the Oregon State Capitol at 790 State Street, Salem, Oregon.



OREGON LAW COMMISSION

245 WINTER STREET SE
SALEM, OREGON 97301

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FAX 503-370-3158
www.willamette.edu/wucl/olc

COMMISSIONERS

Lane P. Shetterly, Chair
Prof. Bernard F. Vail,
Vice-Chair
Chief Judge David Brewer
Mark B. Comstock
Chief Justice Paul J. De Muniz
John DiLorenzo, Jr.
Rep. Chris Garrett
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Dean Symeon C. Symeonides
Prof. Dominick Vetri

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and General Counsel*

Lisa L. Ehlers
Legal Assistant

Dexter Johnson
Legislative Counsel

David W. Heynderickx
*Special Counsel to
Legislative Counsel*

BIENNIAL REPORT OF THE OREGON LAW COMMISSION

2009 – 2011

From the Executive Director's Office

**Jeffrey C. Dobbins
Executive Director**

and

**Wendy J. Johnson
Deputy Director and General Counsel**

**This Report is prepared for the Legislative
Assembly as required by ORS 173.342**

**This report can also be found online at the Oregon Law
Commission website:**

<http://www.willamette.edu/wucl/olc/reports/index.php>



*The Oregon Law Commission
is housed at the Willamette
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This Biennial Report reflects the Commission's work from 2009-2011. We would like to take this opportunity to share the work completed by the Commission this biennium and to also share some changes that have occurred within the Commission.

Work Completed

The Oregon Law Commission, with the help of over two hundred dedicated and exceptional volunteers, completed work on seven pieces of recommended legislation for the 2011 Legislative Assembly, recommended one set of rule changes to the Oregon Council on Court Procedures, and assisted with several other bills. The largest project this interim was a review and rewrite of the inheritance tax chapter of the ORS. In addition, the Commission is already looking ahead to 2013 and has commenced study or will begin study of several other significant law reform projects as described in this Report.

Changes for the Commission

The Oregon Law Commission saw several changes among its membership this biennium. Notably, the Commission added two new judicial positions to comply with 2009 legislation that expanded the Commission to 15 members. Chief Judge David Brewer of the Court Appeals became an ex officio member of the Commission and Judge Karsten Rasmussen was appointed by Chief Justice De Muniz to serve as the trial judge member of the Commission. Greg Mowe, a partner at the Stoel Rives firm, finished his term in 2009. He was originally appointed by the Oregon State Bar in 1997 and led several important law reform projects during the course of his active tenure and reappointments to the Commission. The Commission thanks him for his very meaningful service - he will be greatly missed. Scott Shorr, a partner in the Stoll Berne firm, was newly appointed by the Bar. Former Rep. Greg Macpherson completed his term during this biennium as well, and Rep. Chris Garrett was appointed by the House Speaker to fill that position. Lastly, due to state budget cuts, the Commission staff was downsized and we no longer have a staff attorney position.

Thank You

We would again like to thank all the distinguished and very capable members of the Commission, its Work Groups, and the Executive Director's office at Willamette University for their extensive efforts on behalf of the Commission. The Commission is now well settled into its new home at the Oregon Civic Justice Center on State Street in Salem, and we look forward to the Commission's continued law reform service in support of the Oregon Legislative Assembly and the State of Oregon.

Lane P. Shetterly
Chair, Oregon Law Commission

Professor Bernard F. Vail
Vice-Chair, Oregon Law Commission



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**WILLAMETTE**

THE FIRST UNIVERSITY IN THE WEST

COLLEGE OF LAW
245 WINTER STREET SE
SALEM, OR 97301PETER V. LETSOU
DEAN AND RODERICK & CAROL WENDT
PROFESSOR OF BUSINESS LAW

On behalf of Willamette University, it is my pleasure to congratulate the Oregon Law Commission and its staff for yet another highly productive biennium, the results of which are described in the attached report.

The Willamette University College of Law is proud to support the work of the Commission through its public/private partnership with the State of Oregon. Now in its second decade, this partnership permits Willamette University to contribute to the all-important endeavor of law reform by providing the Commission with an outstanding and dedicated staff and an attractive and historic home at the University's Oregon Civic Justice Center. The College of Law remains wholeheartedly committed to its partnership with the State of Oregon, even in these very difficult economic times, and looks forward to supporting the work of the Commission and serving as the Commission's home for many years to come.

As the College of Law's new dean, I am personally committed to continuing the tradition of support for the Commission established by my predecessor, Dean Symeon Symeonides. Dean Symeonides' tenure as dean at Willamette was marked by exceptional contributions to the work of the Commission, including the \$4.5 million acquisition and renovation of Salem's historic Carnegie Building, which now serves as the Commission's home. While Dean Symeonides has stepped down from his position as dean after twelve years of outstanding service, the College of Law's strong commitment to the Commission remains.

With my best wishes for another successful biennium.

Sincerely,

Peter V. Letsou
Dean and Roderick & Carol Wendt
Professor of Business Law



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From the Executive Director's Office . . .

This biennium, again with the help of the many dedicated volunteers serving on the Commission and its work groups, the Law Commission prepared and approved eight law reform projects. This brings the Law Commission's total output from its first session in 1999 to nearly 100 bills. Approximately 90% have been enacted as proposed or with limited amendments. Several of the projects this session were technical law cleanup type bills, but the Commission also advanced two pieces of legislation that charted new territory in Oregon law. At the request of the legislature's revenue committees, the Commission also recommended a complete overhaul of ORS Chapter 118, the estate tax chapter. Three of this session's projects were based on uniform acts from the National Conference of Commissioners on Uniform State Laws that were adjusted to work with existing Oregon law. The Commission also continues to work in the area of juvenile law reform, forwarding two bills in that area this year.

This Biennial Report contains the explanatory reports for the 2011 bills, and documents the Commission's work from June 1, 2009 to June 1, 2011. It is our hope that the report gives you clearer insight into the Commission's law reform process, its work, and its potential for the future. The Commission and its staff are proud of its reputation of providing quality law reform recommendations that address complex areas of law by working with the private bar, all three branches of government, and the citizens of Oregon.

We wish to again thank the Oregon Legislative Assembly and Willamette University for their support of the Commission and dedication to the work of law improvement and reform in the state. Finally, and most importantly, we extend our thanks to the many volunteers and legislative staff who have given their time to make this biennium another success.

Professor Jeffrey C. Dobbins
Executive Director

Wendy J. Johnson
Deputy Director and
General Counsel



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Commissioners of the Oregon Law Commission

	<u>Present Term</u>
<p>Lane P. Shetterly, Chair Appointed by Speaker of the House Attorney at Law, Shetterly Irick & Ozias, Dallas, Oregon</p>	<p>9/1/07- 6/30/12</p>
<p>Professor Bernard F. Vail, Vice-Chair Designee of Lewis & Clark Law School Dean Professor, Lewis and Clark Law School, Portland, Oregon</p>	<p>Indefinite term as designated by Dean of Law School</p>
<p>Chief Judge David V. Brewer <i>Ex Officio</i> Chief Judge of the Oregon Court of Appeals, Salem, Oregon</p>	
<p>Mark B. Comstock Designee of Board of Governors of Oregon State Bar Attorney at Law, Garrett Hemann Robertson PC, Salem, Oregon</p>	<p>9/01/08-6/30/12</p>
<p>Chief Justice Paul J. De Muniz <i>Ex Officio</i> Chief Justice of the Oregon Supreme Court, Salem, Oregon</p>	
<p>John DiLorenzo, Jr. Appointed by Senate President Attorney at Law, Davis Wright Tremaine LLP, Portland, Oregon</p>	<p>9/1/07-6/30/10</p>
<p>Attorney General John R. Kroger <i>Ex Officio</i> Attorney General of the State of Oregon, Salem, Oregon</p>	
<p>Julie H. McFarlane Designee of Board of Governors of Oregon State Bar Staff Attorney, Juvenile Rights Project, Portland, Oregon</p>	<p>9/1/08-6/30/12</p>
<p>Representative Chris Garrett Appointed by Speaker of the House Representative, State of Oregon, Lake Oswego, Oregon</p>	<p>7/28/10-6/30/14</p>
<p>Scott Shorr Designee of Board of Governors of Oregon State Bar Attorney at Law, Stoll Berne, Portland, Oregon</p>	<p>1/1/10-6/30/14</p>
<p>Hardy Myers Appointed by Governor Former Attorney General, Portland, Oregon</p>	<p>7/1/10-6/30/14</p>
<p>Senator Floyd Prozanski Appointed by Senate President Senator, State of Oregon, Eugene, Oregon</p>	<p>9/1/07-6/30/12</p>
<p>Judge Karsten H. Rasmussen Appointed by Chief Justice Lane County Circuit Court Judge, Eugene, Oregon</p>	<p>7/8/09-6/30/12</p>
<p>Dean Emeritus Symeon Symeonides of Willamette University, College of Law Dean Emeritus of Willamette University College of Law, Salem, Oregon</p>	<p>Indefinite term as designated by Dean of Law School</p>

Professor Dominick R. Vetri **Designee of University of Oregon Law School Dean** **Indefinite term as designated by Dean of Law School**
Professor Emeritus, University of Oregon School of Law, Eugene, Oregon

Outgoing Commissioners

Gregory H. Macpherson **Appointed by Speaker of the House** **9/1/07-6/30/10**
Stoel Rives LLP, Portland, Oregon

Gregory Mowe **Designee of Board of Governors of Oregon State Bar** **9/1/97-12/31/09**
Stoel Rives LLP, Portland, Oregon

Staff of the Oregon Law Commission

Willamette University College of Law Staff

Jeffrey C. Dobbins
Executive Director and
Assistant Professor of Law

Wendy J. Johnson
Deputy Director and General Counsel

Kristy M. Nielsen
Staff Attorney
September 2009 – January 2010

Lisa Ehlers
Legal Assistant

State of Oregon Staff

Dexter Johnson
Legislative Counsel

David W. Heynderickx
Special Counsel to Legislative Counsel

We would also like to recognize and thank all of the Legislative Counsel attorneys, staff, and editors who worked tirelessly with the Commission, enabling us to complete our recommended legislation.

Law Student Staff

One of the goals of the Law Commission is to bring the legal academic community into the law reform process together with legislators, lawyers, judges, and other interested parties. Law students assist the Commission in a variety of ways, including researching new law reform projects, writing legal memoranda, attending Law Commission meetings, and writing final reports. The following law students, from Willamette University College of Law, served the Oregon Law Commission this biennium.

John Adams – Law Clerk
Summer 2011

Raymond Crosiar – Law Clerk
Summer 2010 to Fall 2010

Marielena Forrester – Law Clerk
Fall 2010

Chad Krepps – Law Clerk
Spring 2011 to Present

Ki Jung Lee – Law Clerk
Spring 2010

Daniel Miller – Law Clerk
Summer 2010 to Fall 2010

Commission History and Membership

The Legislative Assembly created the Oregon Law Commission in 1997 to conduct a "continuous program" of law revision, reform, and improvement. ORS 173.315. The Commission's predecessor, the Law Improvement Committee, had fallen inactive, and the State wisely perceived the need for an impartial entity that would address gaps in the law and areas of the law that were confusing, conflicting, inefficient, or otherwise meriting law reform or improvement.

Legislative appropriations supporting the Commission's work began on July 1, 2000. At that time, the State, through the Office of Legislative Counsel, entered into a public-private partnership with Willamette University's College of Law. Since 2000, Willamette has served as the physical and administrative home for the staff of the Law Commission. Willamette provides a wide range of support to the Commission, supplementing the state's appropriation by providing office space, administrative and legal support, an executive director, and legal research support for the Commission and its Work Groups. The College of Law also facilitates law student and faculty participation in support of the Commission's work. With the aid of matching funds, office space, and other support from Willamette, the State is able to leverage Commission funding in order to provide a substantial service to the State. The Commission has been housed in the Oregon Civic Justice Center since 2009.

To carry out its purposes, the Commission is made up of fifteen Commissioners pulled from a unique combination of entities within the state of Oregon, including four individuals appointed by legislative leadership including two current legislators; three from the judicial branch including the Chief Justice, Chief Judge of the Court of Appeals, and a trial court judge; the attorney general; a governor's appointee; the deans (or their representatives) from each of the three law schools in Oregon; and three representatives from the Oregon State Bar. These Commissioners lead the Commission's various law projects each biennium by chairing work groups composed of experts in the given area of law reform.

Commission Law Reform Project Selection and Reform Process

The Commission serves the citizens of Oregon and the legislature, executive agencies, and judiciary by keeping the law up to date through proposed law reform bills, administrative rules, and written policy analysis. It accomplishes this, first, by identifying appropriate law reform projects through suggestions gathered from the citizens of Oregon, each branch of government, and the academic community. By remaining in close personal contact with the people who know and use Oregon law, the Commissioners and staff are able to identify areas of the law generally considered as "broken" and in need of repair.

Once potential projects are identified, the Commission researches the areas of law at issue, with a particular emphasis on gathering input from impartial experts and those who may be affected by proposed reforms. Staff works with project proponents in order to identify and draft a formal proposal for the Commission.

Formal proposals for commission projects are initially presented to the Commission's Program Committee, currently chaired by former Attorney General, and current Governor's appointee, Hardy Myers. Relying on written guidelines governing the selection process, the Program Committee reviews written law reform project proposals, and makes recommendations

to the full Commission regarding which proposals should be studied and developed by the Commission. Along with commission staff, the Program Committee helps to manage the workload of the Commission and identify a reasonable scope for projects to be recommended to the Commission.

In considering the Program Committee recommendations, the Commission uses several factors to select law reform project proposals for action. Priority is given to private law issues that affect large numbers of Oregonians and public law issues that are not within the scope of an existing agency. The Commission also considers the resource demands of a particular project, the length of time required for study and development of proposed legislation, the presence of existing rules or written policy analysis, and the probability of approval of the proposed legislation by the Legislative Assembly and the Governor.

Once a law reform project has been approved by the full Commission for study and development, a Work Group is formed. Over 200 volunteers serve on Commission Work Groups, and each biennium these volunteers contribute well over 2000 hours of professional time to law reform. The Work Groups are generally chaired by a Commissioner and often have a designated Reporter to assist with the project. Work Group members are selected by the Commission based on their recognized expertise, with Work Group advisors and interested parties invited by the Commission to present the views and experience of those affected by the areas of law in question. The Commission works to produce reform solutions of the highest quality and general usefulness by drawing on a wide range of experience and expertise, and by placing an emphasis on consensus decision-making, rather than by placing reliance on specific interest-driven policy making. This is hard to do, but constant vigilance over the process by the Commissioners and staff, with heavy reliance on the expertise of technically disinterested Work Group members, has tended to minimize the influence of personal or professional self-interest on the recommendations of the Commission.

The Law Commission is unique in that it "shows its work" through its stock in trade: written reports that detail each law reform project's objectives, the decision making process, and the substance of the proposed legislation. The reports work to identify any points of disagreement on specific policy choices, and set out the reasons for and against those choices. When there is dissent or uncertainty within the work group, the report makes an effort to identify the reason for that conflict and to explain why the Work Group chose to resolve it the way that it did. The Legislative Assembly is then able to identify and resolve any necessary policy choices embedded in the recommended legislation.

A Work Group's deliberations result in the presentation of proposed legislation and the accompanying written report to the full Commission, which reviews the product of each work group in detail before making its final recommendations to the Legislative Assembly. Those recommendations, in the form of proposed legislation and the accompanying report, are distributed during Session at the time each bill is proposed in Committee and then followed throughout the legislative process. Whether the proposed bills are adopted in full, adopted with amendments, or ultimately fail, the Commission's commitment to thoughtful public policy formation, and the value of memorializing the decisions made in developing the laws, cannot be overstated.

Oregon Law Commission Meetings

The Oregon Law Commission held five meetings from July 1, 2009 through June 30, 2011. Committees and Work Groups established by the Commission held numerous additional meetings. The Commission meetings were held at the indicated locations on the following dates:

September 9, 2009	Willamette University
August 3, 2010	Willamette University
November 29, 2010	Willamette University
February 8, 2011	Willamette University
March 28, 2011	Willamette University

Minutes for the Commission meetings are available at the Oregon Law Commission's office. They also may be viewed at the Oregon Law Commission web site, www.willamette.edu/wucl/olc/reports/index.php

The Commission is required to hold regular meetings (ORS 173.328). Please contact the Commission at (503) 370-6973 or check the Commission's Master Calendar web page at the following URL to confirm dates and times: www.willamette.edu/wucl/olc/calendar/index.php

<p style="text-align: center;">Program Committee 2009-2011</p>

The purpose of the Program Committee is to review law reform projects that have been submitted to the Oregon Law Commission, and then review and make recommendations to the Commission.

Commissioners serving on the Program Committee during some or all of the 2009-2011 biennium:

Hardy Myers, Chair
Chief Justice Paul J. De Muniz
Julie H. McFarlane
Greg Mowe (7/1/09 – 12/31/09)
Sen. Floyd Prozanski
Lane Shetterly

The Program Committee held two meetings from July 1, 2009 through June 30, 2011 at the indicated locations on the following dates:

August 31, 2009	Willamette University
October 1, 2010	Willamette University

The Program Committee meets as necessary to review proposed law reform projects for the Oregon Law Commission. Please contact the Commission at (503) 370-6973 or check the Commission's Master Calendar web page at the following URL to confirm dates of future meetings: www.willamette.edu/wucl/olc/calendar/index.php

2011 Session Bill Summary:

Bills Presented by the Oregon Law Commission to the Legislative Assembly

During the 2011 Legislative Session, the Oregon Law Commission recommended seven bills to the Legislative Assembly. Prior to session, the Commission also recommended one set of rule changes to the Council on Court Procedures. The following is a brief summary of the recommendations:

1. SB 385 makes six technical changes to the overhaul of Oregon's elective share statutes completed during the 2009 session. The bill clarifies and adjusts the scope of the decedent's augmented estate and also addresses questions related to the surviving spouse's estate, trust property and payment of the elective share.
2. SB 411 codifies procedures and standards regarding fitness to proceed motions in juvenile dependency proceedings, including setting time lines and establishing guidelines for evaluations and restorative services. Juveniles have a constitutional right to not be prosecuted if they cannot aid and assist counsel in their defense, but Oregon law lacks a process for raising this issue and for restoring a juvenile to fitness so they may later be prosecuted.
3. SB 815 codifies the Uniform Real Property Transfer on Death Act which provides a new method for transferring real property to a beneficiary on the owners' death that does not require a probate proceeding. A similar process is already used in Oregon for transferring securities and bank accounts on death. The bill codifies required elements for creation and revocation of a transfer on death deed, including addressing creditor rights.
4. SB 867 clarifies the Oregon Department of Environmental Quality's (DEQ) easements and equitable servitudes program that permits DEQ to enter into agreements with property owners to impose institutional controls to manage risks associated with hazardous substance contamination. The bill borrows certain provisions from the Uniform Environmental Covenants Act to further define DEQ's authority to enter into and enforce the agreements and reinforce the long-term validity of the controls against future owners, despite various common law doctrines.
5. HB 2541 rewrites the inheritance tax chapter of the ORS. Both policy changes and technical changes are made throughout the chapter. The tax will no longer be based on the former federal credit for state death taxes paid and instead the bill provides a state estate tax schedule for estates that have a value greater than \$1 million. The natural resource credit is significantly revised.

6. HB 2689 is a technical cleanup bill that adds language to the juvenile court summons form to provide notice to parents and guardians in a juvenile proceeding of their appeal rights, including a right to counsel on appeal.
7. HB 2708 modifies provisions in ORS 359.205 to ORS 359.250, regarding rights, duties, and remedies associated with the consignment of art. The bill makes corrections to properly protect (but not overprotect) the rights of those who consign artwork, corrects inconsistent and confusing use of the terms “artist” and “consignor” throughout the statute, and repeals preempted Oregon law regarding an artist’s public display rights.
8. The Commission recommended changes to ORCP 38 based on the Uniform Interstate Depositions and Discovery Act to improve the procedure for taking depositions in Oregon for a case pending outside of Oregon. The new procedure is intended to be more cost-effective for litigants and the courts while still protecting Oregon residents who become witnesses in out-of-state proceedings. The revised rule becomes effective January 1, 2012.

Commission's Pending Law Reform Agenda for 2013 Legislative Session

The following is a list of projects pending or approved by the Commission for the 2011-2013 interim and sessions:

Approved Projects Under Discussion

Adoption Records

(e-court related request from Oregon Judicial Department)

Juvenile Court Records

(e-court related request from Oregon Judicial Department)

Child Abuse

(Juvenile Court dependency jurisdiction and definitions of abuse)

Child Abuse

(Reporting Requirements and Standards)

Decisions by Disqualified Public Officials (ongoing project)

Pending Projects Under Discussion

Adoption Revocation by Birth Mothers

Government Use of Social Media

U.C.C. Article 9

Uniform Partition of Heirs Property Act

Uniform Collateral Consequences of Conviction Act

(with possible juvenile focus)

Uniform Law Enforcement Access to Entity Information Act

Report Note

The explanatory reports provided in the following section were approved by both the respective Work Group and by the Oregon Law Commission for recommendation to the Legislative Assembly, unless otherwise noted in the report. The reports were also submitted as written testimony to the Legislative Committees that heard the respective bills. Thus, these reports can be found in the State Archives as they constitute legislative history.

Some bills were amended after the Commission approved recommendation of the bill and accompanying explanatory report. The reports are generally printed as presented to the Commission; however, some reports had minor edits made after the Commission's approval. Several of the bills were amended during the Legislative Session. Rather than try to change the text of the reports affected, the Executive Director's office has inserted an "Amendment Note" at the conclusion of some reports when a bill was amended to assist the reader by providing context and history.



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Summary of SB 385: Elective Share Technical Amendments

In 2009, the Oregon Law Commission recommended HB 3077 to the Oregon Legislative Assembly. That bill revised the outdated Oregon elective share statutes. Elective share statutes provide that a surviving spouse has the option to elect to take a percentage of the value of the deceased spouse's estate instead of taking under the terms of the will. The purpose of an elective share statute is to protect a surviving spouse from disinheritance by the decedent spouse. The two primary justifications for an elective share (i.e. a force share) are that 1) both spouses contribute to the acquisition of wealth during marriage and thus both should receive an equal portion of the couple's marital assets (partnership theory); and 2) the surviving spouse should be provided some measure of support (support theory).

The 2009 bill was a long and complex revision to the elective share law that took nearly 10 years to work out with the Commission, the Oregon State Bar Sections, the State, and the legislature. The primary criticisms of the old elective share statute were that 1) the statute only applied to probate assets but today nonprobate tools of estate planning are very common and thus often the surviving spouse's elective share was seriously underfunded; 2) the statute considered only the decedent's assets and not the surviving spouse's assets, so sometimes the surviving spouse's elective share was overfunded; and 3) the percentage of the value of the deceased spouse's estate that the surviving spouse could elect against was only 25%, and this percentage was well below the partnership theory of marriage percentage of 50%. The 2009 bill remedied these criticisms and set the percentage of what a spouse can receive under the elective share at up to 33% of the augmented estate; the percentage starts at 5% and increases with years of marriage. The law took effect for decedents who die on or after January 1, 2011.

The bill before you, SB 385, makes 6 technical amendments to the 2009 legislation. The problems addressed by the bill were raised by the Oregon State Bar's Estate Planning and Administration Section during the legislative interim. The Oregon Law Commission reviewed the Bar's proposal and supports these technical amendments. The bill was jointly sponsored by the Oregon State Bar and the Commission.

Key Points of the Bill:

- Reorganizes and clarifies the bounds of the augmented estate by clearly excluding property that was irrevocably transferred before the death of the decedent spouse, and adding an exclusion for property that is held by either spouse solely in a fiduciary capacity. **(Section 1)**



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- Provides that the value of the noprobate estate is the value of the nonprobate property after payment of claims and expenses of administration. A deduction for payment of claims and expenses of administration was provided for probate property in ORS 114.650, but a parallel deduction is missing in ORS 144.660 for nonprobate property. **(Section 2)**
- Clarifies that the decedent spouse's nonprobate estate in ORS 114.665 should not include property over which the decedent has the power to designate the beneficiary IF the spouse is not a permissible designee. **(Section 3)**
- Clarifies the definition of augmented estate and both reorganizes and clarifies the definition of surviving spouse's estate. The decedent spouse's nonprobate transfers to the spouse were listed in the definition of augmented estate in ORS 114.630 but were unintentionally omitted in the surviving spouse's estate definition in ORS 114.675. **(Section 4 and Section 5(1))**
- Clarifies how to value trusts in an estate. Clarifies that the valuation provided for trusts described in ORS 144.675(2)(b) and (c) apply only to trusts that are established by the decedent. Provides valuation rules for other trusts, including discretionary trusts by cross referencing ORS 114.630. **(Section 5(2))**
- Provides a decedent with the ability to decide how payment of an elective share is to be paid, if a payment must be made. The amendment provides that the decedent can specify how to pay the elective share in a will, trust, or other governing instrument. If there is no specification, the statute already provides that each beneficiary contributes a proportionate share of the distribution. **(Section 6)**



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Juvenile Code Revision Work Group:

Juvenile Aid and Assist Report

SB 411*

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From the Offices of the Executive Director
Jeffrey C. Dobbins

Approved by the
Oregon Law Commission on
November 29, 2010

*HB 2108 as introduced is identical to SB 411 as introduced. HB 2108 was introduced at the request of Governor Kitzhaber for the Oregon Health Authority. This report thus is explanatory of HB 2108 as well.



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

I. Introductory Summary

Like an adult criminal defendant, a youth in a delinquency proceeding has a constitutional right to raise the issue of fitness to proceed and to stand trial before he or she can be adjudicated in juvenile court. The Oregon Juvenile Code, however, is silent on the subject of fitness. No procedure is set out in the Code for the determination of fitness, and no options for the court are specified when a youth is found unfit. As a result, courts are left to fashion an outcome for the youth with no guidance in the law. Clear options are needed to help ensure that both the best interests of the youth and the best interests of victims and the community are protected. This draft provides a statutory structure that best fits juvenile court delinquency proceedings when youth may be unfit to proceed.

In order for a criminal defendant to stand trial he or she must be “fit to proceed” (i.e. able to aid and assist in his or her defense). This means that the defendant must be able to understand the nature of the proceeding and assist and cooperate with his or her counsel. If a defendant is not able to aid and assist the defendant undergoes restorative services until the defendant regains fitness. Restorative services are generally instructional with a focus on educating defendants about the nature of their crimes and the process and results of the trial or proceeding. These services, however, may also include medication or treatment for mental disabilities. Currently, there are statutory provisions codifying fitness to proceed requirements and procedures that govern adult aid and assist proceedings, but there are no similar statutes for juveniles.

Generally, when counsel raises issues regarding fitness to proceed in juvenile court, the courts proceed similarly to how they would proceed in adult court. This, however, is not preferable because in some instances there are specific reasons that juvenile cases should be handled differently. In addition, with no statutory guidance courts deal with aid and assist proceedings inconsistently. Significantly, some judges have not allowed counsel to raise the issue in juvenile proceedings because it is not provided for in statute. The Aid and Assist Sub Work Group was convened to develop a statutory framework to govern fitness proceedings in order to provide guidance to the courts, ensure consistent application for the litigants, and account for differences between the juvenile and adult system.

II. History of the Project

In December 2003, the Oregon Law Commission’s Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the juvenile aid and assist project. The project was deferred to the 2007 Legislative Session. The Aid and Assist Sub Work Group first met on April 14, 2006. The members of the Sub Work Group included judges, district attorneys, defense attorneys, and other stakeholders who represent or work with juveniles.¹ The group

¹ **Juvenile Aid and Assist Sub Work Group members:** Julie McFarlane, Juvenile Rights Project (co-chair); Thomas Cleary, Multnomah County District Attorney’s Office (co-chair); Karen Andall, Oregon Youth Authority; Bill Bouska, Office of Mental Health & Addiction Services; Mary Claire Buckley, Psychiatric Security Review Board; Michael Clancy, Clancy & Slininger; Daniel Cross, Law Office of Daniel Cross; Judge Deanne Darling, Clackamas County; Summer Gleason, Clackamas County District Attorney’s Office; Judge Kip Leonard, Lane

conducted work in monthly meetings until October, 2006 where it met five times between October 3 and November 9 in order to complete its work and present a final draft to the Law Commission's Juvenile Code Revision Work Group. The Juvenile Code Revision Work Group approved the draft with some minor amendments and forwarded the recommended bill to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the 2007 Legislative Assembly during its meeting on December 4, 2006.

The Work Group's proposal was introduced to the Legislative Assembly as Senate Bill 320 on January 12, 2007. Following a hearing on February 19, 2007 in the Senate Judiciary Committee, the bill was referred to the Senate Ways and Means Committee where it remained until the legislature adjourned in June.

The Juvenile Code Revision Work Group voted at its meeting on January 16, 2009 to reintroduce the bill during the 2009 Legislative Session. The original intention of the Work Group was to reintroduce the bill in the same form as it appeared during the 2007 session; however, during the interim, Legislative Counsel made a considerable number of organizational changes as well as some amendments to conform to Legislative Counsel's style and form guidelines. The Work Group felt that more careful review was needed before forwarding the proposal to the Commission and voted to reconvene the Aid and Assist Sub Work Group to examine the new draft, HB 3220. The Aid and Assist Sub Work Group met on January 28, 2009 and proposed several minor changes to HB 3220. Further amendments were agreed to by email. The Oregon Law Commission approved the draft for recommendation to the Legislative Assembly at its meeting on February 11, 2009. HB 3220 passed out of the House Judiciary Committee, but died in the Ways and Means Committee during the 2009 legislative session.

On February 25, 2010, Linn County Judge Carl Brumund issued a written letter opinion relating to the issue of whether youths may raise an aid and assist issue at all in a juvenile delinquency proceeding in Oregon. The opinion addressed motions filed on behalf of several youths in Linn County as Judge Brumund had requested that the motions be consolidated for argument purposes. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths. The parties agreed that the concept of "aid and assist" is not addressed in the Oregon juvenile code nor the Oregon Constitution. The court looked to the U.S. Constitution as the only relevant source of law for the issue. The court cited a line of U.S. Supreme Court cases that held that a criminal defendant is protected by the Due Process Clause of the 14th Amendment and as such cannot be compelled to stand trial if the defendant lacks the capacity to understand the nature and object of the proceedings against him, lacks the capacity to consult with counsel, or lacks the capacity to assist counsel in preparing a defense. (Citing *Dusky v. United States*, 362 US 402 (1960); *Drope v. Missouri*, 420 US 162 (1975), and *Godingey v. Moran*, 509 US 389 (1993)). Judge Brumund's opinion goes on to explain that the 14th Amendment protections associated

County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O'Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney's Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator's Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist.

with adult criminal prosecutions do extend to juvenile delinquency proceedings. The opinion concludes that a youth must meet the Dusky standards of competency before the youth can be compelled to be adjudicated in an Oregon juvenile delinquency proceeding for conduct which, if the youth were an adult, would constitute a crime. Judge Brumund relied also on the Oregon Court of Appeals decision of *State v. LJ*, 26 Or App 461 (1976), to bolster the conclusion that fundamental fairness rooted in the 14th Amendment's Due Process Clause requires applicability of the Dusky competency test to juvenile delinquency proceedings. In *LJ*, the Oregon Court of Appeals concluded that the defense of mental disease or defect (i.e. insanity defense) made available by statute to adults, was also available to juveniles under essentially a fairness theory. At the end of the opinion, Judge Brumund states that the adult "aid and assist" statutes, ORS 161.360-161.370, are applicable to juveniles.

The Juvenile Code Revision Work Group submitted the bill again to the Commission for recommendation to the 2011 Legislative Assembly, and the Commission recommended the bill on November 29, 2010. The Commission noted that the recent Linn County opinion points out further the immediate need for a juvenile "aid and assist" law because application of the adult standards and procedures for "aid and assist" is inappropriate for juvenile court. This bill is identical to the 2009 bill except for references made to the Department of Human Services (department) which underwent a re-organization recently. The legislature created a new agency, the Oregon Health Authority (authority) and some of the duties in this bill belong with the authority and not the department. LC has made these changes throughout the new bill draft.

III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statutes provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, some Oregon circuit court judges have denied a fitness to proceed challenge due to lack of statutory authority, while others courts have allowed a challenge and found that it is indeed the responsibility of the court to ascertain the capacity of the youth to aid an assist once that capacity is placed in doubt. Some Oregon courts have found that if the youth lacks capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, the youth may not be subject to trial. Some courts are creating their own process while other courts are applying the adult procedures from ORS 161.360 to 161.370. Some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Some counties take custody of youth when they are alleged to have committed a crime and wait to adjudicate until the youth can assist, while other counties simply dismiss cases when the youth cannot assist. Routine dismissal of such cases in some counties has led to repeat offenses, frustration, and a general public safety problem. In some counties, the Oregon Health Authority also has been required to provide restorative in cases where aid and assist issues are raised despite a statutory procedure. A consistent structure for the state to follow is simply not in place. Not only does this raise issues of fairness, but it implicates constitutional due process rights. In short, Oregon's gap in the law makes it necessary to establish statutory procedures and guidelines for aid and assist challenges in order to provide direction, ensure consistency, guarantee that constitutional rights are not violated, ensure public safety and develop a procedure to administer restorative services.

IV. Objective of the Proposal

The objective of this proposal is to establish substantive and procedural guidelines for juvenile aid and assist cases. The draft defines when a youth is unfit to proceed and sets out procedures and substantive rules regarding raising the issue of fitness to proceed, obtaining evaluations, challenging evaluations, and administering restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by ensuring that youths who are capable of being restored to fitness will be properly adjudicated and held accountable for their actions. Other states, such as Virginia and Connecticut, have developed juvenile aid and assist statutes. The Aid and Assist Sub Work Group used statutes from these and other states as well as Oregon's own adult aid and assist statutes to develop this bill.

Typically, aid and assist challenges are made by the youth, but the draft provides that any party or the court may raise the issue of fitness. If a party raises the issue, the court is required to order an evaluation to determine whether the youth is able to aid and assist. The evaluation is to be administered by a medical professional and consists of questions and tests to determine whether the youth understands the nature and consequences of the delinquency proceedings and to determine whether the youth suffers from a mental disease or defect. After the evaluation is provided to the parties and the court, the court makes a fitness determination and, if necessary, orders restorative services. The non-moving party may object to any part of the evaluation and have another evaluation administered. The delinquency proceedings continue once the youth is restored. If the youth is incapable of restoration – that is, cannot be treated so that the youth is able to aid and assist – the delinquency proceedings are dismissed and, most likely, the district attorney will initiate dependency proceedings.

Under the provisions of this proposal, the Oregon Health Authority (OHA) is required to administer restorative services to youths who are unfit to proceed. Usually, that will consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services will include medication or other treatment to address a mental disease or defect. Accordingly, this proposal will have a fiscal impact. The cost to OHA for 2011-2013 has not yet been determined, but if Oregon is consistent with other states, there will be about 35 to 40 youths per year who require restorative services.²

The draft is silent on the issue of involuntary medication. In some instances, a youth will be unfit to proceed, but able to achieve fitness with the administration of psychiatric medication. The work group was unable to agree as to whether or under what circumstances a court should order involuntary medication to an unwilling youth. Some work group members proposed a section that would allow courts to order medication upon clear and convincing findings that: 1) the medication would render the youth fit to proceed; 2) there are no less intrusive means; 3) the medication is narrowly tailored to minimize intrusion on the youth's liberty and privacy interests; 4) it is not an unnecessary risk to the youth's health; and 5) the seriousness of the allegations are such that the state's interests outweigh the youth's interest in self-determination.

² This prediction is based on the number of youths who are provided restorative services in Virginia and recent records of fitness to proceed cases from Oregon counties.

Ultimately, the work group voted not to include that section on involuntary medication arguing that it would not sufficiently protect the interests of youths, there are no similar provisions in the adult aid and assist statute, and the section would be unconstitutional. Proponents argued that the section would be constitutional, could provide sufficient safeguards to protect youths, and is necessary because courts currently order involuntary medication so there should be statutory procedure in place. This is an issue that is not essential to the workability of the bill and thus the work group recommends that it not be addressed in statute.

V. Section Analysis

Section 1

This section sets out the standards for courts to determine whether a youth is fit to proceed. It largely mirrors the adult statute except that it provides that a youth may raise the issue of fitness based on other conditions such as severe immaturity. The adult statute provides that a defendant may be unfit to proceed if as a result of *mental disease or defect* the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a “*mental disease or defect or another condition.*”

In addition this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, or the age of the youth (as distinguished from the youth’s maturity level).

Section 1 also provides that any party or the court can raise the issue of fitness any time after the filing of the petition. It requires the court to stay the delinquency proceedings and order the youth to participate in an evaluation to determine whether the youth is fit to proceed if the court finds: 1) there is reason to doubt the youth’s fitness to proceed; and 2) there is probable cause to believe that the factual allegations contained in the petition are true. Section 1(3) states that the issue of fitness to proceed must be raised either in writing by a party to the proceedings or upon the court’s own motion.

Finally, section 1 imports language from the adult criminal code³, which states that the fact that the youth is unfit to proceed does not preclude the youth’s attorney from raising additional defenses that do not require the participation of the youth. These include challenging the sufficiency of the petition, alleging that the statute of limitations has run, and other similar defenses.

Section 2

Section 2 provides that only licensed psychiatrists, psychologists, or clinical social workers may conduct evaluations to determine a youth’s fitness to proceed. In addition, this subsection requires the party who requested the evaluation to provide information regarding the evaluation

³ See ORS 161.370(12)

to the other parties and the court. It authorizes any party to submit written information to the evaluator.

Section 2 also lays out who must pay for an evaluation. If the youth does not meet eligibility guidelines of the Public Defense Services Commission (i.e. they do not qualify for public defense services) the youth must pay for his or her own evaluation. If eligible, the county must pay for the evaluation, costs, and a reasonable fee to the person conducting the evaluation. If the evaluation is requested by either the district attorney or juvenile department, the county must pay for the expense of the evaluation. Furthermore, if the court or youth requests an evaluation and the state (district attorney) would like an independent evaluation, it may obtain one at its own expense. District attorney representatives reported that this was an important provision to include.

Section 3

This section directs OHA to develop training standards for persons providing evaluation services, develop guidelines for conducting evaluations, and provide the court with a list of evaluators. Although the court and parties may use that list to find qualified evaluators, they are not required to do so and may use other evaluators as long as the evaluators meet the training standards. Finally, this section provides OHA with rulemaking authority.

Section 4

This section sets out when a court may remove a youth from his or her current placement for an evaluation. Removal for evaluations should be rare and happen only in extreme circumstances. For the stability and well-being of the youth, it is important not to disrupt or change the youth's environment. In order for a youth to be removed from his or her placement, the court must find that removal is necessary for the evaluation; removal is in best interest of the youth; and, if DHS has custody of the youth, that DHS made reasonable efforts to conduct the evaluation at the youth's current placement. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. However, for example, removal may happen if the district attorney or the court raises the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation. In any case, removal must not exceed 14 days. This section also makes it clear that these statutes are not to be manipulated to move youth to hospitals or residential facilities; the purpose of these statutes is to provide an aid and assist defense, not placement.

Section 5

Section 5 sets out the requirements for filing reports and what must be contained in the evaluator's report. The report must include the information the evaluator reviewed, the evaluator's opinion regarding the fitness of the child, and whether the child would benefit from restorative services. The section provides that statements made by the youth about facts alleged in the petition may not be used against the youth in proceedings related to the petition. Additionally, this subsection provides that the OHA may obtain copies of the evaluation report and petition.

Section 6

Section 6 sets out procedures the court must follow after receiving the evaluator's report. This subsection was drafted with the purpose of ensuring efficient and timely proceedings without compromising a party's right to object to and obtain their own evaluation. Accordingly, a party may object to a report within 14 days of receipt of the report. The objecting party may obtain its own report and the court is required to hold a hearing within 21 days of the objection. If there are no written objections and the court does not adopt the findings and recommendations of the evaluator, the court must hold a hearing within 21 days after the report is filed. The court determines whether a youth is fit to proceed based on a preponderance of the competent evidence and the order issued by the court must set forth its findings.

Section 7

Section 7 is another provision relating to procedures the court must follow after receiving a report. This section states that when a written objection is not filed and the court *does* adopt the findings and determinations contained within the evaluator's report, the court must issue a written order within 10 days after the report is filed. The court must also file a written order within 10 days if a written objection is filed under section 6. In either case the order must set forth the findings on the youth's fitness to proceed.

Section 8

This section sets out how a court must proceed after it makes a finding as to whether the youth is fit to proceed. If the court finds that the youth is unfit to proceed and there is not a substantial probability that the youth will gain or regain fitness to proceed, the court must either immediately dismiss the petition or, within five days, arrange for an alternative proceeding (e.g. dependency proceedings) and then dismiss the petition without prejudice. If the court finds the youth fit to proceed, the court is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed but is likely to gain or regain fitness if provided restorative services, the court shall continue the order staying the proceedings and forward the order for restorative services to OHA.

Section 9

This section requires OHA to administer a program to provide restorative services and develop qualification standards for persons who provide restorative services. This section was included based on the concerns of some sub work group members that a court may not have authority to order a non-party (OHA) to provide restorative services. The sub work group agreed that a specific provision providing statutory requirements of OHA would address those concerns.

Section 10

Section 10 requires OHA to implement restorative services within 30 days of receipt of the court's order. No later than 90 days after receipt of the court's order, OHA must send a report to

the court describing the nature and duration of services provided and recommend whether services should be continued. After the court receives the report from OHA, the court is required to make a fitness finding and either vacate the stay, dismiss the petition, or order further restorative services. If services are continued, OHA is required to issue another report no later than 90 days after the receipt of the order from the court. This section provides for a review hearing and also limits the length of time for which restorative services may be ordered to the lesser of three years or the maximum commitment time had the youth been adjudicated.

Section 11

If the youth is cooperative and when possible, restorative services will take place at the youth's current placement. When necessary, however, the court may remove a youth in order for OHA to administer restorative services. Section 11 states that a youth may not be removed from the youth's current placement solely for the purpose of receiving restorative services unless removal is in the youth's best interest and necessary for the provision of services.

Sections 12 and 13

These sections provide that sections 3 and 9 of this bill go into effect immediately, while the others will not take effect until January 1, 2012. This allows OHA some time to establish standards for both conducting evaluations and providing restorative services before the other elements of this bill become effective.

Appendices:

- 1) February 25, 2010, Linn County Circuit Court Letter Opinion, Judge Carl Brumund
- 2) Adult aid and assist statutes (ORS 161.360-161.370)

AMENDMENT NOTE for SB 411:

Amendments made in the Senate Judiciary Committee:

1. Made a technical amendment that acknowledges that the Oregon Health Authority works in consultation with the Department of Human Services.
2. Provided that it is the party that makes a motion or the court if it is on the court's initiative that must provide the fitness to proceed evaluation to the other parties and file it with the court. The bill, as introduced, provided that the court shall always provide the copies to the other parties.
3. Allows pre-adjudication detention of the youth for an additional 28 days under certain limited circumstances when a motion regarding fitness to proceed is pending. Allows for an extension for more than an additional 28 days if expressly agreed to by the youth and the court determines that detention before adjudication on the merits should continue.
4. Sets forth under what circumstances a youth may be removed from the youth's current placement and given restorative services. For both the purpose of conducting the evaluation or providing restorative services, if the youth is removed from their current placement, the youth shall be returned to that placement after the evaluation or services are finished.



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Real Property Transfer on Death Act

Work Group Report

Prepared by:

Wendy Johnson

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From the Offices of the Executive Director

Jeffrey C. Dobbins and

Deputy Director

Wendy J. Johnson

Approved by the Oregon Law Commission at its Meeting on February 8, 2011



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

I. Introduction

Many individuals seek to avoid probate, some for reasons of wanting to avoid additional cost and delay and others for reasons of privacy. Some individuals want to transfer their assets after their death without having to have a personal representative and the proceedings of a probate court handle it. More and more, much of a deceased person's estate can be easily transferred outside of the probate process because the law provides for various will substitutes. Those methods generally include pay on death designations, joint tenancy with right of survivorship, remainder interests, tenancy by the entirety title designations, and trusts.

Oregon presently permits pay on death designations for securities (see ORS 59.535-59.585) and bank accounts (see ORS 708A.455-708A.515). These pay on death methods permit people to transfer their securities and cash in a bank account on their death to people they designate without a probate proceeding. However, to date there is not a way to transfer real property with a pay on death designation in Oregon. Such a method is typically referred to as a transfer on death deed or a beneficiary deed.

The substance of this recommended bill is taken from the National Conference of Commissioners on Uniform State Laws which approved and recommended the Uniform Real Property Transfer on Death Act for enactment in all the states at its conference in July 2009. The act provides authority for the use of transfer on death deeds in Oregon, complete with the substantive and procedural requirements for creation and revocation of a transfer on death deed and rules to govern transfer on death deeds.

II. Statement of the problem

Oregon law does not currently provide for a probate-avoidance tool relating to the transfer of real property at death. Oregon lacks an inexpensive, straightforward, and reliable method to transfer real property directly to a beneficiary.

Present joint ownership methods of transferring real property during the life of the transferor, i.e. joint tenancy or tenancy by the entirety, vest the property rights at the time the beneficiary is added to the deed. These methods make the property subject to creditors of the beneficiary as well as lawsuits including divorce, bankruptcy, and torts. In addition, there are likely federal income, gift tax, and capital gains tax consequences. These methods are irrevocable, and thus if the original owner later changes their mind, undoing the transaction is impossible if the other owner does not agree. Another available method is a revocable trust, but the big disadvantage of a trust is the cost. In

Interested Parties:

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IV. Who would likely use a TOD deed?

“Small estate. An owner whose estate consists primarily of a house may use a TOD deed to avoid the expense of probate.

Unmarried partner. A couple that has not married or registered as domestic partners may want to use a TOD deed as part of an overall estate plan. The deed does not convey current rights and therefore avoids gift tax problems. (And gift tax will be a concern even if the couple is registered because the federal gift tax does not provide a deduction for persons who are registered but not legally married.) If the couple ends their relationship, the owner can revoke the TOD deed.

Parent and child. Sometimes a parent puts a child on a deed to avoid probate and ensure that the child inherits the property. If the deed creates a joint tenancy with a right of survivorship, the parent has made a lifetime gift, the parent cannot later revoke the gift, and creditors of the child can reach the asset. A TOD deed avoids those difficulties.

Revocable trust. An owner may have created a revocable trust for other property but may not want to transfer title to real property into the name of the trustee. The owner may be planning to sell the property soon and may find a sale easier if the property remains in the owner’s name. A TOD deed transferring the property to the trustee of the revocable trust provides a back-up plan in case the owner does not sell the property before death.”¹

¹ Quoted from Susan N. Gary’s CLE materials for ABA Section Real Property Trust and Estate Law presented in Spring 2008 Symposia, “Uniform Law Commission develops transfer-on-death deeds.” TOD deed is an abbreviation for transfer on death deed.

V. Why enact now?

Thirteen states have already enacted statutes authorizing TOD deeds. Those states include Missouri, Kansas, Ohio, New Mexico, Arizona, Nevada, Colorado, Arkansas, Wisconsin, Montana, Oklahoma, Minnesota, and Indiana.² Five more states (four new states and one state that already has a real property TOD statute) have started working on enacting the uniform act. Those states include Hawaii, Nebraska, Oklahoma, South Dakota, and Utah.³ It is time to bring uniformity across the states to facilitate consistent options of transferring property outside of probate.

VI. Section by Section Analysis and Explanation of Bill:

Section 1: This section simply provides a way to refer to this new law. It also makes it easy for people to electronically search the Oregon Revised Statutes to find the uniform act.

Section 2: This section provides the definitions for the act. Section 2(1) defines “beneficiary” as a person that receives property under a transfer on death deed. The definition of “beneficiary” is linked to the definition of “person,” which is also in Section 2. The definition for “person” is different from the uniform act in that the bill uses “personal representative” and “trustee” rather than “estate” and “trust,” in order to focus properly on the individual. The definition of “joint owner” is also modified from the

² Missouri (1989) – MO. ANN. STAT. §461.025, Kansas (1997) – KAN. STAT. ANN. §59-3501, Ohio (2000) – OHIO REV. CODE ANN. §5302.22, New Mexico (2001) – N.M. STAT. ANN. §45-6-401, Arizona (2002) – ARIZ. REV. STAT. ANN. §33-405, Nevada (2003) – NEV. REV. STAT. ANN. §111.109(1), Colorado (2004) – COLO. REV. STAT. §15-15-401(1), Arkansas (2005) – ARK. CODE ANN. §18-12-608, Wisconsin (2006) – WIS. STAT. ANN. §705.15, Montana (2007) – MON. CODE ANN. §72-6-121, Oklahoma (2008) – OKLA. STAT. ANN. Tit. 58 §1251, Minnesota (2008) – MINN. STAT. ANN. §507.071, Indiana (2009) – IND. CODE §32-17-14.

³ Hawaii: SB 105 (2011); Nebraska: LB 536 (2011); OK: SB 521 (2011); South Dakota: HB 1229 (2010); and Utah: HB 224 (2010).

uniform act so as to recognize Oregon's forms of property law ownership. The definition is modeled after ORS 112.570(1) which is Oregon's definition for co-owners with right of survivorship.

Section 3: This is the applicability section of the bill. It simply provides that the act applies to a transfer on death deed made before, on, or after the effective date of the 2011 Act.

Section 4: This non-exclusivity section provides that other methods of transferring property are not to be affected by this act.

Section 5: This section provides the authorizing authority for a transfer on death deed. While it is a short section of the bill, it really is the key section of the bill because the section authorizes a transfer on deed and makes it clear that the transfer is NOT an inter vivos transfer, but rather the property transfer does not occur until the transferor dies. Any form of property ownership that is valid under Oregon law may be transferred. The provision makes clear that the transferor may designate one or more primary beneficiaries and one or more alternate beneficiaries to take in the event the primary beneficiaries do not survive the transferor. This section has additional verbiage compared to the uniform act to detail a bit more how the primary and alternate beneficiary designations work.

Section 6: This section provides that a transfer on death deed is revocable at any time while the transferor is living. A transferor can revoke the deed even if the deed or some other instrument says it is irrevocable.

Section 7: This section provides that a transfer on death deed is nontestamentary. Because it is nontestamentary, the instrument of transfer is NOT a will, does not have to follow will formality rules and need not go through probate.

Section 8: This section provides that the capacity standard required both for making and revoking a transfer on death deed is the same as the capacity required under Oregon law for making a will. The policy choice was whether to use a deed standard or a will standard for capacity. The deed standard is a higher standard. The work group opted to use the will standard as recommended by the uniform act because a transfer on death deed is a will substitute; Oregon similarly uses a will standard for revocable trusts. A transfer on death deed will not be affected if the transferor loses capacity after the transfer on death deed is made; rather, the requirement for capacity of the transferor is at the time of making the transfer on death deed. In short, using a will standard for capacity is consistent with existing Oregon law.

In addition to providing the capacity standard, this section of the bill has non-uniform provisions to specify how and when to contest the transferor's capacity to have made the transfer on death deed. Marion County Judge Claudia Burton expressed concern about undue influence and elder abuse with transfer on death deeds. The group agreed to specify in this section that a transfer on death deed or a revocation of one can be challenged and set aside for lack of capacity, fraud, duress, or undue influence. While a transfer on death deed generally should avoid a probate proceeding, if capacity, fraud, duress, or undue influence issues arise, a separate proceeding may be commenced. To ensure finality and ensure a timely transfer of property, the bill requires that a proceeding to contest capacity or determine whether there was fraud, duress, or undue influence, must be commenced within 18 months after the transferor's death. This 18-month time limit is consistent with Section 15 of the bill. Much of the language for this non-uniform provision was borrowed and adapted from Missouri's state law. A transfer on death deed or revocation of a transfer on death deed is void if it was procured by fraud, duress, or undue influence or was made when the transferor lacked the required capacity.

Section 9: This section provides for the content requirements of a transfer on death deed. A transfer on death deed must contain the essential formalities required for a properly recordable inter vivos deed under state law. See e.g., ORS Chapter 93 for Oregon's deed requirements. Section 16 of the bill provides a model form for creating a transfer on death deed; the work group modified the uniform act's form for the creation of a transfer on death deed to include the essential elements of a deed under Oregon state law. The bill exempts transfer on death deeds from two mandatory statements required of other instruments transferring real property in Oregon. See Sections 23 (consideration statement) and 24 (land use statement).

The big difference between an inter vivos deed and a transfer on death deed is obviously that the latter does not require a present intent to convey. Instead, this section provides that the transfer on death deed must state that the transfer to a designated beneficiary is to occur at the transferor's death. See Section 9(1)(b).

This section contains two non-uniform provisions. Section 9(1)(c) requires the designation of a beneficiary "by name." Section 9(2) provides that if a transferor fails to designate by name and instead uses a class for a designation, the class designation is void. The deed, however, is not per se void if a class designation is made because any other named designated beneficiaries would take the property under the deed. Some members of the work group believed that the definition of "person" would not include a class designation anyway, but the bill addresses the issue directly and provides that a beneficiary cannot be a class, e.g., "the living children of my sister." The group reasoned that the transfer or receipt, which occurs outside of probate, should be to an ascertained

individual. If a class designation were permitted, a probate proceeding might be necessary to determine the members of the class so that a title company would be able to issue insurance.

The transfer on death deed needs to be recorded where the property is located. If the property is located in more than one county, the transfer on death deed will have to be recorded in each county in which the property is located. See Section 9(1)(d). This is also consistent with Oregon's recording requirements. The deed must be recorded before the transferor's death. This allows reliance on the recording system and also helps to prevent fraud.

Section 10: This section is straight from the uniform act and makes it clear that a transfer on death deed is effective without notice or delivery to or acceptance by the designated beneficiary during the transferor's lifetime and is made without consideration. This is consistent because the transfer does not occur until the transferor's death. Note that the beneficiary may disclaim the property. See Section 14.

Section 11: This section addresses revocation of a transfer on death deed by instrument and by act. Section 11(1) provides the exclusive means for revoking by a subsequent instrument. To be effective, the revoking instrument must both be acknowledged after the deed to be revoked was acknowledged by the transferor and the revoking instrument must be recorded properly before the transferor's death. Note that it is the later acknowledged deed that controls and not the later recorded deed. In addition, the revoking instrument must be: 1) another transfer on death deed that expressly or by inconsistency revokes the deed or part of the deed; 2) a revoking instrument that expressly revokes the deed or part of the deed; or 3) an inter vivos deed that transfers the property or a part of the property that is the subject of the transfer on death deed. Revocation by any instrument not listed is not effective; for example, a transfer on death deed cannot be revoked by will. Revocation by will is not allowed because a transfer on death deed is a will substitute used for the transfer of real property, and it is essential for real property title to be certain. Certainty would be impossible if a will or other instrument could revoke a recorded transfer on death deed. This policy is at odds with the Restatement Third of Property which encourages revocability of will substitutes by will. However, the policy is consistent with Oregon's policy regarding will substitutes and specifically the pay on death bank account will substitute provisions of the state. See ORS 708A.470(5). The comments to the uniform act provide several examples to help better understand how these revocation rules work that the work group reviewed. It is important to note that a subsequent instrument may revoke the transfer on death deed only in part. The bill does not permit revival of a transfer on death deed by reacquisition of property that was once the subject of the transfer on death deed but was transferred.

Section 11(2) is a non-uniform provision. The transferor must acknowledge a revoking instrument, but sometimes a transferor may be incapacitated when there is a need to revoke a transfer on death deed. This non-uniform subsection provides authority to a designated agent of a transferor to revoke a transfer on death deed as provided by the section. Note that an agent is not given authority in the bill to create a transfer on death deed for a transferor but does have authority to revoke for the transferor, but only if the transferor provided express authority for the agent to revoke in the transfer on death deed. The uniform act generally looks to state law to determine the authority of agents, but Oregon's power of attorney laws are not clear. Case law is clear with respect to conservators, but it is not with respect to power of attorney. Thus, the group took this modest step and expressly authorized the power to revoke, but with limits to safeguard misuse.

The work group omitted Section 11(b)(2)⁴ of the uniform act because revocation by one transferor does not affect the interest of other transferors, and thus the subsection was viewed as superfluous. This is consistent with Oregon's counterpart to joint tenancy in real property. In Oregon, concurrent survivorship interests may not be extinguished by the unilateral act of one "joint" tenant; that is, any person's survivorship interest requires that person's act to release it.

Section 11(3) provides the rule for revocation by instrument when there is a transfer on death deed made by more than one owner. Revocation by one transferor does not affect the transfer on death deed as to the interest of another transferor.

Section 11(4) provides that a transfer on death deed may NOT be revoked by a revocatory act on the deed. Tearing up, burning, canceling, or otherwise destroying a transfer on death deed is not effective to revoke a transfer on death deed.

Section 12: A transfer on death deed does not operate until the transferor's death. A transfer to named beneficiaries simply does not occur until the transferor's death. To make this policy principle crystal clear, this section lists the various things that a transfer on death deed does NOT affect. The section substantively follows the uniform act. This section provides that a transfer on death deed does not affect the interest or property rights of the transferor or any other owners during the lifetime of the transferor. A transfer on death deed does not affect transferees. A transfer on death deed has no effect

⁴ That provision provides: "If a transfer on death deed is made by more than one transferor: (2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners."

on inter vivos transfers. A transfer on death deed, during the transferor's lifetime, does not affect creditors. A transfer on death deed, during the transferor's lifetime, does not affect the transferor's or the designated beneficiary's eligibility for public assistance. During the transferor's lifetime, a transfer on death deed does not create a legal or equitable interest in favor of the designated beneficiaries. The beneficiary has no interest that can be assigned or encumbered. And lastly, this section provides that during the transferor's lifetime, a transfer on death deed does not make the property subject to claims or process of the designated beneficiary's creditors.

The work group discussed what affect a transfer on death deed should have on a title report. The uniform act is silent on the issue. The group concluded that because a transfer on death deed has no effect on the property while the transferor is alive, a transfer on death deed should not be listed as an encumbrance nor have an affect on lenders. However, for practical purposes, title companies will likely want to note the transfer on death deed on the title report. Listing a transfer on death deed on the B2 schedule seems the most reasonable course of action with perhaps an endorsement as well. However, the group decided not to regulate title reports from this bill, concluding it is a title insurance issue which is essentially a matter of contract.

Section 13: This section provides that the provisions of the deed control the disposition of property unless one of the listed default rules apply. Subsection (1) of this section carries forward to transfer on death deed transfers several public policy default rule exceptions used with probate transfers and some other nonprobate transfers to help better reflect the decedent's intent.

Section 13(1)(a)(B) provides that a designated beneficiary's interest in the property subject to a transfer on death deed lapses if the designated beneficiary does not survive the transferor. This is also the default for wills and will substitutes. This principle is important to understanding the four exceptions that are explained below.

First, the section makes ORS 107.115 applicable to transfer on death deeds. That statute taken together with Section 19 of the bill provide that provisions of a transfer on death deed in favor of a former spouse can be revoked when there is an annulment or dissolution of marriage after the recording of a the transfer on death deed. The effect on the transfer on death deed is the same as though the former spouse did not survive the transferor. (See conforming amendment to Section 25 of bill and Section 19.)

Second, the section makes the slayer and abuser provisions of ORS 112.455 to 112.555 applicable to transfer on death deeds so that an abuser (convicted of a felony by reason of conduct that constitutes physical or financial abuse of the transferor) or a slayer (person

who with felonious intent, takes or procures the taking of the life of the transferor) of a transferor that was designated as a beneficiary will not be transferred the property at the transferor's death. Instead, ORS 114.465 will apply and the transfer on death deed will be treated as if the slayer or abuser had predeceased the transferor. (See conforming amendment in Section 26 of the bill.)

Third, the section makes the uniform simultaneous death act, found at ORS 112.570 to 112.590, applicable to transfer on death deeds so that a beneficiary must survive the transferor by at least 120 hours in order to be deemed to have survived the transferor and thus receive property provided for by the transfer on death deed. (See conforming amendment in Section 27 of the bill.)

The last exception to an effective transfer to a designated beneficiary is provided by the application of Sections 20 and 21 in Section 13(1). Sections 20 and 21 are modeled after ORS 112.047 and 112.049 which provide for the forfeiture of a parent's share to a decedent child's intestate estate when the parent willfully deserted or neglected without just cause the decedent child for the required length of time. Sections 20 and 21 are new sections of law that provide essentially that the transfer of property under a transfer on death deed may be forfeited when the parent of a deceased transferor willfully deserted or neglected without cause the decedent child. Section 20 focuses on the substantive requirements of this exception and Section 21 focuses on the procedural requirements.

Subsection (1) does not include a reference to Oregon's elective share statute as suggested by the uniform act because Oregon's elective share statute already includes transfer on death deeds in its elective share computations. See ORS 114.665. The subsection also does not include the optional antilapse provision suggested by the uniform act because an antilapse provision would bring an added layer of complexity and not providing for an antilapse provision is consistent with the work group's decision to not permit class gifts. An antilapse provision would have allowed the descendants of a named beneficiary to receive property under a transfer on death deed if the named beneficiary were related to the transferor and predeceased the transferor. Similarly, the group decided not to apply an ademption provision to transfer on death deeds. See ORS 112.385. Ademption is used when specific property made in a bequest no longer exists, and instead a money substitute is generally made. Ademption has not been applied to other nonprobate transfers, so this recommendation is consistent with existing Oregon law.

After the first subsection, the remaining subsections of Section 13 are modeled on the uniform act but were edited to improve readability and conform to Legislative Counsel's form and style. In addition, Section 13(2) does add a non-uniform provision in order to

clearly subject the property of the transfer on death deed to claims or liens by the state, including public assistance reimbursement. The uniform language made the property subject to “conveyances, encumbrances, assignments, contracts, mortgages, liens and other interests.” This list of creditors, while seemingly broad, is insufficient to pick up DHS claims for medical reimbursement. The magic language needed in Oregon is to provide that the property is subject to “claims” by a state because Medicaid recovery is a claim, not a lien in Oregon. The group looked to Minnesota’s statutes for ideas regarding this issue and relied on Oregon DHS representatives on the work group. The group considered, but ultimately rejected requiring transfer on death deed beneficiaries to apply for a certificate of clearance from public assistance claims from DHS. Minnesota has such a requirement. See Minnesota Stat. 507.071 and 525.313. The group reasoned that Oregon law already permits the state to record a request for notice of transfer or encumbrance of specific real property under ORS 93.268 and ORS 411.694.

Section 13(1)(a) provides the default rule that the provisions of the deed control the disposition of the property, unless otherwise provided by the exceptions listed or state law. In addition, the section provides the rule that the interest of a designated beneficiary is contingent on surviving the transferor. The interest of a designated beneficiary who fails to survive the transferor lapses. This treatment is consistent with wills and other will substitutes.

Section 13(1)(b) provides the default rule that concurrent beneficiaries receive equal and undivided interests with no right of survivorship among them. And, in the event of a lapse or failure of an interest that is held concurrently, the share that lapses or fails passes proportionately to the surviving concurrent beneficiaries.

Section 13(2) provides the rule that the beneficiary’s interest is subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens and other interests to which the property is subject at the transferor’s death, including a claim or lien by a state.

Section 13(3) provides that the survivorship of a joint owner takes precedence over the transfer on death deed.

Section 13(4) provides the rule that a transfer on death deed transfers the property without covenant or warranty of title, recognizing that a transfer on death deed is a will substitute.

Section 14: A beneficiary of a transfer on death deed may disclaim the property interest the deed attempts to transfer. This provision provides that the rules of the Uniform

Disclaimer of Property Interests Act as adopted by Oregon at ORS 105.623 to 105.649 will govern a disclaimer.

Section 15: This section provides creditor protections. The rule in (1) provides that the property transferred under a transfer on death deed is liable to the transferor's probate estate for allowed claims and allowances to the extent that the probate estate is insufficient to pay the claims. This is an *in rem* rule as it is the property that is liable. The uniform act provided two alternative options for addressing creditor claims. Because Oregon has not adopted the Uniform Probate Code, Alternative A was not an appropriate approach. Instead, the bill follows the Alternative B approach with some tweaking in Section 15(1)(a) and (1)(b) to reflect Oregon's two probate options, i.e. small estate actions under ORS 114.505 to 114.560 and traditional probate under ORS chapter 115. In addition, the bill specifically references Oregon's statutory allowance to surviving spouse or child provision, ORS 114.015. Subsection (2) of this section provides that liability is apportioned in proportion to the net value of each property when the transferor transfers multiple properties by one or more transfer on death deeds. Lastly, subsection (3) provides that the time in which to establish liability on the property transferred under a transfer on death deed is limited in that a proceeding must be commenced within 18 months after the transferor's death. This provision was debated at length. The 18 month wait time will often make it difficult for the transferee to do anything with the property during the 18 months. This provision will make the transfer on death deed unattractive to some transferors, but the group concluded that shortening the time frame would be too burdensome to creditors, including the state.

Section 16: This section of the bill provides a model statutory form for a transfer on death deed. Use of the statutory form is not required but the form is provided to assist the public and practitioners by providing an understandable model form that meets the requirements of the bill. The Oregon model form differs slightly from the uniform act in a few regards. First, the top of the deed form includes a statutory reference to assist clerks; the temporary reference is "Sections 1 to 18 of this 2011 Act" but when the bill is codified after the legislative session an ORS provision will be substituted. The form has a "Tax Statement" section to follow the deed requirements of ORS 93.260. The form has a "Special Terms" section. This section can be used for a power of attorney provision or other special terms. Lastly, the form has a non-uniform "Return of Deed" section to comply with ORS 205.234(d).

The bill's form omits the "Common Questions About the Use of this Form" with their respective answers as provided in the uniform act. This would substantially increase the length of the deed and look like legal advice attached to a deed. The group decided it would be more appropriate for the Oregon State Bar and practitioners to prepare

educational materials about transfer on death deeds as needed rather than require educational material on the deed itself.

Section 17: This section of the bill provides a model form for an instrument revoking a transfer on death deed. Use of the statutory form is not required but the form is provided to assist the public and practitioners by providing an understandable model form that meets the requirements of the bill. The Oregon model form differs slightly from the uniform act in a few regards. The title of the form is “Instrument Revoking Transfer on Death Deed” to track Section 11 closely. In addition, the form has a non-uniform “Return of Deed” section to assist clerks. The bill’s form omits the “Common Questions About the Use of this Form” with their respective answers as provided in the uniform act for the same reasons as described in Section 16 of these comments.

Section 18: This section is the standard reference to the federal Electronic Signatures in Global and National Commerce Act (ESIGN) to avoid the federal law from preempting Oregon law with respect to electronic documents.

Section 19: This is a new section of law that is modeled after ORS 112.315, which provides that generally the divorce or annulment of the marriage of a testator revokes provisions in the will that are in favor of the former spouse of the testator. Section 19 creates a provision that provides that the divorce or annulment of the marriage of a transferor of a transfer on death deed also generally revokes provisions in the deed that favor the former spouse. See Section 13 comments as well.

Sections 20 and 21: These sections are new sections of law that are modeled after ORS 112.047 and 112.049 which provide for the forfeiture of a parent’s share to a decedent child’s intestate estate when the parent willfully deserted or neglected without just cause the decedent child for the required length of time. These new sections of law provide essentially that the transfer of property under a transfer on death deed may be forfeited when the parent of a deceased transferor willfully deserted or neglected without cause the decedent child. See Section 13 comments as well.

Section 22: This section amends the foreclosure notice statute, ORS 86.740, so as to require notice of sale to beneficiaries designated under a transfer on death deed when the transferor dies and the property subject to the transfer on death deed is subject to foreclosure.

Section 23: This section amends ORS 93.030, the statute that requires a statement of consideration in the body of instruments conveying or contracting to convey fee title to any real estate. The group wanted to exempt this requirement from transfer on death

deeds because consideration is not required. See Section 10. Legislative Counsel also made some style and updating changes to the consideration statement statute. Note that no consideration statement is in the model form in Section 16.

Section 24: This section amends ORS 93.040, the statute that requires a land use statement in the body of instruments conveying or contracting to convey fee title to any real estate. The group wanted to exempt this requirement from transfer on death deeds.

Section 25: This section amends ORS 107.115 to make a conforming amendment related to Section 19 of the bill.

Section 26: This section makes amendments to the slayer and abuser statute, ORS 112.465, so as to make the statute apply to transfer on death deeds. An abuser (convicted of a felony by reason of conduct that constitutes physical or financial abuse of the transferor) or a slayer (person who with felonious intent, takes or procures the taking of the life of the transferor) of a transferor that was designated as a beneficiary will not be transferred the property at the transferor's death. Instead, this section applies and the beneficiary will be treated as if they predeceased the transferor.

Section 27: This section makes a conforming amendment to the Uniform Simultaneous Death Act. See Section 13 comments as well.

Section 28: This section amends the conservator authority statute, ORS 125.440, to both permit conservators to disclaim any property interest the protected person may take by a transfer on death deed and to revoke a transfer on death deed that the protected person made. Both of these actions require prior court approval. A conservator is not given authority to create a transfer on death deed under the bill.

Section 29: The commentary, i.e. this report, has been written under the auspices of, and has been approved by, the Oregon Law Commission. The commentary also is provided to the legislature as written testimony.

Section 30: This section is a standard Legislative Counsel drafting provision that provides that the captions used in the bill are used for convenience and do not become part of the statutory law. The group strived to keep the uniform section numbers the same, follow the order of the uniform act, and even keep most of the section captions to assist practitioners and the courts when interpreting the bill. The uniform act and its official commentary from 2009 provide excellent details regarding the intent of the act that should serve as legislative history for this bill as the work group used it throughout

the Oregon Law Commission's process, making only a few departures from the uniform act.

Section 31: This section is the bill's effective date provision. The group did not recommend an emergency clause and thus the bill will take effect in 2012 should the bill pass.

VII. Conclusion:

This bill should be adopted because it provides one more tool for Oregonians to use to transfer real property at death—a transfer on death deed. This nonprobate tool is being used successfully by 13 states already and comes with the support of the Oregon Law Commission's Real Property Transfer on Death Work Group which was composed of private practitioners (estate planning, elder law, and real property), state lawyers, academics, and title insurance representatives. In short, the bill provides a clear new tool complete with the appropriate rules and safeguards to make the transfer on death deed work in Oregon.

VIII. Appendix

Uniform Real Property Transfer on Death Act, drafted by National Conference of Commissioners on Uniform State Laws, with Prefatory Note and Comments (approved and recommended for enactment July 2009).



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Uniform Environmental Covenants Act / Easements & Equitable Servitudes Work Group

CLARIFYING AND PROTECTING DEQ AUTHORITY TO ENTER INTO LONG-TERM AGREEMENTS IMPLEMENTING INSTITUTIONAL CONTROLS ON REAL PROPERTY

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Approved by the Oregon Law Commission at its Meeting on
March 28, 2011



*The Oregon Law Commission
is housed at the Willamette
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I. Introduction and Summary of Legislation

Under current law (ORS 465.200-.545), the Department of Environmental Quality (DEQ) oversees the cleanup of hazardous substances that are released into the environment. DEQ may take any removal or remedial action necessary to protect the public health, safety, welfare, and the environment. Under ORS 465.315, the Department is permitted to use (or require the use of) a wide range of methods to address contamination by hazardous materials, including on-site treatment, excavation and off-site disposal, the use of containment or other engineering controls, or “institutional controls.” ORS 465.315(1)(c).

Under current law, “institutional controls” is not defined. The term is generally understood to refer to limits placed on the use of real property in order to reduce the risk of exposure to hazardous substances. For example, DEQ might conclude that it would be extremely expensive to remove or otherwise control contamination of groundwater on a particular site. DEQ might, instead, select as a remedy an “institutional control” on the property under which the owner would agree not to permit water wells to be drilled on the property in the future. Similarly, the owner of an industrial site might agree to limit use of the site to industrial activities in order to avoid the risk of future contamination that might occur if the site were later used for residences or a park. Institutional controls are a valuable additional tool used by DEQ in order to manage contaminated properties, and are useful as well for the owners of these properties, who, through the use of these controls, are able to address contamination on their property to the satisfaction of DEQ and Oregon law in a manner that is economically and ecologically efficient.

The effectiveness of institutional controls turns on their long-term enforceability on the property in question. In light of that need, environmental regulators in Oregon and elsewhere have turned to real property contracts as a mechanism to define and enforce institutional controls at contaminated sites. As in many other states, DEQ has assumed this power (known as the “Easements & Equitable Servitudes” (EES) program), and has entered into over 500 EES agreements on properties throughout the state.

In many other states, however, environmental regulators have concluded that they do not have the ability to enter into agreements regarding real property. In addition, even in states where regulators are able to enter into those agreements, concern remained that these somewhat non-traditional agreements might violate various common law principles that limit the scope of restrictions on real property to conditions that directly affect that property. Because institutional controls are only effective if they are enforced a) on a long-term basis, and b) against subsequent owners of the property, many regulators were concerned that traditional common law principles might undermine the effectiveness of institutional controls. As a result, the National Conference of Commissioners on Uniform State Laws drafted and approved the Uniform Environmental Covenants Act, or UECA. UECA was intended to create a uniform mechanism allowing state governments and other interested parties to enter into “environmental covenants” – grants of long term interests in real property that were explicitly authorized by the legislature to last indefinitely, notwithstanding common law principles of real property.

In 2005, UECA was introduced to the Oregon Legislature (HB 3286). However, since enactment of ORS 465.315 in 1995, DEQ had entered into large numbers of agreements implementing institutional controls on contaminated property throughout the state. (To date, DEQ estimates that approximately 500 such agreements have been entered into.) Because a number of interested parties felt that UECA failed adequately to take into account existing Oregon law and practice regarding the use of institutional controls, the bill did not make it out of committee.

In 2010, the Oregon Law Commission convened this work group in order to take another look at UECA. The work group, the members and meetings of which are set out in further detail below, concluded that Oregon's existing program, known as the "Easements & Equitable Servitudes" ("EES") program, was working well, and that a full-scale adoption of UECA could be disruptive to the existing EES program. At the same time, however, the work group recognized that current law was not as clear as it could be regarding the scope of DEQ's authority to enter into these agreements. In addition, the work group believed, there would be value in adopting a version of UECA's clear statements about the validity of these agreements despite various common law doctrines that might be used to undermine their effectiveness.

As drafted, SB 867 (with the -2 amendments) is intended to support and reinforce DEQ's existing EES program by 1) clarifying the scope of DEQ's authority to enter into these kinds of agreements as a means of implementing a remedial action on a contaminated property, and 2) ensuring that common law doctrines cannot be used to undermine the long-term enforceability of these agreements. While DEQ is confident that its existing agreements are valid and enforceable (and that it would, in any event, have the ability to take necessary action in order to protect public health, safety, welfare, and the environment if the agreements proved unenforceable), the changes proposed by the legislation are intended to reinforce this conclusion for any future agreements. The legislation should not be taken to suggest any skepticism by the work group or Law Commission regarding the validity of existing agreements; this sentiment is reflected in Section 7(2) of the proposed legislation, which emphasizes that the proposed legislation should not be construed to effect the validity of past agreements entered into by DEQ under the authority of ORS 465.315.

SB 867 is intended to enhance the effectiveness of one mechanism that DEQ already uses to address environmental contamination. It does not alter any existing standards regarding unacceptable levels of contamination or the choice between various methods to address contamination. Rather, it simply clarifies and delineates authority to enter into these kinds of agreements in order to implement institutional controls, and it will ensure that these agreements are able to accomplish their purpose of long-term protection of health, welfare, and the environment in Oregon in the most efficient and effective manner possible.

II. History of the Project and Work Group

A. History of UECA and Proposal to the Law Commission

In 2003, the National Conference of Commissioners on Uniform State Laws approved the Uniform Environmental Covenants Act (see Appendix A) in order to provide the states with a model statutory process for forming, amending, enforcing, and terminating real property agreements that implemented institutional controls on contaminated property. In 2005, HB3286 was introduced in order to adopt UECA in Oregon. A number of interested parties intervened, however, expressing concern over the way in which various aspects of UECA would interact with DEQ's existing EES program. The bill did not emerge from the committee, and despite a work group meeting in 2006, sponsored in part by NCCUSL and some of Oregon's Uniform Law Commissioners, no further progress was made toward adopting UECA in Oregon.

In 2008, the Oregon Law Commission staff prepared for the Program Committee of the Commission a project recommendation regarding UECA. The Program Committee forwarded the recommendation to the Law Commission, which approved the project in July 2008, and recommended the formation of a work group to determine whether, and to what extent, UECA should be adopted in Oregon.

The project was put on hold during the 2009 legislative session while commission staff was involved with other significant projects, but in late 2009 and the first half of 2010, work group members were identified and contacted in preparation for the first work group meeting, which was held in July, 2010. (A list of work group members is in part II.B., and a list of meeting dates is in part II.C.). The initial meetings were directed to understanding the scope of UECA as well as the existing Oregon program. The work group concluded that a full-scale adoption of UECA was not called for in Oregon, but that some changes (borrowing, in part, from UECA) should be made to Oregon law.

Because the scope of the project was moving beyond mere adoption of UECA, the work group requested, and the Law Commission approved in December 2010, a change in the scope of the work group's charge. The group was directed to

review, in light of UECA, Oregon's existing law and policy regarding the use of limits on the use of real property as a mechanism for institutional controls in environmental cleanups, and to suggest changes or additions to such laws in order to further enhance the use of such limits.

With that change, Oregon DEQ, commission staff, and the work group participants reached rapid consensus regarding the appropriate scope of legislation. Because the deadline for introducing legislation through committee was going to pass before the work group completed its work and could make a recommendation to the full commission, the commission authorized staff to submit an early draft of SB 867 for introduction, with the understanding that the work group would continue to work on amendments that would be ultimately recommended to the Law Commission, and by the Law Commission to the full Legislative Assembly. This report accompanies those -2 amendments.

B. Work Group Membership. The following individuals were part of the UECA work group:

Work Group Members	
John DiLorenzo, Jr. (Chair)	Davis Wright Tremaine; Oregon Law Commissioner
Lynne Perry	Asst. Attorney General, DOJ; General Counsel / Natural Resources
Patrick Rowe	Sussman Shank LLP; OSB, Env. and Natural Resources Section
Charles Landman	Legal Analyst, Land Quality - OR Dept. of Environ. Quality
David Ashton	Sr. Asst. Gen. Counsel, Port of Portland; OSB, Env. and Nat. Resources Section
Dominic G. Colletta	Lane Powell PC; OSB, Real Estate and Land Use Section
Christopher D. Crean	Beery Elsner Hammond LLP; OSB, Real Estate and Land Use Section
Joe Willis	Schwabe Williamson & Wyatt; Uniform Law Commissioner
Tom Zelenka	VP of Environmental Affairs, Schnitzer Group
Jeff Dobbins	Work Group Reporter, Professor, Willamette U. College of Law
Cleve Abbe	Lawyers Title Ins. Corp.

Advisors & Interested Parties	
Michael Abendhoff	BP America, Inc.
Jeff Christensen	Oregon DEQ
Lori Cohen	US EPA
Kelly Cole	US EPA
Lori Cora	Asst. Regional Counsel, Region X, US EPA
Kirsten Day	Perkins Coie LLP
Paul Diller	Professor, Willamette U. College of Law
Susan Grabe	Attorney, OSB Public Affairs Attorney
John Ledger	VP of External Affairs, Legislative Rep. (Env't, Energy & Transp.), AOI
James Miles	Attorney-Advisor Office of Site Remediation Enforcement, US EPA
Kenneth Schefski	US EPA
Ken Sherman	Sherman Sherman Johnnie & Hoyt; Bankers Assoc.
Staff	
Wendy Johnson	Deputy Director and General Counsel, Oregon Law Commission
Mark Mayer	Legislative Counsel
Harrison Conley	Legislative Counsel
Kieran Marion	Legislative Counsel for Uniform Law Commission (NCCUSL)

C. *Work Group Meeting Dates.* The work group met on the following dates:

July 14, 2010
September 1, 2010
October 29, 2010
January 28, 2011
March 1, 2011 (teleconference)
March 22, 2011 (teleconference)

III. Statement of the Problem Areas and Proposed Solutions

Whether a given institutional control limits property use to particular purposes, restricts activities on a property, requires the maintenance of engineering controls, or obliges a property owner to monitor (or allow access to monitor) the state of the property, the institutional controls in question are only effective if they apply to the property itself in the long term, binding both current and future owners as long as the risk of hazardous substances continues on the property. Given the inherent connection between property and institutional controls, the chosen mechanism in many jurisdictions for implementing these controls has been through a transfer of interests in real property. While this approach is a natural one, the relevant regulator must have the necessary authority to enter into such transfers. More important, many traditional common law property principles can undermine the ability to impose indefinite limitations on real property, particularly when those limits impose obligations that do not directly benefit the landowner. The proposed legislation is intended to address these areas of concern by emphasizing DEQ's authority to enter into agreements to implement institutional controls, and by ensuring that such agreements are enforceable even if they might run afoul of traditional common law principles.

A. *Long-term effectiveness of institutional controls.* Throughout the work group process, DEQ pointed out that its residual authority to protect health, welfare, and the environment will serve as a backstop in any circumstance in which an institutional control is later found to be ineffective. If a property owner (whether the original or a subsequent owner) is not complying with an institutional control, even if the agreement implementing that control is deemed invalid for some reason, DEQ retains the ability under current law to take any steps necessary to ensure the necessary protections for health, welfare, and the environment. Nothing in the proposed legislation affects DEQ's ongoing authority to take steps necessary to protect against risks posed by hazardous substances. Thus, even if agreements implementing institutional controls were deemed invalid, or interpreted by courts in an excessively narrow manner, human health and the environment might not ultimately suffer in light of DEQ's continuing authority (though there may be short term costs).

At the same time, however, agreements implementing institutional controls are generally entered into only after a substantial investment of time and energy by all involved. Any steps that can be taken to ensure the ongoing effectiveness of these agreements will avoid having to re-open DEQ investigations on those properties, thereby saving the agency and the state money and employee time that would otherwise have to be expended to protect against exposure to hazardous substances on these properties.

1. *Protection of institutional controls in light of common law property principles.* Under traditional common law, partial grants of interests in land – typically characterized as easements, equitable servitudes, or covenants – may not be enforced unless they fit a number of specific conditions regarding the relationship between the grantor and grantee, and between the property and the burdens and benefits imposed on the property. While many of these common law doctrines have liberalized over time, and will often permit interests in property to bind landowners today in a manner that may have not been permitted in the past, particularly unusual forms of property interests remain subject to challenge under some circumstances, and in particular, the broad public benefits enjoyed by the grantee (DEQ) of agreements implementing institutional controls may present some of those problems.

The agreements at issue in this legislation fit into that category. A property owner who seeks to be freed from obligations under an agreement implementing institutional controls might argue that the agreement did not, in fact, benefit any adjoining property but the public as a whole, making the agreement an easement with accompanying covenants. *See Oregon State Bar, Principles of Oregon Real Property Law* §3.17 (1995). They might then point out that under common law, real covenants could not be formed unless the parties that created the covenant had privity of estate – which DEQ and a private property owner would not have had – and that the only remaining traditional property interest – equitable servitudes – could only be enforced as long as there was a reasonable relationship to the land at issue. *See id.* §4.2. For some kinds of obligations imposed in an agreement implementing institutional controls, a property owner might argue that certain conditions did not, in fact, “touch and concern the land,” or that the benefit connected to the agreement was not “reasonably related to the burden and [did not] relate either to the occupation, use, or enjoyment of the promisor’s land or the promisee’s land.” *Id.* at §4.6 (describing need for benefits of the servitude to relate to the land). This might be particularly true for conditions like payment obligations, which are very common in these kinds of agreements given DEQ’s obligation to recover costs of remedial actions.

To be sure, these traditional limits on the validity of equitable servitudes have been liberalized over the years, and for that reason, the work group and DEQ were not overly concerned that existing agreements might be suspect. *See generally Restatement (Third) Property – Servitudes* §2.18, § 8.5. In addition, as noted above, DEQ would always retain authority to protect the public interest in a case where an agreement was deemed unenforceable; any risk to the public or environment would trigger DEQ’s statutory obligation to step in and mitigate that risk as appropriate. Nevertheless, the prospect of protracted litigation, and the cost associated with reopening a remedial action on a site where the state believed that it had already been resolved, convinced the work group that some additional statutory protection for these agreements would be useful.

As a result, SB 867 borrows from section 5 of UECA, and provides that an agreement remains valid and enforceable even if it implements institutional controls in a manner that “is not appurtenant to an interest in the real property, imposes a negative burden, creates an affirmative obligation, does not touch or concern the real property, or is not otherwise recognized as valid or enforceable under common law.” SB 867-2, Section 6(b)(A). This language is very similar to that under the Uniform Conservation Easements Act, which is already part of Oregon law. *See ORS 271.745.* It is intended to ensure that courts recognize that these kinds of agreements come

with legislative approval, and that, particularly in light of the important public purposes being served by these agreements, traditional common law property doctrines should not be used to undermine their effectiveness and enforceability. The mere failure to fit into traditional pigeonholes of property law should not stand in the way of effective enforcement of these agreements, as long as they meet certain notice requirements and are entered into in order to accomplish their statutory purpose.

2. *Binding effect on future property owners.* The second significant area of concern when implementing institutional controls comes from the need to ensure that future property owners hold land subject to the institutional controls in the relevant agreement. If the initial agreement is viewed simply as a contract, or if terms within the agreement are viewed as primarily contractual, and not tied specifically to the land, there is a risk that subsequent owners may have a claim that they are not obligated to comply with conditions of the agreement.

This problem is substantially addressed by the requirement in SB 867 to include within the agreement a description of the land involved, and to record the agreement with the relevant county clerk. In treating these agreements like traditional interests in real property for purposes of transfers of ownership (but simultaneously excusing them from most common law limits on the creation and enforcement of servitudes), many of the concerns associated with transfers of land will be alleviated. In addition, section 3(6)(a) of the proposed legislation makes it clear that the agreement follows the land, transferring with any conveyance or assignment of the real property that is subject to the agreement. In common law terms, these agreements “run with the land,” and should therefore be enforceable against future owners.

The one remaining type of transfer that the legislation is intended to address is acquisition of the property through prescription, adverse possession, eminent domain, or foreclosures arising out of obligations that develop after the agreements are entered into. Thus, if a property subject to an agreement is taken through a process of eminent domain, or by executing on a tax lien foreclosure, the governmental entity taking the property would still be subject to the agreement under Section 6(b), which provides that the agreement is “valid and enforceable against a grantor and against a person that has an interest in the real property that vests after the recording of the agreement.” Similarly, a person taking the property through adverse possession would also be subject to the agreement.

The long-term effectiveness of institutional controls turns on the ability to enforce those controls on the property despite changes in ownership. The proposed changes made by SB 867 will guarantee that future changes in ownership will not undermine the effectiveness of those controls.

3. *Binding effect on concurrent interest holders.* One final area of concern is how these agreements are affected by properties on which many different entities or individuals have property interests at the time the agreement is entered into. The bill does not specifically address this problem, other than by noting that 1) the agreement should be signed by the grantor of the real property interest at issue (which will generally be the owner(s) of the fee interest in the property), and 2) the agreement is valid and enforceable against the grantor of the interest. The legislation therefore leaves to DEQ and those property owners entering into these agreements the

ultimate responsibility for identifying all current holders of an interest in the property whose consent will be necessary to grant to DEQ the full scope of the interests it seeks to take under the agreement.

B. Clarifying scope of statutory authority. Under existing law, DEQ has the authority to use institutional controls as a means of carrying out removals and remedial actions on contaminated properties. Although ORS 465.315 does not specifically define the nature of “institutional controls,” the term has been interpreted by DEQ to permit it to enter into the kind of long-term property arrangements that would be formalized through this legislation. While DEQ believes that it has been working within the scope of its authority to implement institutional controls, the proposed legislation clarifies that DEQ may enter into these real property agreements. As discussed in further detail in the next section, nothing in this provision should be construed as suggesting that DEQ lacked authority to enter into preexisting agreements. The institutional control language in 465.315 leaves the particular mechanism for implementing institutional controls wide open; the proposed legislation merely clarifies the scope of DEQ’s associated authority.

C. Ensuring effectiveness of existing agreements. A primary concern during the process of drafting SB 867 has been the desire on the part of the work group to ensure that legislation does not in any way cast doubt on the validity and enforceability of the approximately 500 existing agreements between DEQ and owners of contaminated properties. Early in the work group discussions, the group considered the possibility of not recommending any legislation at all, based on the concern that any action clarifying the enforceability of these agreements in the future would necessarily carry with it the implication that existing agreements were in some manner subject to challenge or invalid.

Ultimately, the work group concluded that the benefit of avoiding any risk of future challenge would outweigh any negative implication from legislation, particularly if the legislation and accompanying report made it clear that it was being proposed simply in order to place existing programs on a firmer footing. There was no general sense that existing agreements were likely to be invalid in any way, whether because of a lack of clearly stated DEQ authority or because of the operation of common law doctrines. The work group considered, but rejected, a retroactivity clause that would have sought to make the provisions of SB 867 applicable to preexisting agreements; work group members believed that such a clause would be constitutionally suspect, and that if it were struck down, its absence would cast even more doubt on the validity of existing agreements. The work group concluded, in short, that it was best to let existing agreements stand on their own merits, and to simply make clear that no negative implication should be drawn from the current legislation.

Section 8(2) of the proposed legislation attempts to make this point clear, providing that the legislation “[d]oes not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act.” The legislation should have no bearing on any future challenge to whether an interest in real property was granted by an agreement entered into before 2011; if anything, it should emphasize the degree to which the legislature believes that even the preexisting agreements are a valuable part of DEQ’s existing regulatory program and should be enforced to the degree possible under current law.

D. *Promotion of uniformity and clarity in law.* The impetus for the work group was consideration of the Uniform Environmental Covenants Act. At this point, the proposed legislation implements UECA in spirit, and borrows some language (particularly provisions in sections 6 and 8 of SB 867), but it is difficult to characterize it as an implementation of UECA itself. There is value in placing a program like this into written law; DEQ's current EES program is not defined by regulations or statute, and so having the program explicit in the Oregon Revised Statutes promotes transparency in the law and notice to regulated parties both in the state, as well as to those outside of Oregon who might be seeking to invest in the state.

Because the work group was formed with UECA in mind, it is worth addressing some significant differences between UECA and the program that would be established under SB 867. First, the provisions of UECA allowed a wide range of regulatory entities (including federal agencies or local governments) to take an interest in an environmental covenant. By contrast, SB 867 is applicable solely to DEQ. In work group discussions on this issue, DEQ reasonably noted that it is, as a statutory matter, involved in some form or another with every contaminated property in the state, and that under current law, it is unlikely to cede control to other entities. Even if a point came in the future where another entity needed authority to enter into this kind of agreement, legislative change would be relatively straightforward.

Second, UECA's enforcement provisions allowed a very broad range of parties to enforce environmental covenants. Under UECA section 11, injunctive relief for violations of the covenants could be sought, for instance, not only by parties to the agreement, but by any person "whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant," or by the local "municipality or other unit of local government." Although the work group acknowledged that having more entities paying attention to enforcement would, in theory, be beneficial to the ultimate success of the agreements, work group members also believed that expanding the scope of statutory enforcers would also risk unnecessarily complicating any enforcement that would occur, and that leaving it in the hands of DEQ would likely be preferable. To the degree that other parties have an interest in benefits arising from these agreements, the legislation is not intended to alter existing law regarding the creation of third party beneficiaries. Under contract law, either explicit language in an agreement, or language along with accompanying circumstances, may create third party beneficiaries who are able to enforce the agreement.

Finally, UECA included relatively detailed processes for the creation, amendment, and termination of environmental covenants. Because work group members and, in particular, DEQ felt that existing informal processes for creating these agreements were working well, the proposed legislation eschewed most of those processes. Instead, SB 867 requires only a few relatively simple preconditions for the creation of an agreement implementing institutional controls, and does not specifically address amending or terminating those agreements. Any changes to an agreement after it has been entered into will need to be addressed through traditional contract law.

IV. Review of legal solutions existing or proposed elsewhere

As of early 2011, UECA had been adopted, largely in its original form, in 23 states (including Washington, Idaho, and Nevada), as well as in the District of Columbia and the U.S. Virgin Islands. In many of those states (such as Washington and Illinois), existing programs were already using real property interests to implement institutional controls, and UECA was perceived as unnecessary in light of existing programs. At the same time, however, several other states (including New Jersey, California, and Colorado) have considered but decided not to adopt UECA, generally because existing programs were perceived as an adequate basis for addressing the problems that UECA was intended to solve. The adoption of SB 867 will bring further detail to Oregon law regarding these state-specific alternatives to environmental covenants, but will not gain any advantage associated with the adoption of a uniform law.

V. Summary of Sections

The following section-by-section analysis should be read in conjunction with the preceding descriptions of the general approach and purpose of SB 867. Because the work group suggested, and the Law Commission recommends, approval of the legislation only with the -2 amendments, this discussion assumes adoption of the -2 amendments, and is numbered based on the amended version of the bill.

Section 1: With the -2 amendments, section one defines “institutional control” for purposes of ORS 465.315. The definition is intended to encompass the wide range of limitations and obligations that DEQ may place on a contaminated property in order to limit the potential for exposure to hazardous substances. It includes any limits or obligations regarding how the property is to be used in the future (such as limits on the ability to use the property for residences, or an obligation to use the property only for industrial purposes), as well as any obligations or restrictions regarding activities on the property (such as a bar on the drilling of wells, or an obligation to maintain an impermeable surface on the property). It also includes obligations regarding the installation, maintenance, and monitoring of a wide range of engineering controls or other remedial actions that might be imposed on a contaminated property, and any requirements regarding access to the property (whether limits on the ability to access the property, or obligations to allow access to the property for monitoring or other purposes).

The work group considered defining institutional control within the broader definitions section of the hazardous substance law (ORS 465.200), but that would have required renumbering a broad swath of commonly-used definitions in the hazardous substance statutes, and risked confusion or costs in making the necessary changes to existing DEQ programs. The alternative in the legislation avoids that problem, though it does require referencing the new definition in any location where it is subsequently used. (See SB 867 §§ 3(1)(b), 4, 5, & 6).

Section 2: Places § 3 in its appropriate place within the Oregon Revised Statutes. The work group discussed whether there might be other entities, or circumstances other than properties contaminated with hazardous waste in which DEQ might need to use agreements implementing institutional controls, and whether the relevant provisions regarding these agreements should be located somewhere other than in the hazardous waste chapters of the ORS.

DEQ concluded that the vast majority of these agreements would be entered into in connection with properties contaminated by hazardous waste, and that as a result, this was an appropriate place for the legislation to be codified. Future legislation could always extend the program to other situations or other entities, as the need arises.

Section 3: The most significant section, which grants DEQ the explicit authority to enter into agreements implementing institutional controls.

§ 3(1)(a) & (b): The work group does not intend that these agreements be pigeonholed into a traditional category of a common law property interest. Because the intent of the legislation is to free these agreements from the limitations and restrictions that accompany these common law categories, the legislation simply provides that DEQ may enter into an “agreement” – whether that agreement is deemed an easement, an equitable servitude, or other instrument. The definition in (1)(a) is intended to broadly encompass the full range of agreements to transfer an interest in real property short of a possessory interest, and is not intended to force DEQ to choose among the various categories. Subsection (1)(b) simply carries over the definition of institutional control into this provision.

§ 3(2): Permits DEQ to enter into agreements implementing institutional controls. The legislation makes clear that DEQ is the “grantee” under these agreements of “an enforceable interest in real property.”

§ 3(3): As noted in Part III(D), above, the work group believed that DEQ’s existing process for negotiating these agreements was working well, and therefore decided to impose very few limitations on the process for entering into these agreements. The only specific requirements are that the Director of DEQ (or a designee) sign the agreement along with all grantors of the interest in the property. As noted in Part III(A)(3), above, it remains DEQ’s responsibility, along with that of the grantors, to identify all concurrent holders of an interest in the real property in order to ensure the effectiveness of the agreement. If, for some reason, a current interest holder believes that there is no need to enter into an agreement, they may choose not to, although DEQ retains other powers regarding the implementation of remedial actions on the property (including direct imposition of institutional controls). It will often be to the benefit of concurrent interest holders (such as mortgage holders) to enter into these agreements in order to clarify the status of the property, but that assessment is left to the individual entities in light of DEQ’s other powers.

As discussed in Part III(D) above, the agreements may either explicitly or implicitly create third party beneficiaries entitled to enforce the agreement. This matter is left to DEQ, the grantor, and the operation of the common law of contract regarding third party beneficiaries.

The legislation also requires that the agreement include a description of the real property in order to facilitate the recording of the agreement. See § 3(3)(b) & 4.

§ 3(4): In order to ensure that future owners of the property are on notice of the agreement, the legislation requires that the agreement be filed in the deed records of the county in which the property is located. The default rule is that responsibility for filing is in the hands

of the grantor, although this is a point that can be subject to negotiation at the time the parties enter into the agreement.

The recording of these agreements is already done by DEQ as a matter of course; the legislation simply makes clear that such recording is critical to the enforceability of the act against future property owners. See §6(b) (making agreement valid and enforceable against owners taking an interest that vests after the recording of the agreement).

§ 3(5): Of particular importance to DEQ is the ability to recover costs incurred during its work on a parcel of contaminated property. *See, e.g.*, ORS 465.210(b), 465.255-.260, 465.330-.335. Agreements implementing institutional controls will typically include provisions that require the grantor of the agreement to cover costs (whether incurred by the grantor or by DEQ) associated with the limits on the property, and the work group wanted to be sure that these kinds of obligations were explicitly permitted under the legislation.

Because cost recovery requirements are, to some degree, different from the institutional control itself, the provision makes clear that the department may, in an agreement implementing an institutional control, impose other conditions that are reasonably related to carrying out remedial action on the property. This language should make it clear that the agreement can include a wide range of conditions, as long as those conditions are sufficiently connected to remedial actions on the property.

§ 3(6): This section carries into effect the primary focus of the legislation – ensuring that agreements implementing institutional controls survive in the long term, and are enforceable against subsequent owners of the property (however they may come to possess their interest) despite certain common law doctrines that might call the agreements into question. The reader is referred to the discussion in Part III(A), above, regarding the goals of the legislation and the potential problems that it is intended to avoid, as well as to the Commentary for UECA section 5, from which much of the language in 3(6)(b) is drawn. In essence, the section follows UECA’s lead by giving a unique status under common law to an “agreement to implement an institutional control,” making them separately enforceable even if traditional common law doctrines might call their enforceability or validity into question.

In particular, section 3(6)(b)¹: (i) Provides that the agreement, the benefit of which is held in gross (i.e., not connected to a particular adjoining property), may be enforced against the grantor or his successors or assigns. By stating that the covenant need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of an easement must own an interest in real property (the “dominant estate”) benefitted by the easement. (ii) Provides that the imposition of a “negative burden” – whether novel or otherwise – does not prevent enforceability of the agreement. Some applicable law recognizes only a limited number of “negative easements” – those preventing the owner of the burdened real property from performing acts on his real property that he would be privileged to perform absent

¹ The discussion in this paragraph is substantially dependent on, and occasionally quotes verbatim from, the Commentary to UECA section 5 (Appendix A to this report). With that note, we do not separately cite even verbatim provisions of that Commentary.

the easement – and this provision would eliminate that requirement. (iii) Provides that the opposite problem is also not an issue. Existing law will occasionally call into doubt the enforceability of an easement that imposes affirmative obligations upon either the owner of the burdened real property or upon the holder. Under some existing law, neither of those interests was viewed as a true easement at all. The first, in fact, was labeled a “spurious” easement because it obligated an owner of the burdened real property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement’s holder to perform acts on the burdened real property that the holder would not have been privileged to perform absent the easement.) Because these kinds of obligations are a necessary part of implementing institutional controls on a property, the legislation makes it clear that the agreements are nevertheless enforceable. (iv) Provides that the “touch and concern” limit on the enforceability of servitudes does not apply. (v) Provides that “privity of estate” arguments limiting enforceability of certain property interests where there is not sufficient legal connection between the grantor, the current holder of the subservient property, and DEQ, do not apply. Finally, the legislation (vi) Provides that no other common law doctrines calling the validity of the agreement into question should undermine the validity and enforceability of the act.

Section 4, 5 & 6: These are conforming amendments, making clear that the provisions of existing law regarding the inventory of properties on which DEQ has implemented “institutional controls” use the same definition of institutional control that can be found in ORS 465.315 (as amended by this Act).

Sections 7, 8, & 9: Other than the straightforward applicability provision in section 8(1) and the emergency clause of section 9, these provisions are intended to address the problem discussed in Part III(C), above, regarding the effectiveness of prior agreements entered into by DEQ. The reader is referred to that discussion. Section 7 specifically references this report, and is intended to ensure that a reader of the statute is aware of this accompanying legislative history, which represents the sense of the work group and the recommendation of the Law Commission regarding the effect of the bill.

Section 8(2) is a savings clause that is intended to implement the spirit of UECA Sections 5(c) and (d). As noted in Part III(D), above, the work group considered a retroactive provision like the one in UECA section 5(c), which would have either (a) made the provisions of this legislation wholly retroactive, or (b) prohibited the use of common law doctrines to undermine the validity of prior agreements. The work group concluded that explicit language would likely be ineffective, to the degree that it accomplished its purpose, and that the better course would simply be to express the intent of the work group that this legislation is not intended to cast doubt on the validity of prior agreements. If a future case does arise regarding the enforceability of a preexisting agreement, it is the hope of the work group that the court will, in considering the application of common law doctrines, recognize that these kinds of agreements are widely beneficial to the people and environment of the State of Oregon and that relevant law should be construed liberally in order to ensure their effectiveness.

VI. Conclusion

The bill, with the -2 amendments, should be adopted because it places an existing, effective program for the management of hazardous substances on a firmer legal footing, and ensures the long-term effectiveness of measures taken to limit the release of those substances. At the same time, it puts parties on notice of the scope of DEQ's authority in this area and provides some guidance to those seeking to understand the nature of that authority.

VII. Appendix

Appendix A: Text and Official Comments to Uniform Environmental Covenants Act

AMENDMENT NOTE for SB 867:

Amendments made in the Senate Judiciary Committee:

The Senate Judiciary Committee adopted an amendment that replaced the bill. The "gut and stuff" amendment was recommended by the Work Group and the Commission because the introduced bill was merely a placeholder. The Commission's work and recommendations were reflected in the amendment and the accompanying explanatory report explains the amendment and not the introduced bill

There was also a minority report that came out of the Senate Judiciary Committee. It would have also replaced the introduced bill but would have deleted the provision that provides that institutional control agreements with DEQ run with the land. Subsequent purchasers would also not be released from liability.



OREGON LAW COMMISSION

INHERITANCE TAX

Work Group Report

HB 2541

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Approved by the Oregon Law Commission at its Meeting on March 28, 2011

I. Introduction

This explanatory report is written to accompany the provisions of House Bill 2541 as amended with the -5 amendment. The introduced pre-session filed bill reflected the work of the Inheritance Tax Work Group of the Oregon Law Commission as it stood in October 2010. The changes to the bill made after October 2010 were so great that amending the original bill was not feasible. Thus, the -5 amendment is a complete “gut and stuff” of the original bill, and this report is an explanatory report of the amendment. The -5 amendment is effectively referred to in the report as “the bill.” This report provides background information that led to this bill, explains policy changes that are made in the bill, and provides a section-by-section analysis of the bill.

II. Statement of the Problem

Oregon’s inheritance tax statutes, found in ORS Chapter 118, are tied heavily to the outdated 2000 federal Internal Revenue Code. Using such a structure is awkward and has created both administrative and tax policy problems. In addition to being outdated, Oregon’s state estate tax chapter is perceived as being overly complicated. The chapter was never originally intended to serve as a stand-alone code, but rather it was viewed as a supplement to the federal Internal Revenue Code during the time of the pass-through estate tax credit. Congress’ continual amendments exacerbate the problems with Oregon’s estate tax chapter. The Oregon legislature has tried in the past to address two areas of particular equity concern – those include marital property and natural resource property. In those two areas, Oregon has stepped away from the federal approach and created its own provisions, but problems with those provisions have continued to arise. In particular, the “working capital” provision of the natural resource credit has been under continued review and amendment and is perceived as still not functional. In addition to the general complexity and interpretation problems with many of the estate tax provisions, taxpayers are also frustrated that they can’t easily figure out what their estate will owe in state estate taxes at their death. This problem exists because there is not a rate table in Oregon law. Instead, Oregon’s state estate tax is tied to a complicated graduated rate that is found in the 2000 Internal Revenue Code. The 2000 rates are based on the state estate tax credit that has been repealed for more than 6 years. In addition, because of this tie to the old allowable federal credit, there is an odd wall effect that taxes decedents just over the Oregon threshold at perceived overly high rates. Lastly, in recent years, Oregon’s estate tax chapter has been amended virtually every session. Amendment upon amendment over the years has created quite a mess and a comprehensive review of the state inheritance tax law and policy is long overdue.

III. History of the Project

After the 2009 legislative session¹, led by Representative Vicki Berger, the Legislative Revenue Office and several legislators, including the chairs and other members of the House and Senate

¹ HB 3305 was debated in Committee at length during the 2009 session, but it ultimately died in the House Revenue Committee. Among other things, it would have revised the working capital definition, revised the available natural resource property credit, and provided that federal elections were not binding on the state estate tax return.

Revenue Committees, requested that the Oregon Law Commission conduct a law reform project regarding Oregon’s inheritance taxation laws. The request was to review ORS Chapter 118 (the inheritance tax chapter) and make recommendations for any reform to the 2011 Legislative Assembly, including a proposed bill. Legislative leadership also requested periodic interim reports. Specifically, legislative leadership gave direction to the Commission to approach a law reform project in a two step process. First, the Commission’s Work Group was asked to evaluate the state’s inheritance tax system and determine its own scope—either to take a narrow approach and focus largely on the estate tax Natural Resource Credit (NRC) or take a broad approach, looking at the whole inheritance tax chapter.

The Commission approved the law reform project in September 2009 and appointed a Work Group.² The Work Group was chaired by Commissioner Lane Shetterly and was composed of

² The membership of the Work Group included the following persons:

<u>MEMBERS:</u>	
Lane Shetterly	Oregon Law Commissioner, Work Group Chair
Clint Bentz	CPA, Boldt, Carlisle & Smith LLC
Judge Henry Breithaupt	Judge, Oregon Tax Court
Jeff Cheyne	Attorney, Samuels Yoelin Kantor Seymour & Spinrad, LLP OSB Estate Planning Section Representative
Brian Haggerty	Attorney, Minor Bandonis & Haggerty PC OSB Elder Law Section Representative
Jonathan Mishkin	Attorney, Harrang Long Gary Rudnick PC OSB Business Section Representative
Jeff Moore	Attorney, Saalfeld Griggs PC
Terrance O’Reilly	Law Professor, Willamette University College of Law
Katherine VanZanten	Attorney, Schwabe Williamson & Wyatt OSB Tax Section Representative
<u>ADVISORS:</u>	
Debra Buchanan	Legislative Coordinator, Oregon Department of Revenue
Shawn Cleave	Governmental Affairs Specialist, Oregon Farm Bureau
Debbie Koreski & Alyson Kraus	House Speaker’s Office Staff
Chuck Mauritz	Attorney, Duffy Kekel LLP

members, advisors, and interested persons who have expertise in accounting, estate planning, elder law, estate taxation, business entity law, natural resource interests, public policy, the Oregon Department of Revenue, and state politics. The Work Group also has had the assistance of the Legislative Revenue Office and Legislative Counsel. The Work Group met at least monthly from October 2009 to March 2011.

At the first meetings, the Work Group discussed the scope of the law reform project and chose to take a broad approach as it determined that the problems associated with the Natural Resource Credit could not readily be addressed without addressing structural problems with the inheritance tax chapter itself. Special subgroups were also formed throughout the process and met to focus on complex issues regarding natural resource property, marital property, and intangible property.

Tim Nesbitt	Deputy Chief of Staff, Governor's Office
Steve Robinson	Policy Analyst, Oregon Center for Public Policy
Jeff Stone & Patrick Capper	Director of Government Relations, Oregon Association of Nurseries
INTERESTED PERSONS: Alice Bartelt	League of Women Voters of Oregon
Keith Kutler	Assistant Attorney General, Oregon Department of Justice
Scott Nelson	Attorney, K&L Gates LLP
David Nebel & Matt Shields	Public Affairs Attorney, Oregon State Bar
Jody Wiser	Tax Fairness Oregon
Peggy Woolsey	Tax Fairness Oregon
Staff: Jeffrey Dobbins	Executive Director and Law Professor, Oregon Law Commission and Willamette University College of Law
Wendy Johnson	Deputy Director and General Counsel, Oregon Law Commission
Mazen Malik	Senior Economist, Legislative Revenue
Kate Tosswill	Deputy Legislative Counsel, Legislative Counsel's Office

IV. History of Inheritance Tax Law in Oregon

Oregon has had an inheritance tax since 1903.³ Beginning in 1971, Oregon maintained its own inheritance tax but also imposed an additional tax that was based on the state tax credit that was allowed on the federal return. After a ten year phase out,⁴ in 1987, the only estate tax Oregon imposed was the allowable credit on the federal return (i.e. the pass-through tax). In addition, for several decades now, Oregon's estate tax chapter has relied largely on the federal estate tax code for its definitions and for determining the taxable estate. From 1926 to 2004, federal law permitted a credit on the federal estate tax return for state estate taxes paid. Thus, during that time period, Oregon's state estate taxes had very little burden on many tax payers because the federal credit effectively provided a pass-through to Oregon of estate tax money that otherwise would have gone to the federal government anyway.

In 2001, when the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) passed, EGTRRA phased out the credit (i.e. the pass-through) from 2001-2004. And in 2005, the credit on the federal return was eliminated and replaced with a deduction for state estate taxes paid. This new deduction on the federal return (for those with estates large enough that a federal estate tax is owed) computed to giving federal estate taxpayers nearly 50% back of what was paid in state estate taxes. That percentage was lowered beginning with 2010 decedents as Congress lowered the federal estate tax rate to 35% at the end of last year. EGTRRA also raised significantly the filing threshold for paying federal estate taxes; the threshold increase was phased in, moving from \$1 million to \$3.5 million in 2009. Thus, fewer Oregon residents are paying a federal estate tax, and only those in the upper estate size brackets get the federal deduction.

For over 75 years, most states set their state estate tax rate as the maximum allowable credit on the federal return. When the credit was repealed in 2005, if states wanted to continue to receive estate tax revenues, most states (including Oregon), needed to decouple from the newer federal code since the credit provision had been repealed. Twenty-eight states decided to repeal their estate tax altogether and just forgo the state revenue. Initially, almost all of the other states opted to just amend their statutes and stay linked to the pre-2001 federal code and not connect to the new federal code, thereby still calculating the tax using the old credit chart as the tax. In 2003, Oregon too opted to stay connected to the 2000 federal estate tax code, instead of reconnecting to the new code.⁵ In subsequent sessions, the legislature continued to make amendments to the Oregon inheritance tax, but remained connected to the 2000 federal code.

³ The inheritance tax then was a range of 1-6% that was based on the recipient's relationship to the decedent and the amount of property received. The rate was higher for collateral relatives than for lineal descendants and was even higher for non-relatives.

⁴ See Chapter 66, Oregon Laws (1977).

⁵ HB 3072 (2003), Section 2.

The Oregon legislature did diverge from the federal code and adopted its own modified state QTIP provision known as Oregon State Marital Property in 2005⁶ and its own Oregon Natural Resource Property Credit in 2007⁷. Those provisions have continued to carry some questions and concerns, partially because they are different from federal law and partially because they are complex, new, and present overlapping questions.

Most recently, the federal estate tax expired and there was no federal estate tax for the 2010 year. However, on December 17, 2010, after much Congressional debate and amendments, President Obama signed H.R. 4853, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, and it became effective. Sections 301-304 of that Act provided for temporary estate tax relief provisions. Most notably, the Act retroactively reinstated the estate tax for decedents dying in 2010, but reduced the maximum tax rate for estates to 35 percent (down from 45 percent rate for decedents dying in 2009). Also, the Act allows executors of the estates of decedents dying in 2010 to elect out of the federal estate tax and instead apply the new federal carryover basis rules enacted under the Economic Growth and Tax Relief Reconciliation Act of 2001 to estate property. Also of significant note is that this new federal legislation raised the exclusion (i.e. threshold for size of estate) to \$5 million (was \$3.5 million), making the gap between the federal and Oregon thresholds even greater.

V. Inheritance Tax Revenues

Oregon inheritance tax revenues currently average about \$200 million a biennium, and this revenue comes from approximately 2,000 estates. While these numbers are averages, inheritance tax revenues are fairly volatile as revenue depends on who dies in a given year and what their respective estate size is. One very large estate in a given year can skew the average significantly. Presently over half of the total number of Oregon inheritance tax returns have been for estates between \$1 million and \$2 million; those returns produce approximately ¼ of the biennial inheritance tax revenue. The Work Group reviewed estate tax revenue data provided by Legislative Revenue's Office and the Department of Revenue throughout this law reform project.

VI. Scope of the Project

This recommended bill revises ORS Chapter 118 to:

- Disconnect from the outdated 2000 federal Internal Revenue.
- Improve and amend provisions to meet policy objectives.
- Clarify provisions and expound on estate tax areas where there are gaps in the law or procedure.
- Correct mistakes in the estate tax chapter.

⁶ HB 2469 (2005).

⁷ See HB 3201 (2007), modified by HB 3618 (2008).

VII. Policy Changes Made by Bill

1. Federal Connection with Newer Date, but Oregon Threshold

This bill decouples Oregon's estate tax from the old 2000 federal estate tax code and reconnects to a newer federal tax code—the federal code as it existed on December 31, 2010.⁸ This new code is readily available to tax professionals and the public. The bill provides that Oregon's estate tax law will continue to rely on the federal code for most definitions and the basic federal estate tax structure. Note that Congress passed H.R. 4853 on December 17, 2010, and thus the tie-in date of December 31, 2010 picks up Congress' latest revisions to the federal estate tax.

Rather than track exactly the federal estate tax code, this bill continues several unique state estate tax provisions but is also drafted so that it is a more of a stand-alone state estate tax law chapter. This will help should Congress continue to amend the federal estate tax code. One of the biggest differences between the federal law and the state law is the estate size threshold. The bill maintains a lower state estate tax threshold than the federal estate tax threshold. Only if an estate is larger than the threshold will there be an estate tax. Oregon's threshold has been at \$1 million for 5 years, but this bill would increase Oregon's threshold to \$1.5 million.⁹ The federal threshold was increased in December 2010 from \$3.5 million to \$5 million. The threshold increase was not a unanimous recommendation as it did not have the support of the Tax Fairness Oregon representatives.

2. Tax Rate Computation

The Oregon estate tax will no longer be based on the repealed federal state death tax credit from 2000 that references two complicated and outdated tax schedules.¹⁰ Instead, the bill sets and codifies Oregon's own estate tax rates, using a progressive tax with a range of 8.6% to 19.6%.¹¹ Compared to present law, this rate range provides a slightly lower rate for small estates and a slightly higher rate for large estates (over \$5 million). The rates are competitive with Washington's rates and this is noteworthy because Washington is the only western state with an estate tax. Estates over \$5 million receive a deduction for the state estate taxes paid on their federal return.¹² Thus, while this bill increases the tax rate for larger estates, the net tax burden is eased. The federal deduction is the state estate tax paid multiplied by the federal estate tax rate; that is, presently, taxpayers get 35 cents on the dollar back on the federal tax bill as the federal

⁸ See ORS 118.007 as amended.

⁹ See ORS 118.010 deducting \$1.5 million from the federal taxable estate as part of the calculation to compute the Oregon taxable estate. See also amendment to ORS 118.160, providing that an estate tax return is not required with respect to estates of decedents who die on or after January 1, 2011, unless the value of the gross estate is \$1.5 million or more.

¹⁰ See present ORS 118.010(2) repealed.

¹¹ See new ORS 118.010(4).

¹² See IRS Form 706, Part 2, line 3b.

tax rate is 35% (lowered from 45% in December 2010). The Work Group also considered but rejected a flat or flatter tax rate schedule, in favor of the progressive schedule.

This bill makes more reasonable the tax computation process by taxing only dollars over the Oregon threshold only (ramp structure), instead of taxing the entire estate if the estate size is over the threshold (present wall). The wall effect occurs presently because of the tie to the old federal credit. Under present law, an estate under \$1 million pays no Oregon tax, while an estate \$1 over \$1 million begins paying tax at a 41% marginal rate, which is significantly higher than the 6.4% Oregon inheritance tax rate applicable to the same values. As a result, an estate slightly over \$1 million pays over \$30,000 in tax on the entire taxable estate. This is perceived as an unfair tax result that creates significant incentives to manage estates and spend down in a way that avoids the \$1 million threshold altogether. Instead of the wall, the bill would tax estates only on those dollars over the \$1.5 million threshold. The bill provides for a true 1.5 million exclusion to all estates.

3. Marital Property

This bill maintains but clarifies Oregon's Special Marital Property provisions¹³ and clarifies the overlap of an Oregon Special Marital Property election with the federal marital property election provisions found in sections 2056 and 2056A of the Internal Revenue Code. Specifically, this bill solidifies that an executor may make separate elections for state estate and federal estate tax purposes as long as the requirements are met.¹⁴ This had been the practice as an administrative rule had also provided for this right, but the bill codifies this rule. This is important because the federal and state thresholds are so different, and thus taking a marital deduction is an important tool for deferring taxes. The marital deduction allows couples to defer estate tax at the first spouse's death by electing to use the marital deduction. Importantly, the bill also clarifies when the value of marital property previously claimed must be added back into the Oregon taxable estate when the second spouse dies.¹⁵

4. Intangible Property

This bill provides that Oregon will no longer tax intangible property held by the estates of nonresident decedents.¹⁶ That is, for non-resident decedent estates, only the value of real property and personal property located in Oregon will be subject to Oregon's estate tax.¹⁷ Resident decedents will continue to be taxed on their intangible property (wherever it is located),

¹³ See ORS 118.013 and 118.016.

¹⁴ See ORS 118.010(8) as amended and OAR 150-118.010(7).

¹⁵ See ORS 118.010(3)(a)(B) as amended.

¹⁶ See present ORS 118.010(4)(a) ("intangible property located in Oregon " deleted) and present ORS 118.010(4)(b) deleted.

¹⁷ See new ORS 118.010(6).

unless it is subject to a death tax in another state or country.¹⁸ The reasons for no longer taxing intangibles of nonresident decedents include the following: 1) it is tremendously complex and impractical to try to define what types of intangibles Oregon would tax because by definition intangibles do not have a readily ascertainable location; 2) taxes from intangible property provide little revenue to the state; 3) such a tax is nearly impossible to enforce due to the often complex ownership interests involved; 4) no other western state taxes the intangibles of nonresident decedents' estates; 5) there is a potential state business investment disadvantage with trying to tax such intangibles; and 6) it is easily susceptible to double taxation and litigation because unlike real property and personal property, the location of an intangible is often difficult to determine.¹⁹ The workgroup considered trying to tax the value of an intangible in an estate if there was some percentage of real property ownership in Oregon that was part of the intangible, but the group determined that very arbitrary lines would need to be drawn, it would require looking through entities in ways that are not practical, and there were easy ways for taxpayers to avoid the requirements. In the end, the Work Group concluded that taxing intangibles for non-residents just would not work.

To complete this policy change, the bill repeals the confusing reciprocal exemption of intangible personal property provision in present ORS 118.010(4)(b) and deletes the phrase “and intangible personal property located in Oregon” in present ORS 118.010(4)(a). The administrative rule, OAR 150-118.010(4)(b), will also need to be repealed. The reciprocal provision had long lost its meaning and become the subject of confusion because more and more states have no effective estate tax due because of the repeal of the state estate credit but still have an estate tax in their law. Lastly, the bill deletes confusing “within the jurisdiction of the state” language in ORS 118.010(1) and instead the bill focuses on domicile of the decedent and location of the property of the decedent to determine what property is subject to Oregon’s estate tax.

5. Natural Resource Property

a. Definitions

This bill substantially rewrites to clarify and improve the existing natural resource property credit for farm, fishing, and forestry businesses by providing definitions for each of these businesses and also by expounding upon the definition of natural resource property.²⁰ Present law provides a credit for both real and personal property used for farm, forestry and fishing businesses,²¹ but the definition of “natural resource property” is presently only focused on real

¹⁸ See new ORS 118.010(5).

¹⁹ Unlike real property and personal property, there is no constitutional protection from multiple states taxing the same intangible property. *Texas v. Florida*, 306 U.S. 398, 410 (1939).

²⁰ See new ORS 118.140(1)(b) (defining “farm business”), new ORS 118.140(1)(d) (defining “fishing business” the same way as it is defined in existing ORS 118.140(2)(a)(B)(i)), and new ORS 118.140(1)(f)(defining “forestry business”). See also expounded “Natural resource property” definition in new ORS 118.140(1)(h).

²¹ See existing ORS 118.140(2)(a).

property.²² The bill revises the definition of “natural resource property” to include both real property and personal property (tangible and intangible). This item is listed here as a “policy” change because it effects the other policy changes concerning the natural resource credit. It really is a technical change, though.

b. Formula for Credit and Cap on Credit

The bill provides a new formula²³ for calculating the natural resource credit and repeals the existing credit schedule.²⁴ The existing schedule is odd in that the schedule provides for claims of natural resource property up to \$15 million, but no professional would ever advise a claim greater than \$7.5 million due to the decreases in the credit that the schedule provides for claims over \$7.5 million. The present curve in the schedule, which increases and then decreases, simply does not work well in practice as present law also allows estates to claim a partial credit.²⁵ The present schedule raises equity concerns as well.

After the Oregon estate tax is computed,²⁶ the bill’s new formula gives a credit based on the percentage of the adjusted gross estate that is claimed natural resource property. This new formula focuses on the ratio of natural resource property compared to the adjusted gross estate rather than focusing solely on the amount of natural resource property claimed. This calculation is quite easy. However, Legislative Revenue staff found based on modeling that this new formula does provide a net larger credit than the present law. A more revenue neutral formula was presented and rejected, largely because of its complexity.²⁷

²² See existing ORS 118.140(1).

²³ See new ORS 118.140(2)(b).

²⁴ See existing ORS 118.140(2)(c).

²⁵ That is, as originally drafted, to qualify for the credit, at least 50% of the adjusted gross estate had to be natural resource property and the estate had to actually claim the full amount. The curve worked under that system, but does not function when estates are allowed to take a partial election and elect property for the credit asset by asset. Large estates will choose the maximum benefit, and only claim \$7.5 million in natural resource property. See existing ORS 118.140(2)(b) and new ORS 118.140(2)(c) (both allowing for partial credit).

²⁶ Note that the tax rate is based on the Oregon taxable estate before the credit. Thus the formula builds into it a higher tax rate for larger estates than for smaller estates. See new ORS 118.010(4).

²⁷ The more revenue neutral formula suggested by Legislative Revenue makes an adjustment and would provide: The credit allowed under this section shall be computed by multiplying the tax payable under this chapter by both Ratio A and Ratio B, where:

A) Ratio A is a ratio of the lesser of the amount of natural resource property claimed or \$7.5 million, over the amount of the total adjusted gross estate, and

B) Ratio B is a positive ratio in which the numerator is equal to the amount of natural resource property claimed less \$1.5 million, but not less than zero, and the denominator is equal to the total adjusted gross estate less \$1.5 million.

Note that (A) ratio is the same formula used in the -5 amendment (see new ORS 118.140(2)(b)) but with a higher cap and that the (B) ratio is the adjustment.

This bill also effectively caps the value of natural resource property for which an executor is allowed to elect the natural resource credit upon at \$6 million.²⁸ This is \$1.5 million less than the present effective cap, but the bill makes this change because all estates will enjoy a true \$1.5 million exclusion under the bill.²⁹ In addition, the work group recommended this lowering of the cap to address some of the revenue impact loss. However, the bill's new credit formula will reduce the overall revenue from the estate tax³⁰ as it does provide a larger credit than present law provides, and this is a policy concern.

c. Overlap with Federal Marital Deduction

This bill provides in statute that an estate can take a credit for Oregon natural resource property on the state return for qualifying property, despite using a marital deduction for the same property on the federal return. That is, the bill provides that an executor is not bound by federal elections on the Oregon return in the overlap area of natural resource property and marital deductions.³¹ This is a policy change from the existing Department of Revenue administrative rule³² (the present statute does not speak to the issue). This policy change ensures that every Oregon estate will have a true opportunity to use the natural resource property credit, not just the second spouse. Presently, the first spouse will generally take a marital deduction on the federal return due to the high federal tax rate. If that election is made, the natural resource credit on the Oregon return cannot be made.

d. Working Capital Changed to Operating Allowance

This bill repeals the term “working capital”³³ within the natural resource property credit provision and instead provides for an “operating allowance” within the definition of “natural resource property.”³⁴ The bill also defines “operating allowance” instead of leaving it to be defined by administrative rule as “working capital” is presently. The bill defines “operating allowance” as “cash or a cash equivalent that is spent, maintained, used or available for the operation of a farm business, forestry business or fishing business and not spent or used for any other purpose.”³⁵ The work group discussed this issue at length and determined that it was not

²⁸ See revised ORS 118.140(2)(b).

²⁹ See revised ORS 118.010(3)(b).

³⁰ On average, only about 35 estates per year make a natural resource property election (and that number could decrease by about 1/3 with lowering the exclusion to \$1.5 million) and thus determining the revenue impact of any credit formula involves some speculation and actual estate tax revenues are subject to volatility (who dies and what the estate value is) each year.

³¹ See revised ORS 118.010(8).

³² See OAR 150-118.140(2).

³³ See repealed ORS 118.140(2) (a)(D).

³⁴ See new ORS 118.140(1)(h)(I) (including operating allowance within definition of natural resource property).

³⁵ See new ORS 118.140(1)(i).

practical to try to keep a “working capital” concept because the plain meaning of that term is current assets minus current liabilities. To arrive at such a number would require an individualized and complicated accounting exercise for each estate. In addition, a big problem was that the growing cycle for timber, animals, crops, etc. can vary a great deal. Thus, the time frame chosen from which to calculate the cash on hand for working capital would greatly influence how much working capital could be elected. In the end, the group concluded that the goal is really to allow an estate with a farm, forestry, or fishing business to claim a reasonable amount of cash or cash equivalents on hand as natural resource property if it will be used for the farm, forestry, and fishing business. That is, many such businesses operate on debt, but those who do operate with cash should be able to count it as part of the electable natural resource property.

The work group decided to put a couple safeguards in the bill to prevent abuse of the operating allowance provision. The two safeguards include the following: First, the operating allowance will be subject to the same disposition rules as other elected property, and thus an additional tax due will be due if the operating allowance is not used for the farm, forestry, or fishing business for the required five year period.³⁶ The group reasoned that requiring that the elected operating allowance be tracked and used for the business for five out of the next eight years, will cause many to not elect or at least not elect too much operating allowance. Heirs often do not want to “lock up” cash. Second, the bill places a limit on the operating allowance of cash and cash equivalents that an estate can claim for the credit as the lesser of 20% of the other natural resource property for which a credit is claimed or \$1.5 million.³⁷ This limit helps ensure that the ratio of cash to other elected property is reasonable. The 20% choice is not any “magic number”, but rather a compromise that represents what the work group considered reasonable and workable. Sometimes it could be argued that 20% will allow a particular estate to elect too much cash and cash equivalents, but other times, the 20% may be too small. A death may occur just after a crop has been harvested and before it has been reinvested back into the farm, forestry or fishing business. Depending on the commodity or product, the amount of cash on hand could be a very large percentage of the natural resource property. The group consulted some agriculture experts, but none could help give a more precise percentage suggestion for what to allow for operating allowance. In the end though, the group felt very comfortable recommending the lesser of 20% of the other natural resource property for which a credit is made or \$1.5 million.

e. Replacement Property

This bill provides explicitly that real property and personal property that was claimed for a natural resource property credit can later be replaced with other qualifying natural resource property without causing a disposition with additional tax due.³⁸ For example, the work group reasoned that a farmer should be allowed to carry on the business operations and that may mean that he decides to sell a tractor that isn’t needed anymore. However, if the value of the tractor

³⁶ See new ORS 118.140(9)(a).

³⁷ ORS 118.140(2)(a) (limiting operating allowance to lesser of \$1.5 million or 20% of the total value of natural resource property claimed, not including the operating allowance).

³⁸ See new ORS 118.140(9)(d).

was claimed under the natural resource credit, the proceeds of that tractor sale need to be used in the business—perhaps to purchase another tractor, buy seed, etc. The proceeds cannot be converted out of the business. The issue of replacement is silent in present law. The Department of Revenue expressed concern about the lack of guidance on this issue and thus the bill is explicit regarding the requirements. The Work Group considered using the 26 USC 1031 procedures for like-kind exchanges, but in the end, the group reasoned application of those federal provisions were not necessary because the bill’s own definitions could be utilized instead. The bill provides that property can be replaced as long as the replacement property also meets the bill’s definition of “natural resource property.” In addition, the bill requires that elected property must be tracked on an annual report with a confirmation that elected property is either still in use, has been replaced with qualifying property, or has been subject to a disposition.³⁹ Legislative history shows that the natural resource credit was originally focused only on real property (i.e. the land), but personal property was quickly added. Allowances for replacement seem less important with real property than with personal property that can wear out quickly. That fact explains perhaps why the present law is silent on replacement as the issue probably wasn’t raised initially. While the bill does allow replacement of real property, the bill requires that elected real property may only be replaced with qualifying real property, and to avoid additional tax, the real property must be replaced within one year (except for involuntary conversions that have two years).⁴⁰ The group reasoned that it was protection of the family farm and forestry business and the respective land base for those businesses that was the primary motivation for the legislature’s creation of the natural resource credit. One shouldn’t be able to replace the land for cash, etc. as this would invite abuse of the credit. The bill provides that personal property can be replaced with any kind of other qualifying natural resource property, including real property, personal property, and operating allowance. This bill fills the void in the law and addresses replacement issues both prior to claiming the credit and after the credit is claimed.⁴¹

f. Consistency in Look Forward Requirement

This bill treats all types of elected natural resource property the same for the look forward requirement. That is, any elected natural resource property is subject to additional tax if it is not used in the operation of the farm, forestry, or fishing business or if it is transferred (i.e. converted) to a nonqualified person.⁴² Present law is confusing and does not appear to put the future use requirement on elected personal property or the “working capital,” instead putting the look forward requirement only on real property.

g. Look Back Requirements

This bill clarifies and revises the look back requirements. First, the bill provides that a natural resource credit may be claimed only if during the five out of eight years prior to the decedent’s

³⁹ See new ORS 118.140(10) and the paragraphs within that subsection.

⁴⁰ See new ORS 118.140(9)(d).

⁴¹ See new ORS 118.140(4)(c) and (9)(d).

⁴² See new ORS 118.140(9)(a).

death, the decedent or a family member operated a farm, forestry, or fishing business and the property for which a credit is claimed is part of the business.⁴³ Due to the bill's new definitions in ORS 118.140, these changes and clarifications that focus on the business were possible; the group believes this approach addresses the policy intent of protecting family businesses better. The present law seems to require ownership of all property for which the credit is claimed for five out of the eight years prior to the decedent's death. Such a requirement does not make sense for personal property or operating allowance as personal property is often not durable and is changing in the business and cash and cash equivalents are also in constant flux. For example, crops are generally sold each year and equipment is often replaced before five years. The bill would remove any look back requirement for personal property. Instead, this bill imposes a look back requirement only on the real property by providing that real property may be claimed for the credit if it was owned by the decedent or a family member for 5 out of 8 years prior to the decedent's death and the real property must have been used in a farm or forestry business.⁴⁴ This requirement was intended to prevent land grabs prior to death and other unintended behavior persons may make to qualify for the natural resource credit. The group foresaw two potential unintended consequence by requiring real property ownership for five out of eight years, and that is the exchanged property and involuntarily converted property situations. For example, a farmer may have farmed for the five years but shortly before the decedent's death the farmer exchanged the north 40 acres for the south 40 acres. This bill allows for limited tacking for meeting the five year ownership requirement. The bill provides that when property was received in an exchange under section 1031 of the Internal Revenue Code or acquired in an involuntary conversion under section 1033 of the Internal Revenue Code, the period of time of ownership of the exchanged or acquired real property may be included if it was also used in the farm or forestry business.⁴⁵

h. Fishing Business Qualifications

Present law allows a natural resource credit for the value of listed fishing-related property if the decedent or family member was licensed under ORS Chapter 508.⁴⁶ Present law requires the following additional qualifications for the credit based on having the fishing license: the value of the fishing property must be at least 50% of the total adjusted gross estate, the adjusted gross estate may not exceed \$15 million, and the fishing property must be transferred to a family member. Unlike the farm and forestry business qualification provisions, present law requires no look back for fishing property to qualify and no real operation of a fishing business. The bill tightens up this area of the law by requiring operation of a fishing business. In addition, the decedent or a family member must have owned a vessel used for commercial fishing purposes, held a boat license, held a commercial fishing license, and held one or more restricted fisheries permits as provided in ORS Chapter 508.⁴⁷ Each of these new qualifications must have been

⁴³ See revised ORS 118.140(3)(d).

⁴⁴ See new ORS 118.140(5).

⁴⁵ See new ORS 118.140(7).

⁴⁶ See present ORS 118.140(2)(a)(B)(repealed under bill). Note that Chapter 508 provides for many types of licenses, many of which are not commercial licenses. The Work Group recommends further specificity in the bill.

⁴⁷ See new ORS 118.140(6).

maintained for 5 out of the 8 years prior to the decedent's death.⁴⁸ Such new requirements prevent death bed purchases and seem to provide an estate tax break for those true fishing businesses that the law seems to have been intended to cover. In addition, these requirements are consistent with the natural resource credit qualifications for farm and forestry businesses.

i. Accountability and Disposition Clarity

The Work Group identified an enforcement problem with the natural resource credit under current law. Both present law and the bill require the executor of an estate to make the natural resource credit election and also notify the transferee (heir) of the potential for tax consequences to the transferee if there is a later disposition of the property they received.⁴⁹ That is, if the heir causes a disposition of the natural resource property (for example, by selling it) and doesn't complete the five year requirement, an additional tax will become due. That additional tax is the responsibility of the heir of the natural resource property at the time of the disposition.⁵⁰ The problem under existing law is that there is no required tracking of the elected natural resource property once the estate tax return is filed. In addition, the language defining what triggers the additional tax is unclear, and there is no due date for the additional tax. The present law really is a very loose honor system that is nearly impossible for the Department of Revenue to track or enforce. This bill spells out what events will cause a disposition.⁵¹ The bill specifically provides that payment of federal estate taxes or state inheritance taxes is not an expense incurred in operation of the natural resource business.⁵² As explained earlier, the bill clarifies that natural resource property that is replaced with qualifying natural resource property will not cause a disposition.⁵³ This bill also imposes a new tracking provision by requiring the executor to file a statement with the estate tax return that identifies the property for which the natural resource credit is claimed.⁵⁴ After the return is filed, the bill then turns the tracking responsibility over to the transferees, by requiring the transferees (heirs) of the natural resource property to file an annual report of the natural resource property with the Department of Revenue until the five year requirement is met.⁵⁵ This annual report requires tracking of each asset for which the credit was claimed with confirmation that each asset falls into one of three categories: 1) the asset is still used in the operation of the a farm, forestry, or fishing business; 2) the asset has been replaced with other qualifying natural resource property; or 3) the asset has been subject to a disposition

⁴⁸ See new ORS 118.140(6).

⁴⁹ See ORS 118.140(7)(c) under present law, renumbered as ORS 118.140(9)(f) under the bill.

⁵⁰ See existing ORS 118.140(7)(b).

⁵¹ See new ORS 118.140(9).

⁵² See new ORS 118.140(9)(b).

⁵³ See new ORS 118.140(9)(d).

⁵⁴ See new ORS 118.140(10).

⁵⁵ See new ORS 118.140(10).

and additional tax is due.⁵⁶ Finally, the bill provides for the tax due date for additional tax if there is a disposition of the natural resource property or it is not used for the required five years. The bill provides that due date is six months after the date on which the disposition or event occurs.⁵⁷

6. Interest Issues

The bill removes the enhanced interest penalty (known as tier 2 interest) when the executor of an estate has gotten an extension to pay from the Oregon Department of Revenue under ORS 118.225 (after application and providing security) or a bond is given under ORS 118.300.⁵⁸ This is in keeping with federal law and addresses the practicalities of estates that do not have liquid assets to pay all of the estate tax due on the due date. For example, an estate that qualifies under 26 U.S.C. 6166⁵⁹ for an extension to pay and to use an installment plan to pay receives a reduced interest rate (rather than a penalty rate) on the federal taxes owed. However, under present Oregon law an estate electing to pay the Oregon inheritance tax on a deferred basis pays the normal Oregon deficiency interest rate (currently 5%) and a 4% penalty delinquency rate will also apply starting 60 days after the Department of Revenue assesses the tax (to raise the current rate to 9%), even if all payments are made by the due dates established when the extension was granted. The present law seems inconsistent because on the one hand Oregon law allows for an extension to pay, but on the other hand it still imposes an enhanced interest. This bill would remove the enhanced interest if the extension is granted⁶⁰ or a bond is given.⁶¹ The State is protected because to receive an extension, the tax debt must be secured by bond, deposit, or other good collateral acceptable by the Department of Revenue.⁶² In the same statute, ORS 118.260, the bill also provides an interest break to the State of Oregon. The bill provides that no interest is payable by the State on overpayments of estate taxes until 45 days after the due date of the return, or in the case of a return filed after the due date, no interest is due until 45 days after the date of filing.⁶³ This change also parallels the federal law model for interest. The Department of Revenue explained that an estate presently can file late but provide a timely payment. When the return is actually filed, it may turn out that there was an overpayment. Present law requires the State to pay interest on the refund even though the State could do nothing about the overpayment until the estate tax return was filed. The State of Oregon presently ends up acting as a bank

⁵⁶ See new ORS 118.140(10).

⁵⁷ See new ORS 118.140(9)(e).

⁵⁸ See revised ORS 118.260(5)(b), (6).

⁵⁹ Provision applies where estate consists largely of property interests in a closely held business.

⁶⁰ See revised ORS 118.260(5)(b) (adding “without regard to ORS 305.222” which is the tier 2 interest).

⁶¹ See revised ORS 118.260(6) (adding “without regard to ORS 305.222” which is the tier 2 interest).

⁶² See ORS 118.225.

⁶³ See revised ORS 118.100(1) and ORS 118.260(7).

because the interest on the refund often is higher than an investor would receive at a bank. This bill addresses the problem by providing that no interest is payable by the State on overpayments of estate taxes until the later of 45 days after the due date of the return (applies to early filers) or 45 days after the date of filing.

7. Oregon Department of Revenue

Since Oregon can no longer rely as much on the auditing of the IRS for state estate tax compliance (due to the gap between Oregon's threshold and the federal estate tax threshold), the Work Group recommends providing more resources to Oregon Department of Revenue to assist with compliance and auditing. It was noted that the staffing for this section of the Department has been drastically cut over the years. The bill makes no budgeting directives, but the work group agreed to note this need in the report. This bill does provide several directives to the Oregon Department of Revenue to shape their agency work and help enforce the estate tax more effectively. The bill provides for a statute of limitations in the estate tax chapter – three years to give notice of deficiency, five years for undervaluing the gross estate, and no statute of limitations for false or fraudulent returns.⁶⁴ Present law provides for conflicting statutes of limitations.⁶⁵ The bill codifies a due date for paying Oregon's estate tax for estates that are smaller than the federal threshold and thus have no federal tax due. Present law inaccurately reads as if there is no Oregon estate tax due when there is no federal estate tax due, and that is inaccurate as the state threshold is lower (\$3.5 million lower under the bill and \$4 million lower under present law). The bill fixes this mistake and provides that the tax is due to the Department of Revenue nine months following the date of death of the decedent.⁶⁶ Another fix the bill makes is to codify the requirement for substantiating values for property on the estate tax return and require attachment of any appraisals. This is done in practice but there is not a present statutory requirement. This mirrors the federal approach and the federal Form 706 requirements. An appraisal is not always required but attachment of an appraisal is the best practice and is common practice. The provision stops short of requiring an appraisal because some circumstances will make it unnecessary. For example, if the property will qualify as special marital property anyway, an appraisal wouldn't make a difference. There have been disputes on valuation and this requirement will both assist the Department and clarify the law for executors. This will assist the department in its enforcement.⁶⁷

⁶⁴ See bill Section 28.

⁶⁵ See ORS 118.171 which provides that the assessment provisions of ORS Chapter 305 apply to Chapter 118. However, ORS Chapter 305 provides no statutes of limitations. See also ORS 118.230(2) which provides that the assessment provisions of ORS Chapter 314 apply to Chapter 118. ORS 314.410 does provide limitations on notices of deficiency and assessment of tax, but it references the income tax. In essence, there does not seem to be an estate tax statute of limitations in existing law.

⁶⁶ See revised ORS 118.100(1).

⁶⁷ See new ORS 118.100(6).

VIII. Section by Section Analysis

This bill changes the terminology throughout ORS Chapter 118 and calls the tax what it is—an estate tax and NOT an inheritance tax. The tax is correctly referred to as an estate tax because it is the estate that is taxed, and not individual inheritance beneficiaries.

Section 1: This section provides the definitions for the chapter. The section adds definitions for “federal taxable estate” and “Oregon taxable estate.” The definitions form a type of hierarchy: “Gross estate” is the broadest estate definition as it means the value at the time of death of all of the decedent’s real property and personal property, whether tangible or intangible, and wherever it is situated (Oregon or elsewhere). “Federal taxable estate” is the “gross estate” with the permitted federal estate tax deductions. For example, it picks up deductions under sections 2053, 2054, and 2058 of the Internal Revenue Code. The “Oregon taxable estate” is the federal taxable estate with Oregon state deductions and add-backs. For example, Oregon has a special marital property deduction. This section also deletes three terms and their respective definitions; the deleted terms are “nonresident decedent,” “resident decedent,” and “transfer”. The terms “resident decedent” and “nonresident decedent” are moved to Section 3 of the bill. The term “transfer” was deleted as it was deemed unnecessary and led to confusion with its reference to federal law.

Section 2: This section changes the connection date to the federal Internal Revenue Code to December 31, 2010. By doing so, Oregon will no longer be connected to the outdated code. It also means Oregon’s estate tax will no longer be based on the repealed federal state death tax credit and reference to two complicated and outdated tax schedules for calculating its estate tax.

Section 3: This section substantially rewrites ORS 118.010 to set up the framework for Oregon’s estate tax. It provides what property will be taxed and which decedents will be taxed. Nonresidents are distinguished from residents and it is the domicile of the decedent that will dictate into which of these two categories an estate falls. All resident decedents are subject to Oregon’s estate tax and nonresident decedents are subject to the estate tax only if they have real or personal property located in Oregon. To determine the state estate tax and compute the “Oregon taxable estate,” the section provides that you start with the “federal taxable estate” (this is the federal estate with the federal deductions) and then you add back in two deductions. The first is the deduction for state estate, inheritance, legacy or succession taxes allowed under 26 U.S.C. 2058. Second, you add back in the value of property previously deducted as Oregon special marital property or deducted as a separate Oregon election under section 2056 or 2056A of the Internal Revenue Code, unless the same property is already included in the federal taxable estate. Having made the add-backs, the framework next provides for three reductions. The reductions include the value of all special marital property elections, the \$1.5 million exclusion, and a catch-all category for “any other exclusions or deductions.” With the add-backs and reductions made, the Oregon taxable estate value will be reached. Subsection (4) then provides a tax rate schedule to impose on the Oregon taxable estate. See discussion above under “Tax Rate Computation” heading for more policy explanation. Subsections (5) and (6) then provide a ratio formula to remove the real and personal property located outside of Oregon. Only residents will be taxed on their intangible property and their intangible property is effectively deemed located

in Oregon under the bill.⁶⁸ See also discussion above under the “Intangible Property” heading. If the intangible property of the resident decedent will be taxed by another state or country as a result of the death of the decedent, the value of that property may also be deducted from the numerator of the ratio. Subsection (8) provides that an executor may make separate elections for state and federal estate tax purposes with regard to marital property and natural resource property. See above discussion under “Marital Property” and “Overlap with Federal Marital Deduction” headings.

Section 4: This section repeals existing ORS 118.013(1) as that provision relies on the state death tax credit once allowable under the Internal Revenue Code; the credit was repealed in 2005. With the repeal of (1), this statutory provision will now focus on Oregon’s special marital property by defining the requirements to qualify a trust or other property interest as Oregon special marital property. The section uses a new term, “permissible distributee” and defines it. That term comes from the Uniform Trust Code⁶⁹ passed into law in Oregon during the 2005 session; that term better captures the beneficiaries that should be consenting to property being set aside to qualify as Oregon special marital property. The present phrase in ORS 118.013(3)(b) is too broad. This section also cleans up ORS 118.013(3)(d) to clarify that an executor attaches a statement of election to the estate tax return and does not attach an election. This parallels with language in ORS 118.016(1)(a) as well.

Section 5: Throughout this section the bill replaces the term “beneficiary” and instead applies the new term, “permissible distributee,” from Section 4. The section also deletes the use of the word “distribution” in ORS 118.016(2)(a) so as to cover all possible property interests that may qualify for the Oregon special marital property election and not just trusts. Lastly, this section revises ORS 118.016(4), so as to allow expand the persons who may consent for a permissible distributee who is a minor. The goal of allowing “any person who is authorized under ORS 130.110” to sign, was to also allow noncustodial parents to sign the election if there is no conflict of interest and no conservator has been appointed.

Section 6: This section improves existing ORS 118.100 by providing for a clear and accurate state estate tax due date for payment and filing of the return in (1). The due date is the date the federal estate tax is payable and if no federal estate tax is required, the due date is nine months after the date of the decedent. This rule is the rule in practice today, but the existing statute is inaccurate. This section also revises the refund provision so that the State is not inappropriately paying interest. See policy discussion under Interest Issues above for more detail. The section also makes conforming amendments to replace “inheritance” with “estate” and delete references to the state death tax credit. Other non-substantive form and style edits are also made to the section. Lastly, a new (6) is added to this section. The provision requires that an executor explain, on the return, how the reported values for the property were determined and attach copies of any appraisals.

⁶⁸ See revisions to ORS 118.010. Note that existing (4)(b) is repealed and existing (3) and (4)(a) are revised so as to tax only resident decedents on their intangibles.

⁶⁹ See ORS Chapter 130.

Section 7: This section substantially revises the natural resource credit provision of existing law. The substantive policy changes are explained above in Section VI under the “Natural Resource Property” heading. The bill deletes existing subsections (1) and (2) of ORS 118.140. A walk through of the new (1) and (2) follows:

(1)(a): This subsection provides a definition of “family member,” that is then used throughout the Section. The definition is tied to 26 U.S.C. 2032A, as is present law.⁷⁰ It is intended to cover “domestic partners” because under ORS 106.340, all privileges, rights, benefits, and responsibilities granted by Oregon law because an individual is or was married or because the individual is or was an in-law is granted on equivalent terms to an individual who is or was in a domestic partnership or is or was, based on a domestic partnership, related in a specified way.

(1)(b): This subsection provides a definition for “farm business.” It is a new definition that is used throughout the section and is based on the activities in ORS 308A.056, Washington’s farm deduction statute,⁷¹ and the federal farm deduction statute.⁷² Present law needed some revisions to better capture the intent of the natural resource credit. Much of the list in this definition came from the “farm use” definition in ORS 308A.056, but that definition could not be just cross-referenced because that definition is a real property definition and the need was to cover both real and personal property properly. Thus, the bill had to list out these items in a new definition. Some additions from “farm use” were made to avoid unintended consequences. For example, “fruit” was added because sometimes “crop” is not always interpreted to include fruit from trees. “Nursery stock” is added in the bill as some nursery products are not “trees.” Oregon’s present statute uses the word “including” before providing the list of tangible and intangible personal property. Thus the legislature seems to have intended to provide a non-exhaustive list of property eligible for the credit. This bill makes this clearer by providing a true catch-all under the “farm business” definition under (1)(b)(H).

(1)(c): This is the definition of “farm use.” Like existing law under ORS 118.140(1)(a), the definition cross-references ORS 308A.056. This definition is used for the real property portion of the natural resource property definition later in (1)(h)(A).

⁷⁰ See existing ORS 118.140(3)(c). 26 U.S.C. 2032A(e)(2) provides that:

“The term “member of the family” means, with respect to any individual, only—

(A) an ancestor of such individual,

(B) the spouse of such individual,

(C) a lineal descendant of such individual, of such individual’s spouse, or of a parent of such individual, or

(D) the spouse of any lineal descendant described in subparagraph (C).

For purposes of the preceding sentence, a legally adopted child of an individual shall be treated as the child of such individual by blood.”

⁷¹ Revised Code of Washington 83.100.046(10) (defining farm and farming purposes).

⁷² 26 U.S.C. 2032A(e) (defining farm and farming purposes).

(1)(d): This is the definition for the new term “fishing business.” It references the federal fishing business definition⁷³ as present law does.⁷⁴

(1)(e): This definition of “forestland” cross-references ORS 321.201 as present law does.⁷⁵ This definition is used for the real property portion of the natural resource property definition later in (1)(h)(A).

(1)(f): This is the new definition of “forestry business.” It is a definition that is used throughout the section and is based on definitions in the comparable Washington statute⁷⁶ and the federal statute.⁷⁷

(1)(g): This is the definition of “homesite” that tracks with the existing definition that also refers to ORS 308A.250.⁷⁸ This definition is used for the real property portion of the natural resource property definition later in (1)(h)(A).

(1)(h): This paragraph provides for a revised definition of “natural resource property.” As explained above in the policy section, rather than define natural resource property as only real property but then elsewhere provide that the credit also applies to personal property (and not just real property), this bill lists all the real property and personal property that may be eligible for the natural resource credit as part of the “natural resource property” definition. This revision allows eligible fishing property and an operating allowance also to be covered under the definition of natural resource property. The revision of the definition makes subsequent provisions clearer and allows for essential references to the “natural resource property” throughout the chapter. Subparagraphs (A) through (J) in paragraph (1)(h) are largely self-explanatory and generally track with existing law found at ORS 118.140(2)(a)(C)(i) to (iii) and ORS 118.140(2)(a)(B)(i), (ii). The subparagraphs do expound a bit to track with the new definitions for farm and forestry business. Of note are subparagraph (I) which includes “operating allowance” in the definition of “natural resource property;” as explained, that term replaces the “working capital” concept from present law. Lastly, subparagraph (J) is a catch-all provision that includes any unlisted tangible and intangible property that is used in the operation of a farm, forestry, or fishing business.

(1)(i): This paragraph defines “operating allowance.” See “Working Capital Changed to Operating Allowance” discussion above for details on this policy change.

⁷³ 26 U.S.C. 1301(b)(4)(providing that the term “‘fishing business’ means the conduct of commercial fishing as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act”).

⁷⁴ See existing ORS 118.140(2)(a)(B)(i).

⁷⁵ See existing ORS 118.140(1)(b).

⁷⁶ See Revised Code of Washington 83.100.046(10) (defining farming purpose and timber operations).

⁷⁷ See 26 U.S.C. 2032A(e) (5)(c).

⁷⁸ See existing ORS 118.140(1)(b).

(1)(j): This paragraph provides for the new term, “qualified beneficiary.” The definition references that defined term in Oregon’s Uniform Trust Code. That term more accurately defines the eligible trust property provided for in (4).

(1)(k): This paragraph defines “real property” and it is largely identical to present law as both reference ORS 307.010.⁷⁹ This revised definition clarifies that the real property must be located in Oregon.

(2)(a): This paragraph provides the substantive law provision that an estate is allowed a credit for the value of natural resource property claimed. It goes on to limit the operating allowance that may be claimed as part of the natural resource property. The bill provides a limit on the operating allowance of the lesser of \$1.5 million or 20 percent of the total value of the natural resource property claimed, not including the operating allowance. For example, an estate that claimed \$5 million in natural resource property, not including operating allowance, could claim up to an additional \$1 million in cash and cash equivalents if that money were on hand. The money would need to be used in the farm, forestry, or fishing business for five years. See “Working Capital Changed to Operating Allowance” discussion above for details on this change.

(2)(b): This paragraph provides a formula for calculating the natural resource credit. This formula replaces the schedule in existing ORS 118.140(2)(c). The formula gives a credit based on the percentage of the adjusted gross estate that is claimed natural resource property. The provision caps the natural resource property that may be claimed at \$6 million. This new formula focuses on the ratio of natural resource property compared to the adjusted gross estate rather than focusing solely on the amount of natural resource property claimed.

(2)(c): This paragraph and the subparagraphs within it make it clear that while an executor may make a natural resource property election and claim a credit for such property, the executor may choose not to claim a credit at all, may claim less than the full amount allowed, and may pick and choose which assets to claim. This language is akin to existing law.⁸⁰

(3): This subsection and its four paragraphs provide key qualifications for claiming a natural resource property credit. The qualifications include: a) the adjusted gross estate may not exceed \$15 million; b) the total value of property meeting the definition of natural resource property must be at least 50% of the total estate (note that the executor need not claim all of the property,

⁷⁹ ORS 307.010 provides in relevant part:

“Real property” includes:

(A) The land itself, above or under water;

(B) All buildings, structures, improvements, machinery, equipment or fixtures erected upon, above or affixed to the land;

(C) All mines, minerals, quarries and trees in, under or upon the land;

(D) All water rights and water powers and all other rights and privileges in any way appertaining to the land; or

(E) Any estate, right, title or interest whatever in the land or real property, less than the fee simple.”

⁸⁰ See existing ORS 118.140(2)(b).

but to qualify for the credit at least 50% must be eligible for a claim); c) the natural resource property must be transferred to a “family member”; and d) the property for which the credit is claimed must be part of a farm, forestry, or fishing business that the decedent or a family member operated for five out of the eight years prior to the decedent’s death (look-back requirement). This section was revised to use the new definitions and the look-back was substantively revised here to provide a business look-back requirement. New subsection (5) provides for a real property look-back requirement. See discussion above under “Look Back Requirements” and description of subsection (5) below for further explanation.

(4): This subsection provides three exceptions to the requirements for the credit. Paragraph (a) provides that net cash leases can qualify. That paragraph picks up the new “qualified beneficiary” term from (1)(j), but otherwise tracks existing law. Paragraph (b) provides that trusts can qualify for the credit and also utilizes the new “qualified beneficiary” term; this paragraph also tracks existing law. Lastly, paragraph (c) provides a new exception. It addresses the situation where property is in the process of sale or property is otherwise replaced after the decedent’s death but before the estate tax return is filed. The bill provides that property can be replaced in this window and still qualify for the natural resource credit if the replacement property meets the definition of natural resource property as well. In addition, real property may only be replaced with real property to qualify. See discussion above under “Replacement Property” for further explanation.

(5): This subsection provides for a real property look-back requirement. Real property must be owned by the decedent or a family member during an aggregate period of five out of the eight years prior to the decedent’s death. Note that a look-back will no longer apply to personal property or operating allowance. See discussion above under the “Look Back Requirements” heading.

(6): This subsection provides for a five out of eight year fishing business look-back requirement. See discussion above under the “Fishing Business Qualifications” heading.

(7): This subsection allows for limited tacking to meet the qualifications for the real property look –back requirement under subsection (5). See policy discussion above under “Look Back Requirement.”

(8): This subsection provides that indirect ownership (e.g. ownership in a LLC, corporation, partnership or trust) of property that otherwise meets the requirements of the section may qualify for the natural resource property credit if at least one family member materially participates in the business after the transfer to a family member. The bill makes some nonsubstantive changes to this subsection that utilizes the bill’s new definitions, but the subsection is not materially changed.

(9)(a): This paragraph rewrites the beginning of existing paragraph (7)(a) and provides for rules on what will constitute a disposition and additional tax. If property claimed for the natural resource credit is not used in the operation of the farm, forestry, or fishing business or the

property is transferred before the five year requirement is met, there is a disposition. See policy discussion above under “Accountability and Disposition Clarity” heading.

(9)(b): This paragraph codifies OAR 150-118.140(5)(b). The section provides that using claimed natural resource property (cash or other assets) to pay federal or state estate taxes will cause a disposition. This is consistent with the policy that claimed property must be used for the farm, forestry, or fishing business to avoid a disposition and additional tax.

(9)(c): This paragraph provides that there is not a disposition requiring additional tax when property claimed for the natural resource credit is later conveyed as a qualified conservation contribution under the Internal Revenue Code. This provision is consistent with existing law in paragraph (7)(a).

(9)(d): This paragraph provides that claimed natural resource property may be replaced and replacement will not cause a disposition as long as the replacement property would also qualify as natural resource property. In addition, the bill provides that real property may only be replaced with real property to avoid causing a disposition. The bill provides that replacement must be made within one year, except that property that is involuntarily converted must be replaced within two years. See discussion above under the “Replacement Property” section. Note that subsection (6) of existing law had also allowed replacement when there was an involuntary conversion.

(9)(e): This paragraph provides the formula for computing the additional tax that is imposed when there is a disposition or disqualifying event of claimed natural resource property. The provision has been rewritten to use the new ratio formula from paragraph (2)(b). In addition, the statute provides a due date for the additional tax—6 months after the date on which the disposition or disqualifying event occurs.

(9)(f): This paragraph is unchanged. The paragraph simply requires the executor to notify transferees of claimed natural resource property of the potential tax consequences if they fail to meet the continuing requirements of the natural resource credit. The transferee’s written acknowledgement of the notice is required.

(10) This subsection provides new requirements to help ensure accountability and enforceability of the natural resource property credit. First, this subsection provides that executors must identify property for which the credit is claimed by asset on a form that is filed with the department. Second, the subsection requires transferees that receive property for which a credit is claimed to file an annual report tracking each asset. See discussion above under “Accountability and Disposition Clarity” heading for further explanation.

Section 8: This section increases the Oregon threshold from \$1 million to \$1.5 million. The Oregon threshold has not been increased for five years. ORS 118.160(2) is also amended in this section to delete vestiges from the long repealed state gift tax. Other form and style edits are made as are replacements of the word “inheritance” to “estate” where appropriate.

Section 9: This section changes “inheritance” to “estate” where appropriate.

Section 10: This is the section that allows an executor to get an extension of time to pay the estate tax upon application and the securing of collateral. The section has one conforming amendment which replaces the cross-reference of ORS 118.220 with ORS 118.100 as the former is repealed under the bill.

Section 11: This section is the main penalties and interest provision for the estate tax chapter. This section has been revised to eliminate the enhanced (tier 2) interest penalties provided by ORS 305.222 when the estate has been granted an extension under ORS 118.225 or given a bond under ORS 118.300. In addition, the section provides that the State of Oregon will no longer pay interest on refunds in certain cases. See policy discussion regarding these issues above under “Interest Issues” heading. The section also references ORS 118.100 instead of ORS 118.220 as the substance of the latter has been folded into ORS 118.100 and ORS 118.220 is repealed under the bill.

Section 12: This section changes “inheritance” to “estate” where appropriate.

Section 13: This section makes a couple of non-substantive changes. It uses the term “beneficiary” as that is a defined term in Section 1. In addition, it replaces ORS 118.220 with ORS 118.100 as the bill repeals ORS 118.220 and the substance of that provision will now be in ORS 118.100.

Section 14 and Section 15: These two sections simply make conforming amendments that are not substantive. The main change is to change “inheritance” to “estate” where appropriate. In addition, Legislative Counsel form and style wording changes are made in these sections.

Section 16: This section updates the tie-in date to the federal Internal Revenue Code for tax qualified disclaimers by changing the effective date from January 1, 2002 to December 31, 2010. This provision is one section of the ORS 105.623 to 105.649 series, which is Oregon’s version of the Uniform Disclaimer of Property Interests Act; the series was enacted in 2001. The purpose of this series is to allow beneficiaries of intestate, testamentary and nontestamentary (nonprobate) interests to execute a disclaimer of those interests. A disclaimer extinguishes the interest as if that interest had never been granted. Disclaimers are used to reallocate interests in estates, trusts and other kinds of property holdings in which benefits may be allocated at death. This amendment is needed in order to accommodate the disclaimer extension provided under Congress’ recent H.R. 4853, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Section 301(d). The 2010 Act makes the estate tax effective retroactively for estates of decedents dying after 2009, while allowing the opt-out choice for estates of decedents dying during the 2010 tax year. As a result, § 301 of the 2010 Act provides an extension of the period in which an individual can disclaim an inheritance. Oregon needs to revise its connection date to allow the same extension and this section does that by connecting to a date after this new federal law. The uniform act uses no federal connection date, but Oregon must choose a date due to Oregon’s state constitutional requirements. See Or. Const. art. I, § 21 and *Seale v. McKennon*, 215 Or. 562, 572 (1959). This connection date should be reviewed

more often (i.e. in each future legislative session), similar to the income tax law connection date, to be sure Oregon has an appropriate federal tie-in date.

Section 17 to Section 24: These sections simply make conforming amendments that are not substantive. The main change is to change “inheritance” to “estate” where appropriate. In addition, Legislative Counsel form and style wording changes are made in these sections.

Section 25: This section makes a modification to the provision regarding interest on refunds that is consistent with the changes made to ORS 118.260(7).

Section 26: This section simply makes new sections 27 to 29 part of ORS Chapter 118, the estate tax chapter.

Section 27: When there is a dispute regarding the domicile of a decedent, this section empowers the Department of Revenue to negotiate with the tax authorities of another claimant state, with the consent of the executor or administrator, and to compromise the amount of the estate tax. Under such an agreement each claimant state would likely receive something, although less than the full amount of its claim and the estate avoids double taxation and litigation. The section replaces the outdated uniform act series of ORS 118.855 to ORS 118.880 that is repealed by the bill in Section 31. The section also allows the Department of Revenue to enter into binding arbitration or a compromise agreement with respect to disputed liability for estate taxes with each taxing official and with the executor.

Section 28: This section codifies statute of limitation provisions for the estate tax in the estate tax chapter, ORS Chapter 118. The section is based on ORS 314.410(1), (2), and (3)(a). Present law does not provide a clear statute of limitations for estate taxes and thus this is a new section of law. See above discussion under “Department of Revenue” heading for more analysis of this policy decision.

Section 29: This is the section of the bill that addresses estates of decedents who die after January 1, 2011, but before the bill takes effect. The section provides these estates with extra time to file the return. That is, the return will not be due until the later of nine months after death or two months after the effective date of the Act. However, the estate tax will still be due and payable nine months after death so as not to effect the State’s revenue stream. In other words, the law gives executors more time to finish up the paperwork of the return and apply the new law, but the tax money is still due under the old law. If the tax increases due to this bill, the executor is required to file an amended return accompanied by the payment of the additional tax. If there is a decrease in the taxes, due to the retroactive treatment of this bill, the executor may file an amended return claiming a refund. Interest and penalties assessed due to the retroactive treatment of the new law will also be delayed 60 days.

Section 30: This is the repealer section of the bill. ORS 118.009 is repealed because the legislative findings from 2003 are outdated as the findings were written in response to the repeal of the state death tax credit on the federal return. ORS 118.019 is repealed because the substance of that provision, regarding Oregon special marital property, has been folded into the revised

ORS 118.010. ORS 118.220 is repealed because it is inaccurate and because the due date for estate taxes is provided by revised ORS 118.100(1) of the bill. ORS 118.240 is repealed because it is a vestige of the old gift tax that was repealed in Oregon in 1997, and it is no longer needed. ORS 118.470 is repealed because the statute is from the old probate and certificate system that no longer exists. The bill repeals the ORS 118.810 to ORS 118.840 series because these statutes are from a uniform act that is outdated and no longer in use. In addition, the bill repeals the ORS 118.855 to 118.880 series as that uniform act is also outdated and is more complex than it needs to be. The act was intended to address the situation where more than one state claims to be the decedent's domicile. The substance of the act has been rewritten and shortened; it can be found in new Section 27 of the bill.

Section 31: This section provides that the bill applies to estates of decedents who die on or after January 1, 2011. Thus, the bill is retroactive for some decedents. However, estate taxes are not due until nine months after the decedent's death and thus, if the bill is passed early in 2011, estates will be on notice of the new law and the transition should be smooth.

Section 32: This section provides the effective date of the bill. It is the earliest date it can be effective, i.e. 90 days after sine die, as provided by Article IV, Section 28 and Article IX, Section 1a of the Oregon Constitution.

IX. Conclusion

This bill is the result of approximately 18 months of work by dedicated volunteers with great experience in the area of estate tax law and policy. The bill substantially rewrites ORS Chapter 118 to improve, modernize, correct and clarify the state estate tax law. Many technical and policy changes are made in the chapter with this bill, and this report strives to explain them. The Oregon Law Commission's Inheritance Tax Work Group believes these changes provide a significant improvement upon the present law.

Respectfully submitted,

Wendy J. Johnson⁸¹
Deputy Director and General Counsel, Oregon Law Commission
Staff to Inheritance Tax Work Group

⁸¹ A word of thanks: This was truly a wonderful Work Group to work with, and I extend my thanks to all. In addition to the countless hours provided by the Work Group, I would especially like to thank Lane Shetterly, Kate Tosswill, Jeff Cheyne, Debra Buchanan, Mazen Malik, and Jeff Dobbins for their extraordinary assistance in completing this Commission project. Without their devotion, patience, and expertise, this project could not have been completed so successfully.

AMENDMENT NOTE for HB 2541:

Amendment made in the House:

Adjusted the rates in the new state estate tax table. The amendment provided a rate range of 10.5% to 19.8%.

Amendments made in the Senate:

1. Made the revisions to the chapter effective January 1, 2012 rather than effective January 1, 2011.
2. Lowered the operating allowance for the natural resource property credit from "\$1.5 million or 20 percent" to "\$1 million or 15 percent."
3. Adjusted the notice requirement that executors must provide to heirs regarding the tax consequences of claiming the credit. The notice will need to be provided prior to the time the credit is claimed rather than prior to the time the property is transferred to the heir.
4. Lowered the exclusion (threshold) back to \$1 million rather than \$1.5 million.
5. Adjusted the rates in the new state estate tax table. The amendment provided a rate range of 10% to 16%. (This amendment replaced the House amendment.)
6. Raised the cap on the value of natural resource property that may be claimed for the credit from \$6 million to \$7.5 million.



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HB 2689

Juvenile Summons Form Clean-up

Problem: ORS 419B.117¹ provides that at the first appearance by the parents or guardian of a child before the juvenile court, the court shall inform the parents or guardian verbally AND provide a standard notice describing various things. In many counties, the written “standard notice” used is the summons form. ORS 419B.818 provides a model summons form for a proceeding to establish juvenile court jurisdiction under ORS 419B.100, the dependency bases statute. The model form presently does provide notice of the information in ORS 419B.117(a) and (b) (see bottom of page 2 onto top of page 3 of the bill). However, the summons form presently omits notice of the information in ORS 419B.117(c) and (d). The omitted information relates to the appeal rights of the parents or guardian, including the time to file a notice of appeal.

¹ 419B.117 Notice to parents or guardian of child; when given; contents. (1) At the first appearance by the parents or guardian of a child before the court, the court shall inform the parents or guardian verbally and provide a standard notice describing:

- (a) The obligation of the parents or guardian to pay for compensation and reasonable expenses for counsel for the child, support of the child while the child is in the custody of a state-financed or state-supported residence and any other obligations to pay money that may arise as a result of the child being within the jurisdiction of the court;
 - (b) The assignment of support rights under ORS 419B.406;
 - (c) The right of the parents or guardian to appeal a decision on jurisdiction or disposition made by the court; and
 - (d) The time for filing an appeal of a decision by the court.
- (2) The court shall prepare and provide the standard notice required under subsection (1) of this section.
- (3) The court shall place a notation in the record of the case of the date that the parents or guardian were provided information under this section. [1997 c.748 §2]



The Oregon Law Commission is housed at the Willamette University College of Law, which also provides executive, administrative and research support for the Commission.

Solution: HB 2689 will add information to the model summons form provided in ORS 419B.818. On page three of the bill, notice is added to the summons of the right to appeal the court's judgment or decision regarding jurisdiction or disposition. The summons will also state that the notice of appeal must be made no later than 30 days after the entry of the court's judgment or decision. In addition, the draft states the right to be represented by an attorney in an appeal and that if the person cannot afford to hire an attorney, one is entitled to have an attorney appointed for them at state expense. The language regarding the right to an attorney on appeal parallels that on page two of the bill, starting on line 35, regarding a right to have an attorney during the hearing stage of case. The notice provisions regarding the right to counsel come from summons requirements outlined in ORS 419B.815(4)(b).

Conclusion: This is a simple cleanup bill recommended by the Oregon Law Commission's Juvenile Code Revision Work Group. It will help ensure that parents and guardians are better informed of their rights in a juvenile dependency proceeding and will assist counties in properly noticing parents and guardians. The Juvenile Code Revision Work Group regularly makes law reform recommendations to improve the clarity and consistency of the juvenile code.



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Art Consignment

HB 2708

Prepared by
Chad W. Krepps
Law Clerk
Oregon Law Commission

From
The Offices of the Executive Director
Jeffrey C. Dobbins
and
Deputy Director and General Counsel
Wendy J. Johnson

Bill Approved by Oregon Law Commission
at the Meeting November 29, 2010



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is housed at the Willamette
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which also provides executive,
administrative and research
support for the Commission.*

I. Introductory Statement

This proposed bill modifies provisions in ORS 359.205 to ORS 359.250, regarding rights, duties, and remedies associated with the consignment of art. The Oregon Law Commission is established to conduct a continuous substantive law revision program, which includes recommending corrections to defects in the law. ORS 173.315(1). House Bill 2708 serves to correct three identified issues, as well as bring the language into conformity with Legislative Counsel's Form and Style Manual for Legislative Measures. First, the Commission seeks to address an issue regarding creditors of consignees so as to properly protect (but not overprotect) the rights of those who consign artwork. Second, the Commission seeks to correct inconsistent and confusing use of the terms "artist" and "consignor" throughout the statute. Third, the Commission seeks to address an issue of federal preemption as it relates to an artist's public display rights.

II. History of the Project

Commissioner Dom Vetri, Professor Emeritus at University of Oregon Law School, noticed a potential mistake in the Oregon law while reviewing a reported case out of New York, *Zucker v. Hirschl & Adler Galleries, Inc.*, 170 Misc.2d 426, 648 N.Y.S.2d 521 (1996). Commissioner Vetri contacted Wendy Johnson, General Counsel for the Oregon Law Commission. Wendy Johnson in consultation with Commissioner Vetri and Professor Vincent Chiappetta of Willamette University College of Law addressed the issues within the statute and drafted revising language, in consultation with Legislative Counsel. The proposed language was then submitted to, and approved by, the Oregon Law Commission on November 29, 2010.

III. Statement of the Problem

Issue of Creditors:

In *Zucker v. Hirschl & Adler Galleries, Inc.*, 170 Misc.2d 426 (1996), the New York court interpreted New York's art law statutes, but in doing so, also reviewed the law of other states. The opinion indicated that of the twenty-two other states that have statutes designed to protect an artist's consigned work from creditors' claims, twenty-one specifically restricted the scope of that protection to guard against claims of the consignee's or art dealer's creditors. With respect to the one state, Oregon, whose statute appears to protect an artist's works against the artist's own creditors, the New York opinion noted that it appears that the statute may suffer from a clerical error. *Id.* As currently written ORS 359.210(b) reads "the work of fine art, or the artist's portions of the proceeds from the sale of such work, shall not be subject to the claims of a creditor or consignee." This language leads to the unintended consequence that art on

consignment is immune from both claims by a creditor against an artist and claims by the consignee against an artist.

Inconsistency in Terms:

The use of the term “artist” and “consignor” are used interchangeably throughout the art consignment statute series. This causes confusion when attempting to determine the application of the statute. The inconsistency in terms also causes potential issues because “artists” are not the only individuals who may enter into an art consignment agreement. Due to these inconsistencies, certain provisions do not extend the same protections to “consignors” as are enjoyed by “artists.” Thus, throughout ORS 359.210 to 359.255 the term “artist” should be replaced with the proffered term of “consignor.”

In addition, the term “consignor” is mistakenly used in ORS 359.210(3), where the correct term is “consignee.” ORS 359.210(2) creates a duty owed by the “consignee” to the “consignor.” The following subsection, ORS 359.210(3), allows a remedy for an “artist” against a “consignor” if the “consignor” breaches the duty specified in subsection (2). This is clear error. The purpose of ORS 359.210(3) is to allow a “consignor” a remedy against the “consignee”.

Preemption:

In working to revise the series of art statutes, Commissioner Vetri also discovered that ORS 359.220(2) is superfluous because it is preempted by the Copyright Act of 1976 and its amendments. This provision of the ORS addresses the rights of an artist to be credited as the artist of a work of fine art when it is on display. This provision is problematic because all legal or equitable rights that are equivalent to any of the rights within the general scope of copyright are governed exclusively by federal copyright law. 17 U.S.C § 301(a) (1976).

IV. Objective of the Proposal (Section Analysis)

Section 1-8: (Term “artist” replaced by “Consignor”)

ORS 359.200 to 359.255 sets out rights, duties, and remedies with regards to art consignment. However, as currently written, these rights, duties and remedies apply only between an artist and the consignee. Throughout this bill the term “artist” is replaced by the term “consignor.” When solely using the term “artist,” the statutes only apply to the creator of a work of fine art or, if the artist is deceased, the artist’s personal representative, heirs or legatees. ORS 359.200(2). Alternatively, using the term “consignor” includes an artist or any person who delivers a work of fine art to an art dealer for the purpose of sale or exhibition, or both, to the public on a commission or fee or other basis of compensation. ORS 359.200(5). The term “consignor” is the better term as it appropriately includes an “artist” as well as other individuals who may typically enter into an art consignment agreement.

Section 1:

The only substantive changes recommended to ORS 359.205 can be found in section 1(1) of this bill. The bill recommends replacing the phrase “work of the artist’s own creation” with the term “fine art”. The phrase “artist’s own creation” does not provide sufficient insight into what may or may not be covered by this statute. Instead, referencing the term “fine art,” as used in the same series, will provide a clear definition in the statute and remove any ambiguity as to the scope of the art consignment statute series.¹

Section 2:

ORS 359.210 presently switches back and forth between the term “artist” and “consignor.” In addition, subsection (1) of the provision erroneously states that when fine art is consigned, the fine art itself or the artist’s proceeds from its sale are not subject to the claims of a creditor or consignor. The language of the bill would fix both problems. Specifically, the bill changes the provision to mean that the fine art on consignment or the consignor’s proceeds from its sale would not be subject to claims of creditor of the consignee.

Subsection (3) seeks to clarify other confusing language. The language addresses a consignee’s failure to properly record sales information and provide the information to an artist as required by (2). The proposed amendments clarify that the injunction would order the consignee to disclose the information to a consignor, rather than provide an injunction to prohibit the conduct of failing to disclose.

Section 3:

This section of the bill repeals ORS 359.220(2). This section as currently written addresses issues which are covered by federal copyright law which makes any inclusion of the current language unnecessary. The public display right of an artist is one of the exclusive rights under the Copyright Act of 1976. 17 U.S.C §106(5). The prefatory language of ORS 359.220(2), authorizing an art dealer to display a work publicly under certain conditions, is beyond the state's

1

359.200 Definitions for ORS 359.200 to 359.255

(6) “Fine art” means:

- (a) An original work of visual art such as a painting, sculpture, drawing, mosaic or photograph;
- (b) A work of calligraphy;
- (c) A work of original graphic art such as an etching, lithograph, offset print, silk screen or other work of similar nature;
- (d) A craft work in materials including but not limited to clay, textile, fiber, wood, metal, plastic, glass or similar materials; or
- (e) A work in mixed media such as a collage or any combination of the art media described in this subsection. [1981 c.410 §1; 1985 c.830 §1]

power. State law in this area is preempted where the state law either purports to protect the same rights granted by federal copyright or protects the same subject matter as federal copyright law. 17 U.S.C § 301(a).

Section 4-8:

These sections do not contain any substantive modifications. Any additions or deletions are a result of previously-mentioned changes to the use of the terms “artist” and “consignor”, as well as modification to comply with Legislative Counsel’s Form and Style Manual.

Section 10:

Section 10 is an emergency clause section which will allow the new bill to go into effect upon passage. Because of the unintended consequences of these statutes as currently written it is important to retain an emergency clause rather than wait until January 2012 as an effective date.

V. Conclusion

HB 2708 should be adopted in order to clarify and improve the law surrounding art consignment. After consultation with professors in the area of Art Law and Copyright Law, the Oregon Law Commission recommends this bill to correct errors in existing statutes, while at the same time revising the language to alleviate foreseeable problems that could arise under the statutes as currently written. The proposed language serves to address and correct the three issues that were raised in review of these statutes. First, the bill corrects the error as to the rights of creditors of parties in an art consignment agreement. Second, this bill makes uniform the use of the term “consignor” to make an unequivocal statement as to who may enjoy the rights, duties, and remedies under an art consignment agreement. Finally, this bill repeals provisions preempted by federal law.

AMENDMENT NOTE for HB 2708:

Amendment made in the House:

Added a cross reference in ORS 79.0109, the state’s Uniform Commercial Code, to the art law provisions in ORS 359.200 to 359.255.



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Uniform Interstate Deposition and Discovery Act Work Group

Prepared by
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From
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Jeffrey C. Dobbins
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Deputy Director and General Counsel
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Approved by the Oregon Law Commission
at its meeting on September 9, 2009 and forwarded to the Oregon Council
on Court Procedures



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is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*

I. Introductory Statement

The National Conference of Commissioners on Uniform State Laws (NCCUSL) created the Uniform Interstate Depositions and Discovery Act (UIDDA) to provide a uniform procedure for taking “foreign depositions,” which are depositions taken in a state other than where a case is pending. While every state has a rule governing foreign depositions, these rules vary widely across jurisdictions and can be confusing for practitioners.

The proposed procedure is simple and straightforward. This procedure is also cost-efficient for litigants, provides for limited judicial resources and oversight, and maintains protections for the interests of in-state deponents by requiring the procedures to comply with Oregon’s discovery rules. The proposed rule varies somewhat from the model UIDDA in a few ways, most notably by removing or amending some of the definitions to conform more closely to current Oregon rules and practice. Additional language was added to the UIDDA, modeled after amendments made in other states, in order to further Oregon’s interest in protecting residents who become witnesses in out-of-state proceedings.

II. History of the Project

The UIDDA was completed by NCCUSL in 2007 and has since been adopted, either through legislation or court rule, by 10 other jurisdictions including California, Colorado, Idaho, Kentucky, Maryland, Montana, New Mexico, Tennessee, Utah and Virginia. It has been introduced for possible adoption in 2009 in Mississippi and South Carolina.

The Oregon Law Commission’s UIDDA work group was formed in late 2008 upon the recommendation of the Program Committee of the Oregon Law Commission and the Commission’s approval. The goal of the work group was to determine the feasibility of adopting the UIDDA in Oregon and was thought to be a smaller law reform project that could be worked on during the legislative session. The work group met twice in early 2009 in Eugene and conducted much of its final work via email. While the UIDDA was drafted by NCCUSL as a uniform act, the work group eventually decided that the content of this act should be presented as a model rule to be adopted by the Council on Court Procedures rather than a legislative measure. Similarly, Idaho, Montana and New Mexico have all adopted the UIDDA via rule rather than legislation.¹

Members of the work group were: Co-Chair Hon. Mustafa Kasubhai, Lane County Circuit Court; Co-Chair Prof. Dom Vetri, University of Oregon School of Law; James Chaney, The Chaney Firm LLC; Prof. Andrea Coles-Bjerre, University of Oregon School of Law; Don Corson, The Corson & Johnson Law Firm, Chair of the Council on Court Procedures; Hon. Lauren Holland, Lane County Circuit Court; Prof. Maury Holland, University of Oregon School of Law; Lance LeFever,

¹ See: http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uidda.asp

Thorp Purdy Jewett Urness & Wilkinson PC; John Schwimmer, Sussman Shank LLP; and Joe Willis, Schwabe Williamson & Wyatt PC, member of the Uniform Law Commission.

III. Statement of the Problem

ORCP 38 C, which currently governs foreign depositions taken in Oregon, shares much of its language with the Uniform Foreign Depositions Act, created by NCCUSL in 1920. The act was withdrawn by NCCUSL in 1966 and superseded by another NCCUSL uniform act, the Uniform Interstate and International Procedures Act (UIIPA). The UIIPA was withdrawn from recommendation by NCCUSL in the 1970s because NCCUSL now considers it “obsolete.” Despite this, several states, including Oregon, continue to use the language from these acts in their rules governing foreign depositions.² The fact that states have adopted widely varying rules, now are considered obsolete by their drafters, makes the process of conducting foreign depositions costly and confusing for practitioners.

ORCP 38 C currently requires that practitioners follow the same process and proceeding used for taking testimony in proceedings pending in Oregon. This means that in practice, Oregon requires an out-of-state attorney wishing to take depositions within Oregon to either be a member of the Oregon State Bar, be admitted to practice under pro hac vice status, temporarily associate with a member of the Oregon State bar or obtain a writ, mandate, commission, letter rogatory, or order executed by an authority in the foreign state and registered with an Oregon circuit court.³ Uniform Trial Court Rule (UTC R) 5.140 became effective in August of 2008 and that rule sets out procedures for conducting discovery in Oregon for cases pending in foreign jurisdictions. While these new procedures are helpful, since there previously was no procedure spelled out in any ORCP or UTC R, these procedures are much more complex than what would be required if the UIDDA is adopted. For example, one of the benefits of the UIDDA is that attorneys from foreign jurisdictions need not associate with an Oregon attorney, be admitted pro hac vice, or obtain commissions, letters rogatory or other special documentation described in UTC R 5.140. Therefore, if the UIDDA is adopted by the Council on Court Procedures and the Council amends ORCP 38 C, UTC R 5.140 will also require amendment or repeal, as it will become unnecessary.

IV. Objective of the Proposal (Section Analysis)

As stated above, the work group agreed that the content of this act would best be incorporated into Oregon practice as a model ORCP rather than a legislative act. This recommended proposal would accomplish that should the Council adopt it. The UIDDA was renumbered to conform to ORCP form and style rather than legislative form. The work group anticipates that this rule would either replace Rule 38 C or become a new ORCP with ORCP 38 C repealed. That decision will

² See: http://www.law.upenn.edu/bll/archives/ulc/idda/2007act_final.htm

³ See Oregon Uniform Trial Court Rule 5.140.

ultimately be made by the Council on Court Procedures, which drafts the ORCP. Because the UIDDA will not be adopted as a legislative measure, section 1, the short title, was removed. Similarly, sections 8 and 9, regarding an effective date for the act, were not carried over to the proposed rule, as the work group agreed to defer to the Council as to when the rule should become effective.

The objective of this proposal is to adopt the UIDDA's substantive provisions which provide for a simple, straightforward clerical procedure whereby an attorney from out-of-state may conduct discovery within Oregon by receiving a subpoena in the home state and then submitting it to the clerk of the court in the discovery state. The clerk then issues an Oregon subpoena for service on the person identified in the subpoena. No preliminary action, such as obtaining a commission or admission pro hac vice is necessary, and obtaining a subpoena does not constitute an appearance by the attorney in Oregon. Additionally, since the subpoena issued is an Oregon subpoena, the ORCP, specifically ORCP 55, govern the form, service and motions or objections relating to the subpoena.

Section A. Definitions

The uniform act contained several definitions that the work group found to be repetitive or otherwise unnecessary. The uniform act from NCCUSL contained five separately defined terms, some with several subparts. The UIDDA's terms "foreign subpoena" and "foreign jurisdiction" were combined into one definition for "foreign subpoena." The definition for "person" was eliminated altogether as that term is already defined in ORS 174.100 and creating a conflicting definition solely for the purposes of this rule could cause confusion. The definition for "state" was retained from the uniform act. "Subpoena" was defined in the uniform act, but the definition was removed by the work group because "subpoena" is comprehensively defined in ORCP 55 and is very similar to what is contained in the uniform act.

Section B. Issuance of Subpoena

Under the proposed rule, an attorney from a foreign jurisdiction must first obtain a subpoena in that jurisdiction before submitting it to the clerk of court for the Oregon county in which the discovery is to take place. Much of the language in this section is copied directly from the uniform act. Under both the UIDDA and the proposed rule, when a party submits the foreign subpoena to the clerk in Oregon, the clerk then issues a subpoena for service upon the person to whom the subpoena is directed. This subpoena must contain the names and contact information of all counsel of record in the case relating to the subpoena and any unrepresented parties.

While the work group's proposal retains much of the original language from the UIDDA, this section differs some important ways from the uniform act. One change is that the statement clarifying that a request for issuance of a subpoena is

not an appearance in Oregon's courts was moved to Section D, which is a new section not found in the uniform act. (See discussion for Section D, below). Second, under the uniform act, the subpoena must simply "incorporate the terms used in the foreign subpoena." The work group felt that this language was not specific enough and that the word "terms" was somewhat vague. Idaho's adoption of the UIDDA provides more specific language, and much of this language from the Idaho rule was incorporated into this proposed rule.⁴ The proposed rule clarifies that the subpoena must conform to the requirements of the ORCP, specifically rule 55 governing subpoenas, and may incorporate terms used in the foreign subpoena so long as they conform to the ORCP. This prevents subpoenas from foreign jurisdictions requesting types of discovery not permitted by the ORCP, such as premises inspections where the premises is owned by a non-party.

Section C. Service of Subpoena

This section states that the subpoena issued by the clerk under the previous section must be served in compliance with ORCP 55. This language is identical to that of the uniform act, and requires discovery conducted within Oregon to comply with Oregon law and rules. This protects Oregon residents who are non-party witnesses for out-of-state cases from burdensome or unreasonable discovery requests. Section 5 of the uniform act, entitled "Deposition Production and Inspection" was deleted by the work group, who felt it was unnecessary because other sections of the proposed rule make it clear that any discovery conducted under the rule must comply with the ORCP,

Section D. Effects of Request for Subpoena

This section is a new section and was not included in the uniform act. Under the uniform act, section 3, issuance of a subpoena, states that a request for the issuance of a subpoena under the uniform act is not an appearance in the courts of this state. The work group felt that it was important to include this information; however they decided it was best placed in a separate section for additional emphasis. Some language from Idaho's adaptation of the UIDDA was also incorporated into this new section.⁵ This section states that while requesting the subpoena does not constitute an appearance in Oregon courts, it does confer jurisdiction upon the courts to impose sanctions for actions in connection with the subpoena that are violations of the ORCP. This provides additional protections for Oregon deponents and puts the requesting attorney on notice that he or she must comply with the terms of the ORCP.

Section E. Motion to Court.

Section E of the proposed rule states that motions to the court for a protective order or motions to enforce, quash, or modify a subpoena issued by a

⁴ See Idaho Rule of Civil Procedure 45(i)(3)(C)

⁵ See Idaho Rule of Civil Procedure 45(i)(3)(A).

clerk of court pursuant to this rule must comply with the ORCP and be submitted to the county in which discovery is to be conducted. This language is identical to the uniform act except that the act uses “application” where the proposed rule uses “motion.” This change was made to reflect Oregon practice and word usage.

This section, like Section C, also protects non-party witnesses deposed in Oregon from unreasonable or unnecessarily burdensome discovery requests. As the commentary to the uniform act makes clear, nothing in this proposed rule prevents parties from applying for appropriate relief in the trial state. Furthermore, this rule does not change any rules of professional conduct which govern out-of-state lawyers appearing in its courts. So if the non-party witness makes an objection to the subpoena under ORCP 55 B or motion under Section E of the proposed rule, the lawyer (presumably out-of-state) responding must follow Oregon’s Rules of Professional Conduct, including Rule 5.5 which pertains to the unauthorized practice of law in Oregon.

Section F. Uniformity of Application and Construction

The model UIDDA stated in section 7 that consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. Current ORCP 38 C includes a “uniformity” clause, which states that the rule should be interpreted in a similar manner as other states with similar rules or statutes. This language was imported into the proposed rule.

V. Conclusion

The proposed rule should be adopted because it provides a simple and straightforward process for conducting discovery within Oregon for a matter pending outside of the state. This adoption of the UIDDA will streamline the process by eliminating the need for non-Oregon attorneys to associate with in-state counsel or navigate the complicated process of obtaining a commission, letter rogatory, or other special documentation. Some Oregon-specific modifications made by the work group further increase protections for Oregon residents from unduly burdensome discovery requests and clearly state that Oregon Rules of Civil Procedure must be followed when conducting discovery in Oregon.

Oregon Law Commission

173.315 Oregon Law Commission established; duties; membership; chairperson.

(1) The Oregon Law Commission is established to conduct a continuous substantive law revision program as described in ORS 173.338.

(2) The Oregon Law Commission has 15 members, as follows:

(a) A person appointed by the President of the Senate who is a member of the Senate at the time of appointment;

(b) A person appointed by the President of the Senate who is a current or former member of the Senate at the time of appointment;

(c) A person appointed by the Speaker of the House of Representatives who is a member of the House of Representatives at the time of appointment;

(d) A person appointed by the Speaker of the House of Representatives who is a current or former member of the House of Representatives at the time of appointment;

(e) The deans of Oregon's accredited law schools, or their designees;

(f) Three persons appointed by the Board of Governors of the Oregon State Bar;

(g) The Attorney General, or the Attorney General's designee;

(h) The Chief Justice of the Supreme Court, or the Chief Justice's designee;

(i) The Chief Judge of the Court of Appeals, or the Chief Judge's designee;

(j) A person appointed by the Chief Justice of the Supreme Court who is a circuit court judge, or a retired circuit court judge who has been designated as a senior judge under ORS 1.300, at the time of appointment; and

(k) One person appointed by the Governor.

(3) The Attorney General, the Chief Justice of the Supreme Court, the Chief Judge of the Court of Appeals and the deans of Oregon's accredited law schools are ex officio members of the commission and have the same powers as appointed members.

(4)(a) Except as provided in paragraph (b) of this subsection, appointed members of the commission serve four-year terms. Terms commence on July 1 of even-numbered years. Before the expiration of the four-year term, the appointing authority shall appoint a successor. A person who has served as a member is eligible for reappointment.

(b) A person appointed under subsection (2)(a) of this section serves a term of four years, or until the person ceases to be a member of the Senate, whichever occurs first. A person

appointed under subsection (2)(c) of this section serves a term of four years, or until the person ceases to be a member of the House of Representatives, whichever occurs first.

(5) If there is a vacancy in the position of an appointed member:

(a) The appointing authority shall appoint a person as soon as possible to serve during the remainder of the unexpired term; and

(b) The appointing authority may specify that the person appointed to serve the remainder of the unexpired term is also appointed to the next following full term.

(6) If a member of the commission is authorized under subsection (2) of this section to name a designee, a person named as a designee has all of the powers and duties of the member until the designation expires or is revoked. The following persons may be designated:

(a) A dean of one of Oregon's accredited law schools may designate a member of the faculty of the law school.

(b) The Chief Justice may designate a Supreme Court judge.

(c) The Chief Judge of the Court of Appeals may designate another judge of the Court of Appeals.

(d) The Attorney General may designate an assistant attorney general or the Deputy Attorney General.

(7) The term of an appointed member of the commission shall cease if the member misses three consecutive meetings without prior approval of the chairperson, and the appointing authority for the position shall appoint a person to fill the vacancy in the manner provided by subsection (5) of this section.

(8) The Oregon Law Commission shall elect its chairperson and vice chairperson from among the members with such powers and duties as the commission shall determine.

(9) A majority of the members of the commission constitutes a quorum for the transaction of business. If a quorum is present at a meeting, the commission may take action by an affirmative vote by a majority of the members of the commission who are present. [1981 c.813 §1; 1997 c.661 §1; 2009 c.114 §1]

Note: Section 2, chapter 114, Oregon Laws 2009, provides:

Sec. 2. (1) The member of the Oregon Law Commission who is serving on the effective date of this 2009 Act [May 21, 2009] and who is a member of the Senate shall be considered to have been appointed under ORS 173.315 (2)(a), as in effect on the effective date of this 2009 Act.

(2) The member of the Oregon Law Commission who is serving on the effective date of this 2009 Act and who is a member of the House of Representatives shall be considered to have been appointed under ORS 173.315 (2)(c), as in effect on the effective date of this 2009 Act.

(3) Notwithstanding ORS 173.315 (2)(b), the person who was appointed under ORS 173.315 (2)(a), as in effect immediately before the effective date of this 2009 Act, and who was not a current or former member of the Senate at the time of the appointment, may continue to serve as a member of the Oregon Law Commission and be reappointed by the President of the Senate under ORS 173.315 (2)(b) even though the person is not a current or former member of the Senate at the time of reappointment. When the person described in this subsection ceases membership with the commission, a person shall be appointed with the qualifications specified in ORS 173.315 (2)(b), as in effect on the effective date of this 2009 Act.

(4) Unless the term of the member is lengthened or shortened by the Oregon Law Commission under subsection (5) of this section, the term of an appointed member of the commission serving on the effective date of this 2009 Act ends on June 30 of the year in which the term of the member would otherwise have ended under ORS 173.315 (3), as in effect immediately before the effective date of this 2009 Act.

(5) Notwithstanding the two-year term of office specified for members of the Oregon Law Commission under ORS 173.315 (3), as in effect immediately before the effective date of this 2009 Act, for the purpose of staggering the terms of appointed members, the commission may establish terms that are longer or shorter than two years for the appointed members of the commission who are serving on the effective date of this 2009 Act. The term established by the commission under this subsection may not exceed four years and must end on June 30 of the year specified by the commission.

(6) Notwithstanding the four-year term of office specified for appointed members of the Oregon Law Commission in ORS 173.315 (4), the commission may establish a term that is shorter than four years for the first person appointed under ORS 173.315 (2)(j). The term established under this subsection must end on June 30 of the year specified by the commission. [2009 c.114 §2]

173.320 [1963 c.292 §3 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.325 Compensation and expenses of members. (1) A member of the Legislative Assembly who serves as a member of the Oregon Law Commission, or on any work group established under ORS 173.352, may receive actual and necessary travel and other expenses under ORS 171.072 from funds appropriated to the Legislative Assembly.

(2) A member of the Oregon Law Commission who is not a member of the Legislative Assembly shall receive no compensation for services as a member but, subject to any other applicable law regulating travel and other expenses for state officers, may receive actual and necessary travel and other expenses incurred in the performance of official duties, providing funds are appropriated therefor in the budget of the Legislative Counsel Committee. [1981 c.813 §2; 1987 c.879 §3; 1997 c.661 §2; 2009 c.114 §3]

173.328 Commission meetings. The Oregon Law Commission shall meet regularly pursuant to a schedule established by the commission. The commission also shall meet at other times and places specified by the call of the chairperson or of a majority of the members of the commission. [1997 c.661 §5; 2009 c.114 §4]

173.330 [1963 c.292 §4 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.335 Legislative Counsel assistance. The Legislative Counsel shall assist the Oregon Law Commission to carry out its functions as provided by law and shall provide necessary drafting services to the commission as legislative priorities permit. [1981 c.813 §§3,4; 1997 c.661 §6; 2009 c.114 §5]

173.338 Law revision program. (1) The law revision program conducted by the Oregon Law Commission may include, but is not limited to:

(a) Review of the common law and statutes of the state, and current judicial decisions, for the purpose of discovering defects and anachronisms in the law.

(b) Consideration of changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Consideration of suggestions from judges, justices, public officials, lawyers and the public

generally as to defects and anachronisms in the law.

(d) Recommendation for changes in the law that the commission considers necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of Oregon into harmony with modern conditions.

(e) Recommendation for the express repeal of statutes repealed by implication or held unconstitutional by state and federal courts.

(2) The commission shall study any topic that the Legislative Assembly, by law or concurrent resolution, refers to the commission. [1997 c.661 §3; 2009 c.114 §6]

173.340 [1963 c.292 §5 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.342 Commission biennial report to Legislative Assembly. The Oregon Law Commission shall file a report at each regular session of the Legislative Assembly that contains recommendations for statutory and administrative changes and a calendar of topics selected by the commission for study, including a list of the studies in progress and a list of topics intended for future consideration. [1997 c.661 §4; 2009 c.114 §7]

173.345 Cooperation with bar associations or other associations. The Oregon Law Commission may cooperate with any bar association or other learned, professional or scientific association, institution or foundation in a manner suitable to fulfill the functions of the commission. [1997 c.661 §7]

173.347 Appearance of commission members or staff before Legislative Assembly. The Oregon Law Commission by its members or its staff may appear before committees of the Legislative Assembly in an advisory capacity, pursuant to the rules thereof, to present testimony and evidence in support of the commission's recommendations. [1997 c.661 §8]

173.350 [1965 c.397 §1; repealed by 1979 c.472 §2]

173.352 Work groups. (1) To aid and advise the Oregon Law Commission in the performance of its functions, the commission may establish work groups. Work groups established by the commission may be continuing or temporary. The commission shall determine the representation, membership, terms and organization of work groups and shall appoint work group members.

(2) Members of work groups established by the commission are not entitled to compensation, but in the discretion of the commission may be

reimbursed from funds available to the commission for actual and necessary travel and other expenses incurred in the performance of their official duties. [1997 c.661 §10; 2009 c.114 §8]

173.355 Solicitation and receipt of gifts and grants. The Oregon Law Commission may solicit and receive funds from grants and gifts to assist and support its functions. [1997 c.661 §9]

173.357 Disposition of moneys collected or received by commission. All moneys collected or received by the Oregon Law Commission shall be paid into the General Fund of the State Treasury. Such moneys are continuously appropriated for and shall be used by the commission in carrying out the purposes for which the funds are received. [1997 c.661 §11]

Program Committee Selection Criteria

In addition to the guidance of ORS 173.338, the Oregon Law Commission approved the following criteria for the selection of law reform projects for development by the Commission:

Selection of Issues for Study/Development of Legislation

The Commission should select issues for study/development of legislation based on the following criteria:

- A. Source of Work Proposals (Priorities)
 - 1. Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
 - 2. Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
 - 3. Legislative Counsel proposals;
 - 4. Law school proposals;
 - 5. Oregon State Bar section proposals;
 - 6. Commission member proposals; and
 - 7. Other sources

- B. Nature of Issues

The Commission should give highest priority to private law issues that affect large numbers of Oregonians and public law issues that fall outside particular regulatory areas administered by state agencies.

- C. Resource Demands

The Commission should select issues that available staff and the Commission can finish within the time set for study/development of legislation.

- D. Probability of Approval by Legislature/Governor

The Commission should select issues that can lead to legislative proposals with a good prospect of approval by the legislature and Governor.

- E. Length of Time Required for Study/Development of Legislation

The Commission should select issues that include both those permitting development of proposed legislation for the next legislative session and those requiring work over more than one biennium.

<p style="text-align: center;">Program Committee: Project Proposal Outline</p>

Do you (or does your organization) have a law reform project that is well-suited for study by the Oregon Law Commission?

A written law reform proposal seeking involvement of the Oregon Law Commission should be addressed to the Oregon Law Commission Program Committee for consideration and contain the following preferred sections:

1. PROBLEM: Identify the specific issue to be studied or addressed by the Law Commission and explain the adverse consequences of current law. An illustration from real life might be helpful.

2. HISTORY OF REFORM EFFORTS: Explain past efforts to address the problem and the success or limits of those efforts.

3. SCOPE OF PROJECT: Explain what needs to be studied, evaluated or changed to fix the problem.

4. LAW COMMISSION INVOLVEMENT: Explain why the issue is a good subject for law reform of broad general interest and need (as opposed to an issue likely to be advanced by a single interest group or lobby).

5. PROJECT PARTICIPANTS: Identify individuals who are willing to serve on a Work Group, and a Reporter who is willing to work with the Chair of the Work Group to draft a Report and Comments. The Chair of the Work Group should be a Commissioner. The Proposal may state a preference for a chair.

Mailing Address:

Oregon Law Commission
Attn: Hardy Myers, Program Committee Chair
245 Winter Street SE
Salem, OR 97301

Phone: 503-370-6973

Fax: 503-370-3158

Illustrative Outline of a Report to the Oregon Law Commission

All Commission recommended legislation should be accompanied by a report that among other things explains the need for the bill and the details of the bill. The following is an outline of a report to the Oregon Law Commission for Work Groups to consider when preparing their own reports to the Commission. Of course, each Work Group's issues are unique and certain sections outlined below may not be necessary for every report. Therefore, the following outline is only a guide and actual reports may differ.

I. Introductory summary

This section briefly identifies the problem area, the reason why it needs attention, and the overall objective of the bill. The introductory summary may be followed by the actual text of the proposal's scope section, if the text is quite brief, otherwise by a summary of its provisions.

II. History of the project

This section recounts when the OLC undertook the project, who led it, who was on the Work Group, who participated in the research and the design of the proposal, the process of consultation with experts in or outside Oregon, and interested persons outside the Commission.

III. Statement of the problem area

This section explains in some detail what in the existing state of the law is problematic, either by reason of uncertainty and lack of clear standards, or because apparently clear standards are inconsistent or self-contradictory, or are outmoded, inefficient, inadequate, or otherwise unsatisfactory.

IV. The objectives of the proposal

The preceding sections set the stage for now identifying the objectives of the proposal concretely (as distinct from general goals like "clarification," "simplification," or "modernization") in advance of explaining the choice of legal means to achieve those concrete objectives. This section would identify propositions that are uncontroversial and others on which different interests have competing objectives. If one objective of the proposal is to craft an acceptable compromise among competing interests, this section would candidly state what opposing positions were argued in the consultations, and why the proposal represents the best and most principled accommodation of those that have merit. This section would also note any issues that were discussed but were deferred, complete with an explanation of the deferral.

V. Review of legal solutions existing or proposed elsewhere

The report here or later should describe models of existing or proposed legal formulations that were examined in preparing the proposal. An explanation of how Oregon compares with the rest of the states would be helpful.

VI. The proposal

In this section, the report should set forth the whole proposal verbatim, except for revisions of a lengthy statute that is better attached as an appendix. The report would then proceed by setting out significant parts of the bill section by section (or by multi-section topics), followed by explanatory commentary on each item. American Law Institute statutory projects offer an illustrative model.

On occasion, the Commission may choose to offer alternative drafts. This can be appropriate when the Commission considers it important that a statute (or rule) provide clear and consistent guidance on a legal problem while leaving to the political decision-makers the choice of which among competing policy objectives should prevail.

VII. Conclusion

The conclusion summarizes the reasons why the bill should be adopted.

VIII. Appendices

These would include a bibliography of sources, and perhaps relevant statutory texts or excerpts from other relevant documents or published commentary bearing on the proposal.

IX. Form of publication

A formal report to the Oregon Law Commission should be reproduced in a format suitable for preservation by the Commission, Legislative Counsel, the Department of Justice, and for distribution to libraries and other interested subscribers, perhaps by one of the state's academic law reviews.

Apart from the formal report, the experts who worked on the project should be encouraged to publish their own articles analyzing and commenting on the subject of the report in more detail. Publication in these two different forms was the common practice for scholarly reports to the Administrative Conference of the United States.

MEMORANDUM

To: Commissioners of the Oregon Law Commission
From: David Kenagy
Date: September 6, 2001
Re: Managing Mid-Session Amendments to Law Commission recommended bills

Our experience in the 2001 Legislative Session taught that even the most carefully drafted Law Commission legislative recommendations will be amended during the legislative process. We also learned that the amendments may be proposed from many sources for reasons some of which may not even be known or revealed until after an amendment has been adopted.

Other Law Commissions around the country have faced the same issue. In general they favor maximum flexibility for those charged with guiding the legislation on behalf of the Commission. They do not adopt policy constraining the process but follow understood practices that have developed over their years of experience. I suggest that we do the same. This memo displays the broad outlines of the approach used by the Executive Director's office, which we intend to use in the future, subject to further guidance from the Commission.

You will recall that in light of the experiences of the 2001 Session, the Commission discussed at its July 13, 2001 meeting how to best process the inevitable amendments to Law Commission bills. This discussion included a desire to see Commission recommendations enacted, unless the content of the final enactment departs fundamentally from the original recommendation.

The Commission's Executive Director is responsible for guiding the Commission's recommendations through the legislative process. In that capacity the Executive Director is expected to exercise an initial judgment when faced with a proposed legislative amendment to a Law Commission bill. That initial judgment is to distinguish between amendments that make either "material" or "immaterial" changes to the Law Commission bill. Technical text changes and corrections which do not alter the purpose and function of a bill are examples of immaterial changes.

In the exercise of this initial judgment concerning materiality, the Executive Director will resolve doubts in favor of assuming materiality in order to engage the wider consultation and discussion about the amendment as detailed below. Consultation with either the Commission Chair, Vice-Chair or others usually would be a part of the Executive Director's initial decision making process.

If an amendment is immaterial, the Executive Director will continue to guide the amended Law Commission bill as would be the case without amendment. Making clear, however, that the amendment does not carry formal Law Commission approval.

If an amendment is material, the Executive Director will take steps from among those listed below. The steps selected will naturally depend upon the stage of the legislative process in which the amendment is proposed or made.

Generally, early in the Session there is more time for broad-based discussion, reflection and review. Later in the Session faster responses are needed, requiring a more confined and efficient discussion. Regardless of the step chosen, the Executive Director will consult with the Chair of the Commission in order to take such other necessary steps or combinations of steps as may not be contemplated at this writing. The keys are good communication and flexibility in approach.

The hierarchy of steps in managing mid-session amendments is as follows:

1. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Law Commission for formal consideration and a vote on taking a position on the amendment. Only this first approach would authorize the Executive Director to affirmatively report support or rejection of an amendment "on behalf of the Commission." This approach, however, requires both an assessment of the time available for such action and the nature and scope of the amendment itself. Experience has shown that some amendments, while fairly judged "material," are of lesser scope and effect than others and may therefore be better addressed in a less formal manner.
2. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Work Group responsible for the Commission's draft at a meeting of the Work Group or informally by email or otherwise where necessary.
3. In consultation with the Commission Chair or Vice-Chair, present the amendment to the responsible Work Group Chair, to the Work Group Reporter, and to any members of the Work Group known to the Executive Director to be most knowledgeable on the subject raised by the amendment.
4. In consultation with the Commission Chair or Vice-Chair, present the amendment to the Work Group Chair, Reporter or other most knowledgeable Work Group member.

Following each of the above actions the Executive Director will carry out the steps next reasonably necessary to implement the guidance obtained from the process. In no case shall the views of any person or group of persons be reported by the Executive Director as the views of the Law Commission unless supported by a vote of the Commission affirming those views.

To: Commissioners of the Oregon Law Commission
Date: November 9, 2001

Re: Memorandum of Understanding: Reminding Work Group Members to Act on Their Independent Professional Judgment

The Oregon Law Commission exists to provide clarification and improvement of Oregon law. ORS 173.315; ORS 173.357. For this purpose, the Commission must rely on knowledgeable committees, known as Work Groups, to pursue the various substantive projects that are the Commission's task. ORS 173.352 (1) provides that the Commission shall determine the membership and organization of the committees and "shall appoint their members." Work groups generally are made up of Commissioners and volunteers who bring either professional expertise to the law reform project or familiarity with community interests that are particularly affected by the project.

The goal of a Commission project is to produce what the Commission, in its professional judgment, determines to be the best feasible improvement in the law, taking into account that different people and groups have divergent views on and interests in the subject matter. This goal is furthered by finding a way for knowledgeable advisors who will express those views and interests to inform the Commission's Work Groups, while leaving the decisions on the substantive issues to the disinterested professional judgment of the regularly appointed members of the Work Group. The work of these committees can only be hampered if some members subordinate their judgment of the public interest to the interests of a particular private party or client. It is recommended that the Commission accept a practice by the Executive Director's office of communicating to Work Group members that they are to speak and vote on the basis of their individual and professional convictions and experience in the exercise of independent judgment.

Other commissions and committees in Oregon and throughout the United States have addressed the issue of membership criteria in this context. Some have promulgated statutes, rules, or policies to require or encourage members to contribute solely on the basis of their personal experience and convictions. For example, Congress passed the Federal Advisory Committee Act in 1972. A section of that statute speaks to membership. 5 U.S.C.A. app.2 § 5 (West 1996). That Act arose out of the growing number of advisory groups in the nation and growing concern that special interests had captured advisory committees, exerting undue influence on public programs. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3495; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE L. ON REG. 451, 462 (1997). The Act also required advisory committees to keep minutes, including a record of persons present. In short, the goal of the Act was to establish openness and balanced representation but also prevent the surreptitious use of advisory committees to further the interests of any special interest. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500.

Another example comes from the National Assessment Governing Board, appointed by the Secretary of Education, for the purpose of formulating policy guidelines for the

National Assessment; the Board has twenty-five members. 20 USCA § 9011 (West 2000). The statute establishing the Board contains the following provision limiting membership: “The Secretary and the Board shall ensure at all times that the membership of the Board reflects regional, racial, gender, and cultural balance and diversity and that the Board exercises its independent judgment, free from inappropriate influences and special interests.” *Id.* at §9011 (b)(3). Still another example is found in ORS 526.225; that Oregon statute authorizes the State Board of Higher Education to appoint a Forest Research Laboratory Advisory Committee composed of fifteen members. Composition of the Committee is to include three members from the public at large, but they may not “have any relationship or pecuniary interest that would interfere with that individual representing the public interest.”

Less formal examples are found in other law reform organizations. The American Law Institute, in its Rules of Council, provides guidelines for membership in the Institute. Rule 9.04, titled Members’ Obligation to Exercise Independent Judgment, was added at the December 1996, meeting of the Council. That Rule communicated that members are to “leave client interests at the door.” Finally, the Louisiana State Law Institute has a philosophical policy statement, dating back to 1940, that encourages “thorough study and research, and full, free and non-partisan discussion.” (John H. Tucker, Address at Louisiana State University on the Philosophy and Purposes of the Louisiana State Law Institute (Mar. 16, 1940)).

Instead of a formal rule or statute to express an ideal that Oregon Law Commission Work Group members should leave their client interests at the door, the Executive Director’s office suggests the Commission accept this Memorandum of Understanding and the following statement:

“To maintain the Oregon Law Commission’s professional non-partisan analysis of legal issues in support of law reform, Commissioners and those individuals appointed by the Commission to serve as Work Group members are expected to exercise independent judgment when working on Oregon Law Commission projects by speaking and voting on the basis of their individual and professional convictions and experience. Recommendations to and from the Law Commission must be the result of thoughtful deliberation by members dedicated to public service. Therefore, Work Group members are not to subject their individual and professional judgment to representation of client or employer interests when participating in the Work Group’s decisions.”

Unless otherwise directed, the Executive Director’s staff will incorporate the above statement into the Work Group letters of appointment as a means of communicating to Work Group members the Commission’s important mission and expectations.

QUICK FACT SHEET

What does the Oregon Law Commission do?

The Commission assists the legislature in keeping the law up to date. By statute, the Commission will “conduct a continuous substantive law revision program. . .” (ORS 173.315). The Commission assists the legislature in keeping the law up to date by:

- Identifying and selecting law reform projects
- Researching the area of law at issue, including other states’ laws to see how they deal with similar problems
- Communicating with and educating those who may be affected by proposed reforms
- Drafting proposed legislation, comments and reports for legislative consideration

How was the Oregon Law Commission formed?

The 1997 Legislative Assembly adopted legislation creating the Oregon Law Commission (ORS173.315). Legislative appropriations supporting the Commission’s work began July 1, 2000.

How does the work of the Oregon Law Commission compare to the work of other groups who may have ideas about changing Oregon laws?

The Commission identifies and considers needs that are not likely to be advanced by traditional interest groups.

What is the role of Willamette University?

Willamette University has entered into a public-private partnership through the Office of Legislative Counsel that allows the Oregon Law Commission to recommend law reform, revision and improvement to the legislature while providing opportunities for student and faculty involvement in support of the Commission’s work. Symeon Symeonides, Dean Emeritus of the College of Law, is a Commissioner, and several professors participate with work groups. The Office of the Executive Director, housed at the Willamette University College of Law, provides administrative support to the Commission and the Commission’s Work Groups. Undergraduate students serve as office assistants, and law students serve as Law Clerks for the Commission.

Who makes up the Oregon Law Commission?

In creating the Commission, the Legislative Assembly recognized the need for a distinguished body of knowledgeable and respected individuals to undertake law revision projects requiring long term commitment and an impartial approach. The Commissioners include four members appointed by the Senate President and Speaker of the House (at least one sitting Senator and Representative), the Chief Justice of the Oregon Supreme Court, the Chief Judge of the Court of Appeals, a circuit court judge, the Attorney General, a Governor's appointee, the deans or representatives from each law school in Oregon and three representatives from the Oregon State Bar. In addition to the fifteen Commissioners, currently over seventy volunteers serve on the Commission’s Work Groups. Once an issue has been selected by the Commission for study and development, a Work Group is established. Work Groups are made up of Commissioners, volunteers selected by the Commission based on their professional areas of expertise, and volunteers selected by the Commission to represent the parts of the community particularly affected by the area of law in question. The expectation is that the Commission is able to produce the best reform solution possible by drawing on a wide range of experience and interests.

How do people get involved?

To apply for service as a volunteer on a Work Group or to receive electronic Work Group meeting notices, please contact the Office of the Executive Director at (503) 370-6973.

