

## ELDER LAW / PROTECTIVE PROCEEDINGS

**UPDATE OF OREGON PROBATE CODE  
ORS CH. 111, 112, 116, 419B  
2015 OREGON LAWS CH. 387 (SB 379)**

Senate Bill 379 updates the probate statutes relating to wills and intestate estates. The bill creates a process for introducing a writing as a will, revocation of a will, or addition to a will when execution requirements are not met; creates an avenue for inheritance for a child conceived posthumously; allows continuation of wills executed by domestic partners if they later marry; allows express limitation or exclusion of an individual or class within a will; specifies that termination of parental rights is included as forfeiture of share by parent; requires diligent search and inquiry prior to property escheating to state; clarifies rights of child adopted after domestic partners marry; requires signatures of witness to will to hear or observe testator direct another to sign will, and sign the will within a reasonable time before testator's death; allows contemporaneously executed affidavits to be counted as signatures; prohibits electronic documents as formal will; allows digital statement or list disposing of personal effects; prohibits disposal of money, business property, or certificates of title through digital writing; and clarifies statutes on enforcement of no-contest clauses and partial revocation of will.

One of the more significant changes made by SB 379, found in section 29, is the adoption of the doctrine of "harmless error." This doctrine was developed to address the situation when mistakes were made in the execution of a will, codicil, or written revocation of a will, rendering the document ineffective. SB 379 creates a process whereby a proponent of a

document may present evidence to the court to demonstrate the decedent's intent to adopt the document. The standard of review to establish harmless error is clear and convincing evidence.

*Effective date: January 1, 2016. The amendments apply to decedents dying and wills and writings executed after the effective date.*

**SEARCH WARRANTS  
ORS 133.545****2015 OREGON LAWS CH. 415 (HB 2225)**

House Bill 2225 amends ORS 133.545. Circuit court judges are now authorized to execute search warrants outside the judicial district in which the court is located if (1) an enumerated offense involves a victim 65 years of age or older at the time of the offense; (2) the search is for financial records; and (3) the person requesting the search warrant is not able to ascertain at the time of the request the proper place of trial for any of the enumerated offenses. The enumerated offenses are criminal mistreatment in the first degree, identity theft, aggravated identity theft, computer crime, fraudulent use of a credit card, forgery in any degree, criminal possession of a forged instrument in any degree, theft in any degree, or aggravated theft in the first degree.

*Effective date: January 1, 2016.*

**DEFINITION OF VICTIM EXPANDED  
ORS 137.103, 137.106, 161.685  
2015 OREGON LAWS CH. 9 (HB 2226)**

House Bill 2226 expands the meaning of "victim" as defined in the restitution provisions

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of ORS 137.103 to include decedents who suffered or did suffer economic damages as a result of an offense; the estate of the decedents who suffered or did suffer economic damages as a result of an offense; and the estate, successor in interest, trust, trustee, successor trustee, or beneficiary of a trust that suffered economic damages as a result of an offense.

*Effective date: January 1, 2016.*

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## **DEFINITION OF SEXUAL ABUSE LIMITED ORS 124.050**

### **2015 OREGON LAWS CH. 416 (HB 2227)**

House Bill 2227 limits the application of “sexual abuse” as defined in ORS 124.050(11)(a). The amendment carves out from the definition of “sexual abuse” the consensual sexual contact between an elderly person and an employee of a facility who is also the spouse of the elderly person. Prior to the effective date of HB 2227, only consensual sexual contact between an elderly person and a paid caregiver is exempt from the definition of “sexual abuse.”

*Effective date: January 1, 2016.*

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## **MODIFICATION OF OREGON UNIFORM TRUST CODE ORS 130.230, 130.232, 130.715, 130.730**

### **2015 OREGON LAWS CH. 126 (HB 2331)**

House Bill 2331 makes several changes to ORS Chapter 130, Oregon’s Uniform Trust Code. Legislation in 2013 had the effect of preventing the application of the “Separate Share Rule” in IRC section 663 to Oregon trusts. This rule allows a trust’s creator to choose to provide in the trust document whether the trust will be divided into separate shares that would benefit separate beneficiaries. HB 2331 reinstates this option for a settler in Oregon.

HB 2331 also authorizes trustees to distribute capital gains from an existing irrevocable trust to pass through the capital gains to the beneficiary and thus taxed to the beneficiary and not the trust. This option avoids the higher capital gains rate applied to trusts.

Finally, HB 2331 codifies the early vesting rule of trusts. This rule holds that trust interests vest when the grantor of the trust created the trust or when the trust became irrevocable, not at a later date, unless the trust document clearly indicates a different intent. 2013 legislation had created some confusion whether this was still the rule in Oregon, so HB 2331 codifies the rule.

*Effective date: January 1, 2016. The amendments apply to trusts executed on or after the effective date.*

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## **PETITION FOR APPOINTMENT ORS 125.240, 125.475**

### **2015 OREGON LAWS CH. 364 (HB 2349)**

House Bill 2349 amends ORS 125.240 to require additional information in the petition for appointment of a professional fiduciary as follows:

- (1) The investment credentials and licensing of the individual responsible as, or acting on behalf of, the professional fiduciary;
- (2) Whether there is any revenue-sharing arrangement between the professional fiduciary and any other person;
- (3) The method in which fees will be assessed or charged, including commissions, monthly charges, and any other method; and
- (4) An acknowledgement that the professional fiduciary will make investments in accordance with ORS 130.750 to 130.775 (The Uniform Prudent Investor Act).

*Effective date: January 1, 2016.*

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## **DISCRETIONARY WAIVER OF FILING FEE ORS 125.075**

### **2015 OREGON LAWS CH. 365 (HB 2361)**

House Bill 2361 amends ORS 125.075, which provides for filing of objections or motions by an interested person in a protective proceeding. The amendment allows the court the discretion to waive the filing fee for an objection or motion when the interested party is the respondent, protected person, the office of the long-term-care ombudsman, or a system to protect and advocate the rights of individuals as provided in ORS 192.517. An example of a system to protect and advocate is the nonprofit law office Disability Rights Oregon.

*Effective date: January 1, 2016. This amendment applies to protective proceedings commenced on or after the effective date.*

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## **ATTORNEY FEES ORS 125.098**

### **2015 OREGON LAWS CH. 127 (HB 2362)**

House Bill 2362 amends ORS 125.098(2), which lists a number of factors for a court to consider in determining

whether to award attorney fees. Previously, no factor was weighted higher than another. Under HB 2362, the court is now required to give the greatest weight to one factor: “the benefit to the person subject to the protective proceeding by the party’s action in the proceeding.”

*Effective date: January 1, 2016.*

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## **CLAIMS ON BEHALF OF MINORS ORS 31.700**

### **2015 OREGON LAWS CH. 213 (HB 2964)**

House Bill 2964 amends ORS 31.700(1) to empower conservators for an estate of a person under 18 years of age, along with guardians ad litem, to file a cause of action for recovery of damages to a child by a wrongful act. Prior to HB 2964, only a guardian ad litem is empowered to seek recovery.

In addition, HB 2964 distinguishes the procedural effect of an accompanying consent to include in the cause of action the damages as, in all the circumstances of the case, may be just, and will reasonably and fairly compensate for the doctor, hospital, and medical expenses. If the consent is filed by a guardian ad litem, a court has the discretion to allow the filing. Upon the court’s approval of the consent filing, then no court shall entertain a cause of action by the parent, parents, or conservator for doctor, hospital, or medical expenses. If the consent is filed by a conservator, the court has no discretion whether to allow the filing. Again, as with a consent filed by a guardian ad litem, upon filing of the consent, no court shall entertain a cause of action by the parent, parents, or conservator for doctor, hospital, or medical expenses.

*Effective date: June 2, 2015.*