Chapter 115

1965 REPLACEMENT PART

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NATURE OF PROCEEDINGS

115.010 Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

(1) A citation to a party.

(2) A verified petition of a party in interest.

(3) A subpena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees.

115.020 Contents of petition to prove will or to appoint executor or administrator. A petition to prove a will or for the appointment of an executor or administrator shall set forth the facts necessary to give the court jurisdiction and also state whether the deceased left a will or not and the names, age and residence, so far as known, of his heirs.

115.030 to 115.100 [Reserved for expansion]

INITIATING PROBATE

115.110 Custodian of will must deliver to proper court; liability. Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.

115.120 Persons entitled to petition for proof of a will. Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is lost or destroyed or beyond the jurisdiction of the state or is a nuncupative will.

115.130 Order for production of will. If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order.

115.140 County in which proof of will shall be taken. Proof of a will shall be taken by the probate court of a county as follows:

(1) When the testator, at or immediately before his death, was an inhabitant of the county, irrespective of the place he may have died.

(2) When the testator, not being an inhabitant of this state, died in the county, leaving assets therein.

(3) When the testator, not being an inhabitant of this state, died out of the state, leaving assets in the county.

(4) When the testator, not being an inhabitant of this state, died out of the state, not leaving assets therein, but where assets thereafter come into the county.

(5) When real property, owned by the testator at the time of his death is situate in the county, and no other probate court has gained jurisdiction under any of the preceding subsections of this section. [Amended by 1955 c.292 §1]

115.150 Probate and proof of nuncupative wills. (1) No probate of any nuncupative will shall be granted for 14 days after the death of the testator.

(2) No proof shall be received of any nuncupative will unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within 30 days after they were spoken.

(3) No nuncupative will shall at any time be proved, unless a citation, accompanied with a copy of the will, together with a copy of the proposed proof of the will, is issued to the widow or next of kin of the decedent, that she or they may contest the will if she or they see fit so to do.

115.160 Establishing foreign wills. (1) If a will made pursuant to ORS 114.060 is probated in any other state or territory of the United States or in any foreign country, copies of such will and of the probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the court affixed thereto, if there is a

seal, together with a certificate of the chief judge or presiding magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the record, shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect.

(2) If any will is filed or recorded in any other state or territory of the Unites States or in any foreign country without probate thereof, and probate of such will is not required by the law of the place when the same is filed or recorded, such will shall not be deprived of record in this state by reason of the lack of probate in the foreign jurisdiction, but a copy of the will, certified as provided in subsection (1) of this section, may be filed in any court of competent jurisdiction in this state, and thereafter such court may direct that the testimony of the subscribing witnesses to the original of such will be taken upon deposition issued as in other cases for taking the testimony of witnesses outside the jurisdiction of any court. In all such cases the court shall designate the commission before whom the testimony of such witnesses shall be taken, and when such deposition has been filed in such court, if it appears therefrom to the satisfaction of the court that the will was executed in all respects according to the laws of this state, and that the testator was competent to execute the same, the court may direct the certified copy of such will and the testimony of the witnesses to be recorded in the same manner and with like effect as wills executed and proven in this state.

115.170 Testimony of attesting witnesses; affidavits; depositions. (1) Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. If an attesting witness is outside the reach of a subpena of the court having jurisdiction of the probate of the will such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

(2) However, upon motion of any person interested in the estate within 30 days after the order admitting the will to probate is made, or upon the discretion of the court within that time, the court may require that the witness making the affidavit be produced before the court for further examination, or if the witness is outside the reach of a subpena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

(3) However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

115.180 Contest of will. (1) When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest the same or the validity of such will; but, if a person entitled to contest the probate of a will or the validity thereof is laboring under any legal disability, the time in which he may institute such contest shall be extended six months from and after the removal of such disability.

(2) Any will made pursuant to ORS 114.060 may be contested and annulled within the same time and in the same manner as wills executed and proven in this state.

115.190 Letters testamentary; administrator with the will annexed. (1) When a will is proven, letters testamentary shall be issued to the persons therein named as executors, or coexecutors or to such of them as give notice of their acceptance of the trust and are qualified. If all the persons therein named decline to accept, or are disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.

(2) Where a bank or trust company is named in a will as executor or coexecutor, and such company is converted as provided by law, or is consolidated with another bank

or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, letters of administration with the will annexed shall be issued to such converted, consolidated or purchasing company if it is otherwise qualified.

115.200 Issuance of letters of administration where will declared inoperative. If after a will has been proven and letters testamentary or of administration with the will annexed have been issued thereon, such will is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

115.210 Form of letters testamentary. Letters testamentary may be in the following form:

State of Oregon, }
County of ——— } ss.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That the Will of ———, deceased, has been duly proved in the probate court for the county aforesaid, and that ———, who ——— named Execut— therein, ha— been duly appointed such Execut— by the court aforesaid; this, therefore, authorizes said ——— to administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, I, ———, clerk of the court, have hereunto subscribed my name and affixed the seal of said court, this —— day of ———, A. D. 19—.

(Seal)

A. B., Clerk of the Court.

115.220 Copy of will to legatees and devisees. Upon the entry of an order admitting any will to probate, the appointed representative shall forthwith cause a copy of the decedent's will to be mailed to each legatee and devisee named therein at his last-known address. If the appointed representative is also a legatee or a devisee, the will need not be mailed to such appointed representative. Proof of such mailing shall be made by affidavit and filed at or before the hearing of the final account.

[1963 c.447 §1; 1965 c.514 §1]

115.225 to 115.300 [Reserved for expansion]

INITIATING ADMINISTRATION

115.310 Jurisdiction; to whom administration granted; serving copy of petition on clerk of State Land Board in certain cases. (1) Administration of the estate of an intestate shall be granted by the court authorized to take proof of a will, as prescribed in ORS 115.140, if such intestate had made a will. Letters of administration thereof shall be issued as follows:

(a) To the widow, widower or next of kin in the discretion of the court.

(b) To one or more of the principal creditors having claims against the estate which accrued prior to the death of the deceased.

(c) If the intestate at the time of his death was a citizen or subject of a foreign country, or his or her heirs at law are all citizens or residents of such foreign country, in that event to the consul, vice consul, consular agent or other representative of such foreign country resident in the State of Oregon.

(d) To any other person competent and qualified whom the court may select.

(2) In every case in which the petition for appointment of an administrator or administratrix does not specifically designate by name an heir or heirs of the decedent, the State Land Board is an interested party, and the party signing and presenting the petition for the appointment of the administrator or administratrix shall immediately serve upon the clerk of the State Land Board, as provided by ORS 16.770 to 16.810, 16.850 and 16.860, a copy of the petition for appointment of the administrator or administratrix, and no order appointing an administrator or administratrix therein shall be granted by the court or entered until after due proof of service has been filed with the clerk of the court having jurisdiction in such proceedings.

115.320 Time for application. The persons named in subsection (1) of ORS 115.310 if qualified and competent for the trust, shall be entitled to the administration in the order named. If those named in paragraph (a) of that subsection do not apply for the administration within 30 days from the decease of the intestate, they shall be deemed to have renounced their right thereto; but the court or judge thereof in its discretion may, if they reside within the county, direct that a citation issue to them, requiring them within

such period to apply for or renounce their right of administration. If the persons named in paragraph (b) of that subsection do not make such application within 40 days from such decease and if the persons named in paragraph (c) of that subsection do not make such application within 50 days from such decease, they shall be deemed to have renounced their right to the administration.

115.330 Appointment of special administrator. When for any reason there is a delay in issuing letters testamentary or of administration, and the property of the deceased is in danger of being lost, injured or depreciated, the court may appoint a special administrator to take charge of the estate. He shall qualify in like manner, and have the powers and perform the duties of an administrator generally, except that he is not authorized to pay the debts of, or otherwise discharge any obligation against, the deceased. Upon the issuing of letters testamentary or of administration, the powers of such special adminstrator shall cease.

115.340 Proceedings when will found after administration granted. If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

115.350 Form of letters of administration. (1) Letters of administration may be in the following form:

State of Oregon, }
County of ———. } ss.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That it appearing to the court that ———— has died intestate, leaving at the time of h— death, property in this state, and that the probate court for the county aforesaid has duly appointed ———— administrat—— of the estate of said decedent; this, therefore, authorizes said ———— to administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, etc., (the same as in letters testamentary).

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(2) Letters to an administrator of the partnership with the will annexed, or to a special administrator, may be issued according to the foregoing forms, with such variations as may be proper in the particular case.

115.360 to 115.400 [Reserved for expansion]

EXECUTORS AND ADMINISTRATORS GENERALLY

115.410 Persons not qualified to act. The following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers, other than justices of the peace; persons of unsound mind; persons who have been convicted of any felony; persons who have been convicted of a misdemeanor involving moral turpitude; persons suspended for misconduct or disbarred from the practice of law, during the period of such suspension or disbarment.

115.420 Nonresident or minor qualifying as executor after disability removed. If a person is named in a will as executor who is a nonresident of the state or a minor, upon the removal of such disability, he is entitled to qualify as such executor if he applies therefor within 30 days from the removal of such disability, if otherwise competent. If, in the meantime, an administrator with the will annexed has been appointed, his powers and duties cease with the qualification of such executor; but if another executor has qualified and is acting as such, they thereby become joint executors.

115.430 Necessity and amount of undertaking; undertaking notwithstanding will. (1) No executor or administrator shall, except as stated in this section, act as such until he files with the clerk of the court having jurisdiction of the estate an undertaking, which shall be void upon the condition that the executor or administrator faithfully performs the duties of his trust according to law, in an amount and with sureties as follows:

(a) With one or more sufficient personal sureties approved by the court, in a sum not less than double the probable value of the personal property of the estate, plus double the probable value of the annual rents and profits of and from the real property of the estate; or

(b) If the undertaking is signed and executed by a surety company qualified to transact surety business in this state, then in a sum not less than the probable value of

the personal property of the estate plus the probable value of the annual rents and profits of and from the real property of the estate.

(2) When there are stocks and bonds registered in the decedent's name, which may not be sold or transferred of record by the executor or administrator without an order of court authorizing such sale or transfer, the required undertaking shall be based only upon the estimated dividends and interest to be derived from such stocks and bonds during the period of administration, unless such stocks and bonds are ordered by the court to be sold, at which time a further undertaking shall be required by the court for the full market value of such stocks and bonds.

(3) When, by the terms of his will, a testator expressly declares that no bond shall be required of his executor, such executor may act upon taking an oath faithfully to perform his trust, without filing the undertaking mentioned in this section; but such executor is criminally and civilly liable for any dereliction of duty, as are other executors and administrators. Notwithstanding such provisions in a will the court may, at any time in its discretion, upon the petition of any person interested in the estate, require such executor to give the undertaking required by this section.

(4) If, upon filing the inventory, or at any time thereafter, it appears to the satisfaction of the court that the penalty named in the undertaking is other than the amount required by this section, the court may, by order, reduce or increase the penalty of the undertaking accordingly.

(5) Nothing in this section shall affect the provisions of ORS 709.230 and 709.240, relating to a trust company acting as executor or administrator.

115.440 When sureties may become severally liable for portions of undertaking. Whenever the penal sum in the undertaking prescribed by ORS 115.430 exceeds $2,000, three or more sureties may become severally liable for portions of that sum, if the aggregate sum for which such sureties become liable equals the penal sum provided in the undertaking.

115.450 When new and sufficient undertaking may be required. Whenever the amount of an executor's or administrator's undertaking is insufficient, or the sureties therein or either of them have become nonresidents of this state, or are likely to or have become insolvent, the executor or administrator shall be required to give a new and sufficient undertaking. The application for such new undertaking may be made by any heir, legatee, devisee, creditor or other person interested in the estate, and in the manner prescribed in ORS 115.470 for the removal of executors and administrators.

115.460 Effect of new undertaking or failure to give it. The new undertaking required under ORS 115.450, when given and received, discharges the sureties in the former undertaking from any liabilities on account of their principal arising from his acts or omissions subsequent thereto. When a new undertaking is ordered, if the executor or administrator fails to comply therewith within five days from the entry thereof, or such further time as the order may prescribe, thenceforward the authority of such executor or administrator ceases and he is deemed removed and his letters revoked.

115.470 Removal of executor or administrator; grounds and procedure. Any heir, legatee, devisee, creditor or other person interested in the estate may apply for the removal of an executor or administrator who has ceased to be a resident of this state or becomes mentally incompetent or has been convicted of any felony or a misdemeanor involving moral turpitude or who, in any way, has been unfaithful to or neglectful of his trust to the probable loss of the applicant or the estate. Such application shall be by petition and upon notice to the executor or administrator, served in the manner provided for the service of summons. If the court finds the charge to be true, it shall give and make an order removing such executor or administrator and revoking his letters.

115.480 Nonresident status as cause for removal; service of process if representative cannot be found. If an executor or an administrator becomes a nonresident of this state he may be removed and his letters revoked in the manner prescribed in ORS 115.470, and whenever after due diligence the person to whom letters have been granted cannot be found within the state, service of process issuing from the probate court may be made upon his bondsman, and, if he

or it cannot be found within the state, upon the county clerk of the county in which the proceeding is pending, in like manner and with like effect as if it were served personally upon such person to whom letters have issued.

115.490 Duty of court as to executors and administrators. Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exists or have transpired, as specified in ORS 115.470, it is the duty of such court or judge to cite the executor or administrator to appear and show cause why he should not be removed, and if he fails to appear or show sufficient cause, an order shall be made removing him and revoking his letters. It is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently performs the duties of his trust according to law.

115.500 Continuation of administration after death, resignation, removal or change of status of executor or administrator. (1) Whenever an executor or administrator dies, resigns or is removed, if there is a coexecutor or administrator he shall thenceforward exercise the powers and perform the duties of the trust. If all the executors or administrators die, resign or are removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they are competent and qualified.

(2) Whenever a bank or trust company is appointed and qualified as an executor or administrator, and thereafter such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, the converted, consolidated or purchasing company shall continue and complete the administration of the estate as though it had been originally appointed as the executor or administrator with all the rights, obligations and responsibility incident thereto.

115.510 Rights and powers of remaining or new administrator. The surviving or remaining executor or administrator, or the new administrator, as the case may be, is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit or proceeding on account thereof, against the executor or administrator ceasing to act, or against his sureties or representatives.

115.520 Resignation of executor or administrator. The court or judge thereof, in its discretion, may allow an executor or administrator to resign, when it appears that such executor or administrator has published a notice of his intention to apply therefor in some newspaper in general circulation in the county for the period of four weeks prior to such application, and that he is not in default in any matter connected with the duties of his trust. Such executor or administrator shall pay the cost of the proceeding, and if the application is allowed, he shall surrender his letters to be canceled, and his powers as such shall cease from that time forward.

115.530 to 115.980 [Reserved for expansion]

PENALTIES

115.990 Penalties. Any person who wilfully sequesters or secretes any last will of a person then deceased, or who, having the custody of any such will, wilfully fails or neglects to produce and deliver the same to the judge of the court having jurisdiction of its probate, or to any executor named therein, within a reasonable time after the death of the testator thereof, with intention to injure or defraud any person interested therein, is punishable, upon conviction, by imprisonment in the county jail not more than one year or by a fine not exceeding $500.

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Sam R. Haley, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on November 15, 1965.

Sam R. Haley
Legislative Counsel