

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: SB 236 Proposed Limits on Fees Allowed in Probate to Heir Search Firms

Submitted by: Estate Planning Section

Legislative Contact: Susan Grabe
Phone : (503) 431-6380
E-mail: sgrabe@osbar.org

1. Does this amend current law or program? This is a new statute.

This proposal would create a new provision which regulates the fees charged for locating devisees or heirs. The Estate Planning Section envisioned the new law as a part of ORS Ch. 112.

2. PROBLEM PRESENTED (including level of severity):

Current Status of Heir Search Firms and Practices.

An industry of heirship search firms has developed which exploits two problems: (1) gaps in family relationships making it difficult to identify heirs; and (2) delays in notice to heirs and devisees. Currently there is no regulation of these heir searchers.

Agents of national search firms appear daily in probate courts throughout the state and review records of recently filed probates. For those in which heirs or devisees may be missing, these search firms use extensive networks spreading around the world and modern data bases to find the missing individuals. They will then approach them to inform them (vaguely) that they may be entitled to receive money and that for a share they will assist them in recovering the funds. A typical share is one-third to one-half for heirs found in the United States. Fees can be higher for heirs found overseas.

While it may be assumed that most heir searchers are honestly filling an economic niche, there have been abuses:

- The fee structure creates an incentive to find people with similar names who are not in fact heirs. Heirship records have been presented based on false relationships — the claimed heirs were descendants of someone with the same name as an ancestor of the decedent. It is also practically impossible to verify heirship records from Eastern Europe, Asia, Latin America and the underdeveloped world.
- In one case a probate was filed in Oregon identifying heirs in Europe by name and address. The next day those heirs were contacted by independent heir searchers hoping they had not heard of their inheritance and trying to get them to sign fee agreements to recover their inheritances. Particularly in parts of the world where

government corruption is rampant it is easy to convince heirs before they receive formal notice of a probate that they must pay a bribe to secure an inheritance.

Oregon's Probate Code and how this affects the number of heirs entitled to a share of the estate.

Probate is the process of steering unsupervised assets of a decedent to creditors, heirs and devisees entitled to them. Part of the statutory scheme for protecting these assets is regulation of compensation to those who participate in the process. Oregon already has statutes which regulate:

- Fees of personal representatives, which are set by statute, subject to modification by the probate court. ORS 116.173.
- Fees of the attorney for the personal representative, which must be approved by the court. ORS 116.183.

This proposed legislation would add a new category of persons involved in probate whose fees are regulated in the process.

The 1969 Probate Code revision made a number of changes to the law regarding heirship in Oregon, which affected the number of heirs who take by representation.

- The 1969 code, for the first time, allowed all collateral heirs to take by right of representation. The concept of "right of representation" is that when an heir dies, the descendants of the heir take the share the heir would have received. That change greatly increased the number of heirs when someone dies without descendants. Someone who dies with no spouse or descendants and who was an only child may well have over 100 heirs.

Other States Regulate Heir Search Fees.

Many states regulate fees paid to independent search firms. Fleck, Carole "Sleuths Find Lost Money, Consumers Be Careful", *AARP Bulletin*, December 2001; Klein, Karen E. "Where There's a Will, There's a Business", *Business Week online*, February 13, 2002. These limits generally appear in the context of unclaimed property, not heirship. Commonly all fees are prohibited until after a reasonable period of time has expired for the property owners to be found by other means or to come forward themselves.

In California the maximum fee after the waiting period is 10%. Washington limits fees to 5%. Idaho makes finders fee agreements unenforceable for the first two years after it receives unclaimed property.

3. SOLUTION:

Amend the Probate Code to:

1. Provide that contracts for payment of fees for finding heirs or devisees entered into within one year of the death of the decedent are against public policy and void, if the consideration for the contract would be paid by an heir, devisee, or the estate.

2. Provide the following exceptions:

(1) contracts approved by the probate court;

(2) contracts entered into by the Department of State Lands, by the personal representative or by a person reasonably expecting to be appointed personal representative and making a pre-probate search to comply with ORS 113.035(6) for a reasonable non-contingent fixed or hourly fee; and

(3) contracts for fees not exceeding specified percentages of the value of the share of the person found. Exclude from the prohibition (1) contracts for legal services by attorneys; (2) routine genealogical searches to identify family not related to a potential inheritance; and (3) contracts relating to heirs or devisees intentionally omitted from the probate petition.

3. Provide that all contracts entered into after the one year period are against public policy and void unless they include a 10 day right of rescission, clearly stated in the contract.

4. Require that distributive shares in probate be distributed to heirs or devisees, not to heir finders, except to the extent that assignments are duly acknowledged by an heir or devisee and filed with in the probate proceedings. The proposed rules would apply to contracts signed by heirs or devisees of a decedent to the extent the estate is subject to probate in Oregon.

In many cases missing heirs or devisees are briefly out of touch or without a home base, but make contact with family once or twice a year. Giving the personal representative a reasonable period of time to find these individuals assures they, not an unrelated heir searcher, will receive their inheritance.

In some cases it can be extraordinarily simple to find heirs. In such cases the fee should be proportionate to the work involved

A personal representative will still be able to hire an heirship search firm at reasonable rates to assist in fulfilling the personal representative's obligation to search for heirs and devisees. The Department of State Lands retains heirship search firms in appropriate escheat estate cases at hourly fees to assist in locating heirs and devisees.

4. **PUBLIC POLICY IMPLICATION** of this proposed legislative change: This is a protective statute designed to assist consumers.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education? No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group? No.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

The heir search firm industry, missing heirs, and Division of State Lands would all be interested in this legislation.

8. **Has this been introduced in a prior session?** In 2003, the first draft of SB 64 included (in Sec. 5) this proposal. SB 64 was amended to exclude this language, and the bill passed without the heir search fee limitations.

The Division of State Lands supported the proposal in the 2003 session.

Heir Search Firms were not supportive.