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Dated 7/14/10
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12.045 MEDIATION IN PROBATE PROCEEDINGS

(1) Scope and Objectives. Probate proceedings shall be subject to mediation in accordance with these rules.

(a) Unless excluded below, all matters in Chapters 111 to 116 and 125 to 130 of the Oregon Revised Statutes under the jurisdiction of the Circuit Court shall be subject to mediation. These include protective proceedings, gifts, trusts, health care directives, powers of attorney, probate estates and estate matters outside of probate.

(b) The following matters are excluded from mediation: temporary protective proceedings under Chapter 125.

(c) If there is a dispute about whether a specific matter is subject to mediation under these rules, a court shall make the determination and shall rely on the policy to encourage the use of mediators in alternative dispute resolution and to discourage litigation.

(d) Mediation shall occur with the objectives of allowing parties to air their grievances informally, craft personal and creative solutions, forestall future possible disputes, work in an atmosphere that is outside of the formal rules of the courtroom, and to save on the expense of the judicial process.

(2) Presentation for Mediation

(a) Matters may be assigned for mediation by order of the court on its own motion.

(b) Matters may be mediated by agreement of all of the parties or notice by any party as set forth herein. A party may notice mediation without court permission.

(3) Pre-Filing

A matter may be mediated before the filing of a legal proceeding. The mediation shall occur in substantially the same manner as if a legal proceeding had been filed except that the court cannot be used to resolve disputes in the mediation unless a legal proceeding is filed.

(4) Procedure – No Hearing Set

Mediation before a hearing has been set shall proceed as follows:

(a) A party seeking to mediate shall serve a written Notice of Mediation on all other parties stating that the party has elected to mediate the matter pursuant to these rules. The Notice shall include a plain and concise statement of the facts that inform the parties and the court of the questions in dispute, that a party may object to the mediation within twenty-one (21) days from the service of the Notice, and that if there is no objection each party must provide all parties a list of acceptable mediators within twenty-one (21) days from the service of the Notice. The Notice may include the noticing party's list of acceptable mediators. The Notice may be substantially in the form set forth as Appendix (See Notice Form, Page 114, Appendix of Forms) to these rules.

(b) A party objecting to mediation shall serve an Objection to Mediation on all other parties stating that the party objects to the mediation. The Objection shall include a plain and concise statement of the facts so

as to inform the parties and the court of why the party is objecting. The Objection must be made within twenty-one (21) days of the service of the Notice of Mediation. The Objection may be accompanied with pleadings necessary to set the substantive issues before the court.

(c) The court shall set a hearing on the Objection to Mediation for no later than fourteen (14) days from the filing of the Objection and shall notify all parties.

(d) A court hearing an Objection to Mediation shall order that mediation proceed except for good cause shown. If the court determines that the matter should not be subject to mediation, the court shall set the matter for a hearing on the substantive questions in dispute.

(5) Procedure – Hearing Already Set. Mediation after a hearing has been set and all parties notified of the hearing shall proceed as follows:

(a) A party cannot request mediation fewer than twenty-one (21) days in advance of the day that has been set by the court for a hearing unless all parties are in agreement.

(b) A party seeking to mediate shall follow the requirements of Rule 12.045 (4)(A) except that the Notice shall give seven (7) days from the service of the Notice for a party to object, the date, time, place and length of the hearing to the extent available, and the reason why the party is seeking to mediate after a hearing has been set.

(c) A party objecting to mediation shall follow the requirements of Rule 12.045 (4)(B) except that the Objection shall be made within seven (7) days from the service of the Notice.

(d) The court shall set a hearing on the Objection to Mediation for no later than fourteen (14) days from the filing of the Objection and shall notify all parties.

(e) A court hearing on an Objection to Mediation shall order that mediation proceed except for good cause shown. The court may take into account relevant facts about why the party seeking mediation did not request mediation in advance of the setting of a hearing. If the court determines that the matter should not be subject to mediation, the court shall set the matter for a hearing on the substantive questions in dispute.

(6) Other Procedure

(a) The court may modify the times for notice and objection if a party is unrepresented by legal counsel or for good cause shown. A modification can be retroactive.

(b) The calculation of the timelines under these rules shall be made in accordance with ORCP 7D(2)(d)(ii).

(c) Service of pleadings shall occur as set forth in Chapters 111 to 116 and 125 to 130 or shall be governed by the Oregon Rules of Civil Procedure. Proof of service of pleadings required by these rules shall be filed with the court with a copy of the pleading.

(d) In the event the times set forth in these mediation rules prejudice a party's statutory rights, the court shall provide relief for the party if the relief is consistent with the fair adjudication of disputes.

(e) If there is a dispute about whether or not an attorney or other advocate should be present at mediation under these rules, a court shall make the determination and shall rely on the policy to encourage the use of attorneys and advocates.

(7) Choice of Mediator

A mediator shall be chosen by the parties or the court as follows:

(a) By stipulation of the parties.

(b) If mediation is by order of the court or there is no Objection to Mediation, each party shall provide all parties a list of acceptable mediators within twenty-one (21) days of the order or from service of the Notice of Mediation.

(c) If there is an Objection to Mediation and a court determination that mediation shall proceed, each party shall provide all parties a list of acceptable mediators within seven (7) days of the order on the Objection.

(d) The parties shall make a good faith effort to find a mutually agreeable mediator. Once a mediator is chosen by the parties the noticing party shall inform the court of the mediator's name and address.

(e) If the parties cannot agree to a mediator within seven (7) days from the date the list was required to be furnished, a party may file a Motion to Appoint a Mediator. That motion must be served on all parties and any party may file a Response with a list of their choice of mediators and a plain and concise statement of facts about why one of the mediators on their list should be appointed. The court shall appoint a mediator qualified under paragraph (8) (b) of this rule that appears on the list of at least one party and is not required to hold a hearing.

(8) Qualification of Mediator

(a) A mediator qualified for probate mediation must be: (i) An attorney licensed to practice before the courts of this state having at least five years of experience in estates, trusts or protective proceedings, (ii) an individual with special skill or training in the administration of estates, trusts or protective proceedings, or (iii) an individual with special skill or training as a mediator.

(b) A mediator appointed by the court rather than by agreement of the parties shall also (i) comply with the Oregon Judicial Department Court-Connected Mediator Qualification Rules and (ii) have attended the Multnomah County Probate Department mediation training.

(c) The mediator shall not have an interest in any of the issues subject to dispute and shall not be related to a party.

(9) Date for Mediation

Upon the designation of a mediator by the parties or the court appointment of a mediator, the mediator and the parties shall establish a date for the mediation. If a date cannot be agreed upon within fourteen (14) days of the designation or appointment of the mediator, a party may motion the court to set a date for the mediation and the procedure shall be substantively similar to that for the appointment of a mediator in Rule 12.045(7)(E).

(10) Duration of Mediation

Parties to mediation shall mediate in good faith. In all cases the mediation must last at least three (3) hours unless the matter is conclusively resolved in less time or if the mediator concludes that no progress is likely to occur.

(11) Mediation Agreement. A resolution of the matter that is the subject of the mediation shall be memorialized in writing and signed by the mediating parties. Subject to the waiting period set forth below, the agreement shall be binding on all signors.

(a) Each party to the mediation shall have seven (7) days to repudiate the agreement.

(b) After seven (7) days the parties to the agreement shall reduce it to a court order or judgment for approval of the court.

(c) If a party repudiates the agreement, the party shall immediately inform the mediator and all parties and the mediator or any party shall inform the court. The matter shall be scheduled for hearing by the court in the same course and with the same priority on the docket as though there had been no mediation.

(12) **Costs of Mediation.** Costs of the mediation, including reasonable compensation for the mediator's services, shall be borne equally by the parties unless the parties agree otherwise.

(a) The details of mediation costs and fees, including the compensation of the mediator, must be set forth in a mediation agreement between the mediator and all parties to the matter.

(b) Nothing in these rules is intended to affect a party's right to petition for payment or reimbursement of fees and costs pursuant to another rule or statute in the underlying matter.

(c) A party shall not be kept from mediation due to indigency and the court shall establish procedures for mediation when there is an indigent party.

(13) **Compliance**

If a party does not comply with these rules, any other party may motion the court for an order compelling compliance. A party obtaining an order compelling compliance is entitled to reimbursement of costs and attorneys' fees incurred in connection with the compliance proceeding unless the court at the hearing determines otherwise for good cause shown. Reimbursement must be from the party or parties whose failure to comply was the basis for the petition.