ADVISORY COMMITTEE
Probate Law Revision

First Meeting, April 18, 1964

Suggested Agenda

1. Remarks by Allan G. Carson, Chairman of Law Improvement Committee.

2. Scope of probate law revision project (that is, areas of law to be covered by project).

3. Manner and methods of proceeding on project, including:

   a. Division of project into segments.

   b. Use of subcommittees.

   c. Use of more than one research assistant.

   d. Time schedule.

   e. Generation of suggestions (general publicity, meetings with representatives of interested groups, direct contact with interested groups and individuals, etc.).

   f. Liaison with interested groups and individuals (for example, Bar committees, probate judges and clerks, public agencies, etc.).

   g. Kinds of services and facilities desired by advisory committee.

4. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

First Meeting, April 18, 1964

Minutes

The first meeting of the advisory committee was convened at 9:30 a.m., Saturday, April 18, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members were present. Also present were Allan G. Carson, Chairman of the Law Improvement Committee; William E. Love, a member of the Law Improvement Committee; Sam R. Haley, Legislative Counsel; and Robert W. Lundy, Chief Deputy Legislative Counsel.

The following materials were given to each member:

(1) A loose-leaf notebook in which the member may file various materials received by him. Lundy pointed out that the notebook presently contained a roster of the members, a suggested agenda for the meeting, a copy of Staff Report No. 1 and a reproduction of comments and suggestions, including sources thereof, pertaining to Oregon's probate and related law that had been received by the Legislative Counsel's office in recent years. Lundy requested that each member check the information pertaining to the member on the roster and report any inaccuracies or omissions.

(2) A binder containing the text of the principal Oregon statutes pertaining to probate and related matters -- ORS titles 12 (Estates of Decedents) and 13 (Guardianships, Conservatorships and Trusts) -- and the Oregon annotations (including pertinent Oregon Supreme Court decisions, federal court decisions, Oregon Attorney General opinions and Oregon Law Review material) to those statutes.

(3) A copy of the recently enacted 1963 Iowa Probate Code, with comments of the special bar committee responsible for the revision project out of which that new code arose.

1. Remarks by Allan G. Carson, Chairman of Law Improvement Committee. Allan Carson commented briefly on the selection by the Law Improvement Committee of probate law as the subject of its first law revision project and the appointment of the advisory committee to assist on the project. He called attention to Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), and indicated that this report appeared adequately to reflect the background on the project and the role of the advisory committee as contemplated by the Law Improvement Committee. With respect to the scope of the project, he expressed the hope that the advisory committee would ultimately consider the entire area of probate and related law.

2. Scope of Probate Law Revision Project. Chairman Dickson asked committee members for their suggestions on the scope of the probate law revision project.

Allison expressed the view that the committee should not limit itself as to the scope of the project since changes in the probate law that might be proposed by the committee necessarily may involve adjustment of law not strictly probate in nature. Chairman Dickson commented on the work done in the early 1940's on a proposed new Oregon probate code by the Bar Committee on Probate Law and Procedure and its chairman, Mr. Lowell Mundorff, and indicated that since that time no comprehensive study on the subject had been made. After further discussion, Chairman Dickson announced that it appeared to be the prevailing opinion at this time, among advisory committee members and others, that the scope of the committee's work should be all-inclusive so that the best possible probate code would be proposed as the ultimate result of the project.

3. Manner and Methods of Proceeding on Project.

a. In general. Jaureguy expressed the opinion that the committee should decide whether to start with the present Oregon probate code and proceed to propose changes therein, as was done in the case of the revision of the guardianship and conservatorship statutes in 1960-1961, or to start with some other probate code -- for example, the Model Probate Code -- and work from that. He indicated that his preference would be to start with the present Oregon probate code. Allison agreed with Jaureguy's preference.

Zollinger suggested that criticisms of the new Oregon guardianship and conservatorship statutes enacted in 1961 be assembled and that the committee begin its work by proposing necessary improvements in these statutes. He expressed his belief that proposed legislation in this area could be decided upon and prepared in time for submission to the 1965 session of the Oregon legislature. Lundy called attention to the "Comments and Suggestions Received" section of each committee member's notebook, and indicated that a number of the comments and suggestions reproduced therein were addressed to the new guardianship and conservatorship statutes. He stated that the Legislative Counsel Committee had undertaken, but had been unable to complete, a follow-through consideration of these new statutes in 1962, and that the comments and suggestions referred to had been received in response to questionnaires and publicity initiated as a part of the follow-through.

Zollinger suggested that dower and curtesy was another area that the committee might consider and make recommendations on in the form of proposed legislation for submission to the 1965 legislature.

After further discussion, Jaureguy moved, seconded by Riddlesbarger, that the committee begin its work by proceeding with an immediate

program to produce something concrete in the form of proposals for improvement of a few selected areas of Oregon's probate law for submission to the 1965 legislature, and that determination of a long-range program be postponed until the immediate program is well under way and such determination can more intelligently be made. Jaureguy offered an amendment to his motion, which was accepted, that one area to be included in the immediate program be the proposal of necessary improvements in the guardianship and conservatorship statutes. Amended motion carried unanimously.

Chairman Dickson requested that committee members suggest particular areas of the probate law that might be in need of improvement, and that might be included in the immediate program. Frohnmayer described a typical situation in which a person, while not yet legally incompetent, is gradually approaching that status and needs some legal representative device to assist in taking care of his property or personal affairs, guardianship not yet being available or appropriate. He stated that present law does not provide a satisfactory method of determining the point of change from competency to incompetency. He suggested that this problem be investigated and some solution sought.

Love stated that, as Vice Chairman of the Bar Committee on Judicial Administration, he would appreciate an expression of opinion by the advisory committee as to whether the Bar committee should proceed to make a recommendation to the 1965 legislature concerning the transfer of probate jurisdiction to the circuit court in all counties, or whether the Bar committee should postpone this matter until such time as the advisory committee had an opportunity to look into the matter and perhaps make its own recommendation. Chairman Dickson agreed that the matter was one in need of study, and commented on a number of problems involved. Zollinger suggested that the Bar committee proceed with its own study, and then perhaps might wish to report its findings and recommendations to the advisory committee.

Zollinger suggested that summary proceedings for administration of small estates of decedents was an area of the probate law that should be considered with a view to improving and facilitating such proceedings. Butler and Wallace Carson agreed, Butler adding that the committee would be doing the public a real service if it could devise means of speeding up such proceedings and making them less expensive.

Chairman Dickson suggested that consideration be given to expanding to cover a widower the present provisions of law relating to allowances of temporary support for a widow. [Note: See, for example, ORS 116.005 and 116.015.]

Chairman Dickson appointed Zollinger as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the committee's immediate program,

and to submit recommendations thereon at the next meeting of the committee. Zollinger was authorized to designate other members of the committee to serve on his subcommittee.

b. Use of subcommittees. The use of subcommittees for various aspects of the probate law revision project was discussed. It was agreed that subcommittees should be employed where appropriate, and that since members of the committee reside in widely separated parts of the state, particular tasks may be assigned to individual members, who may then solicit such assistance as they choose from that available in their immediate vicinity.

c. Staff assistance. Haley commented on the availability of personnel of the Legislative Counsel's office to perform research and other staff functions for the committee, and the limitations necessarily imposed on that availability by reason of other functions required to be performed by that office. Lundy pointed out that his availability to serve the committee during the balance of 1964 was limited to between three and four months by reason of other commitments. The possibility of securing research assistance other than that provided by the Legislative Counsel's office was discussed. Haley suggested that law schools might be a source of research assistance worth investigating, and mentioned the Harvard Student Legislative Research Bureau and the staff of Vanderbilt Law Review, which has recently inaugurated a section to be devoted to legislation with emphasis on law improvement, as possibilities. After further discussion, Chairman Dickson appointed Riddlesbarger to investigate the possibility of securing outside research assistance for the committee.

d. Correspondence and publicity. Chairman Dickson requested that all communications from members of the Bar or from the public received by members of the committee that pertain to the work of the committee be forwarded to Lundy, who will acknowledge receipt on behalf of the committee and catalogue the comments, suggestions and other information contained in such communications for submission to and consideration by the committee.

Frohnmayer suggested that a letter, signed by Chairman Dickson as chairman of the committee, be sent to each probate judge in Oregon calling attention to the probate law revision project and requesting comments and suggestions. He also suggested that a similar letter be sent to the president of each local bar association. After further discussion, it was agreed that such letters should be sent to all probate judges, presidents of local bar associations, deans of the three Oregon law schools, banks, trust companies, title insurance companies, county clerks (probate court clerks) and state and federal tax agencies (i.e., State Tax Commission, State Treasurer and District Director of Internal Revenue).

Lundy explained that the Legislative Counsel's office had been attempting to publicize the activities of the Law Improvement Committee by sending news releases, usually following meetings of that committee, to the Oregon State Bar Bulletin, to newspapers published

in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. It was agreed that the same procedures should be employed in an effort to publicize the activities of the advisory committee.

Zollinger suggested that, in the interests of publicizing the probate law revision project and the work of the advisory committee, Staff Report No. 1 be submitted to the editorial staff of the Oregon Law Review for its view as to the possibility and suitability, with whatever revision necessary, of publication of the report in a forthcoming issue of the Review. Riddlesbarger was asked to check into this matter. Frohnmayer requested that, if Staff Report No. 1 is accepted for publication in the Oregon Law Review, the report specifically credit Mr. Lowell Mundorff for his work as Chairman of the Bar Committee on Probate Law and Procedure in connection with the proposed new Oregon probate code drafted by that committee in the early 1940's.

e. Liaison with Oregon State Bar and Bar committees. Allison pointed out that he currently is Chairman of the Bar Committee on Probate Law and Procedure, and asked that the advisory committee consider whether it would want recommendations by the Bar committee submitted to it, or would prefer that such recommendations be submitted to the legislature in the usual manner as Bar or Bar committee proposals, independently of the advisory committee. Frohnmayer suggested that liaison be established between the advisory committee and the Board of Governors of the Oregon State Bar, and further that Chairman Dickson, on behalf of the advisory committee, appear before the Board of Governors to call attention to the work of the advisory committee and seek to enlist the support and cooperation of the Board of Governors. Chairman Dickson agreed to do this. Chairman Dickson appointed Allison to act for the advisory committee in a liaison capacity with appropriate Bar committees, Allison's duties to commence after Chairman Dickson has contacted the Board of Governors and received their views on the matter.

f. Future meetings. The day, time and place of future meetings of the committee were discussed. It was agreed that Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland, was the best place for holding committee meetings, and that Saturday commencing at 9:30 a.m. were the best day and time. It was also agreed that, for the time being at least, meetings should be held at the call of the chairman.

Frohnmayer requested that minutes of meetings prepared and furnished to members be in abbreviated or summary form, rather than verbatim form, and that a copy of a suggested agenda be furnished to members before each meeting. Lundy indicated that every effort would be made to comply with this request.

4. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, May 16, at 9:30 a.m., in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The meeting was adjourned at 12 noon.

ADVISORY COMMITTEE
Probate Law Revision

Second Meeting

Date: Saturday, May 16, 1964
Time: 9:30 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of April 18 meeting of advisory committee.

2. Report on publicity (Lundy).

3. Report on liaison with Oregon State Bar and Bar committees (Chairman Dickson; Allison).

4. Report on possibility of outside research assistance (Riddlesbarger).

5. Report on content of immediate program (Zollinger).

   a. Dower and curtesy; election against will; related matters (Allison).

   b. Guardianship and conservatorship (Carson).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Second Meeting, May 16, 1964

Minutes

The second meeting of the advisory committee was convened at 10 a.m., Saturday, May 16, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Butler, were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

1. Minutes of Last Meeting. Jaureguy moved, seconded by Gooding, that reading of the minutes of the last meeting (April 18, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity. Lundy reported on measures taken since the last meeting to publicize the activities of the committee. He stated that news releases on the last meeting had been prepared and sent to the Oregon State Bar Bulletin, to newspapers published in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. He pointed out that the news release sent to the Bar Bulletin was published in the April issue. He stated that a form letter, signed by Dickson as chairman of the committee, calling attention to the existence and work of the committee and inviting comments and suggestions on problem areas in Oregon's probate and related law, had been sent to all probate judges, all county clerks, executives of certain banks and trust companies, state and federal tax agencies (i.e., State Tax Commission, State Treasurer and District Director of Internal Revenue), presidents of local bar associations and deans of the three Oregon law schools (a total of 116 letters). He indicated that the news release on the last meeting had been used by Allison as the basis for an item published in a newsletter distributed to all title insurance companies in Oregon and to many located outside the state.

Lundy further reported that he had received a letter from Professor Wendell M. Basye, Editor in Chief of the Oregon Law Review, indicating that Riddlesbarger had brought to his attention Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), expressing his interest therein and requesting permission for its publication, with some revision, in a forthcoming issue of the Review. Lundy indicated that he had responded, giving Basye the permission requested and, pursuant to the wishes of the committee expressed at the last meeting, asking that the report so published specifically credit Mr. Lowell Mundorff for his work as chairman of the Bar Committee on Probate Law and Procedure in connection with the proposed new Oregon probate code drafted by that Bar committee in the early 1940's.

3. Report on Liaison with Oregon State Bar and Bar Committees. Dickson reported that he had contacted the Board of Governors of the Oregon State Bar and requested approval of the Board on appointment of Allison to act for the committee in a liaison capacity with the Bar and appropriate Bar committees. Dickson indicated his expectation that the Board would act favorably on his request at its next meeting.

Allison reported that the Bar Committee on Probate Law and Procedure, of which he currently is chairman, had met recently and decided upon a number of changes in the probate law to be proposed in its annual report. He stated that the Bar committee was recommending that these proposals, if approved by the Bar at its annual meeting next fall, be submitted to the advisory committee and the Law Improvement Committee for their consideration and action, instead of being submitted directly to the legislature. He expressed the view that, since the Law Improvement Committee had been created pursuant to action by the legislature for the purpose of undertaking the work of continuous substantive law revision and had inaugurated the probate law revision project, it would be inadvisable to bypass that committee with approved Bar committee proposals within the purview of the probate law revision project and the advisory committee established to assist on the project. He indicated his belief that the Bar, acting at its annual meeting, would approve the recommendation of the Bar committee.

4. Report on Possibility of Outside Research Assistance. Riddlesbarger reported on his efforts to locate sources of research assistance, other than the Legislative Counsel's office, that might be available to the committee. He indicated that he had written to the deans of the three Oregon law schools, inquiring as to the availability of faculty and student research assistance. He stated that Dean Orlando J. Hollis, School of Law, University of Oregon, had responded to the effect that the matter would be brought to the attention of that school's faculty and students, but had pointed out that at the present time, with the current academic term coming to an end, students at least would have little time to devote to research assistance for the committee. Riddlesbarger indicated that he also had written to the staff of Vanderbilt Law Review, which had previously indicated some interest in Oregon's law improvement program in correspondence with the Legislative Counsel's office, and the Harvard Student Legislative Research Bureau, but so far had received no response from them.

Riddlesbarger further reported that Charles M. Lovett, attorney, Portland, (a member of the Bar Committee on Probate Law and Procedure) had indicated an interest in doing some research work for the committee, and that Campbell Richardson, attorney, Portland, had volunteered to undertake some research

in the area of summary proceedings for administration of small estates of decedents. Zollinger agreed to contact Richardson in order to get the small estate research started. Dickson commented that Alfred A. Hampson, attorney, Portland, had evidenced an active interest in improving the probate law. Riddlesbarger suggested that each other member of the committee should make an effort to furnish him the name of one attorney who might be interested in assisting the committee in a research capacity.

5. Report on Content of Immediate Program. [Note: At the last meeting (April 18, 1964) Dickson appointed Zollinger as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the committee's immediate program. Subsequently, Zollinger appointed Allison as chairman of a subcommittee to consider a revision of the statutes relating to dower and curtesy, their bar, their admeasurement and related matters; appointed Carson as chairman of a subcommittee to undertake a critical examination of the new guardianship and conservatorship statutes enacted in 1961 and the several criticisms thereof that have been received; and appointed Butler as chairman of a subcommittee to consider the matter of summary proceedings for administration of small estates of decedents. Because of unexpected illness, Butler was unable to undertake his assignment. The other two subcommittees (dower and curtesy and guardianship and conservatorship) considered the matters assigned to them and prepared reports thereon for submission to and consideration by the advisory committee.]

a. Dower and curtesy. Allison submitted and explained the report of his subcommittee on dower and curtesy. [Note: A copy of this report, altered somewhat as to form and style but not changed as to substance, constitutes Appendix A to these minutes. Briefly, this report (1) calls attention to a number of problems and defects in the present statutory provisions for release of dower and curtesy interests of incompetents and recommends that a simplified procedure (i.e., bar by conveyance executed by the guardian of an incompetent) be substituted therefor, and (2) proposes three changes in the nature of the dower and curtesy interest, which are (a) changing the interest from a life estate to a fee estate, (b) changing the amount of the interest from one-half to one-fourth and (c) limiting the interest to land owned by the deceased spouse at the time of death, thus abolishing the present inchoate interest.]

In response to a question by Frohnmayer as to the scope and purpose of committee discussion on the problems of dower and curtesy at this time, Dickson indicated that it was his thought that preliminary ideas on the matter should be presented and discussed, then some research done on ideas which the committee considers worth further investigation and then committee determination as to whether some proposals can be

agreed upon for submission to the 1965 legislature. Zollinger and others agreed in general with the approach outlined by Dickson.

(1) Release of dower and curtesy interests of incompetents. With respect to the proposal for substitution of a simplified procedure for the present statutory provisions for release of dower and curtesy interest of incompetents, Allison, Riddlesbarger and Zollinger commented that if the proposal to abolish the inchoate interest were adopted, there would be no problem of release of interests of incompetents to deal with. Following extended committee discussion of the matter of changing the nature of the dower and curtesy interest and initial adverse reaction to abolishing all inchoate interest, Dickson proposed that the committee proceed to have prepared a draft of proposed legislation on the matter of release of the interests of incompetents for consideration by the committee pending research and further consideration on the matter of changing the nature of the interest. Allison pointed out that the report of his subcommittee probably set forth sufficient guidelines for preparation of such a draft. Riddlesbarger moved, seconded by Zollinger, that Lundy prepare a rough draft of proposed legislation based upon the recommendation contained in the subcommittee report with respect to release of dower and curtesy interests of incompetents. Motion carried unanimously.

(2) Changes in nature of dower and curtesy interest. The proposals for changing the nature of the dower and curtesy interest were discussed at length.

(a) Changing interest from life estate to fee estate. A poll of the members present disclosed that all agreed that changing the dower and curtesy interest from a life estate to a fee estate would be feasible and desirable.

(b) Changing amount of interest from one-half to one-fourth. With respect to the proposal to change the amount of the dower and curtesy interest from one-half to one-fourth, Allison pointed out that the proposed amount was the same as the present amount of the interest in personalty which a surviving spouse may elect to take instead of under the will of the decedent (ORS 113.050). Riddlesbarger indicated that he was somewhat inclined to favor doing away with dower and curtesy altogether and simply have an allowance to the surviving spouse as determined by the court in terms of any property that might exist at the time of the death of the decedent, and suggested that the court, in making its determination, might look at the situation much in the same manner as it does in divorce cases. Gooding commented that in divorce cases each spouse was available to testify as to the situation, whereas in the case of a decedent's estate the decedent would not be available to afford the court the benefit of his testimony on the situation. Riddlesbarger responded that the court in the case of a

decedent's estate would have the benefit of the testimony of heirs and perhaps others, at least in the instance of a will contest.

Frohnmayer questioned the selection of one-fourth as the amount of the dower and curtesy interest and outlined some hypothetical situations in which this amount might not be equitable. He suggested the possibility of an approach, similar to that suggested by Riddlesbarger, wherein the court would have some authority, subject to suitable standards, to determine the amount of the interest. Carson pointed out that the suggestions made by Riddlesbarger and Frohnmayer, if adopted, might give rise to some difficult problems with respect to estate planning. Gooding commented that he was not satisfied that the one-fourth interest would be adequate in some situations, whereas in others it might be categorized as a windfall, but indicated that he would be willing to accept it, at least initially. He also indicated that he was interested in further exploration of the approach suggested by Riddlesbarger and Frohnmayer. Dickson, Jaureguy and Zollinger stated that they were not in favor of the approach wherein the court would have authority to determine the amount of the interest.

(c) Abolishing inchoate interest. With respect to the proposal to limit the dower and curtesy interest to land owned by the deceased spouse at the time of death, thus abolishing the present inchoate interest, Allison suggested that the proposal was not as radical as it might sound, and indicated the present limitations on the interest which were described in the report of his subcommittee. He pointed out that the proposal is similar to that embodied in a draft of proposed legislation which had been prepared in the course of a probate law study currently under way in Wisconsin, a copy of which Lundy had sent him. In answer to questions by Jaureguy and Frohnmayer, Allison explained the effect of the proposal, and compared it with the consequences of a decedent dying without a will. Jaureguy commented that the principal type of situation in which the surviving spouse would be prejudiced under the proposal would be where the decedent disposed of all his realty before his death. Riddlesbarger remarked that a decedent presently can defeat his surviving spouse's election as to personalty by disposing of all of it during his life. He further commented that the purpose of dower and curtesy as presently constituted was to protect the surviving spouse against disposition of realty by the decedent during his life, that if both spouses wanted to join in such disposition it was their own concern, that the problem was to protect the surviving spouse against the decedent who did not wish to protect the survivor by leaving some property interest to the survivor, and that if the survivor should be protected, he should have some right of veto of such disposition. Allison pointed out that Alaska statutes provide the surviving spouse

with some protection against inter vivos disposition of realty by means of an inchoate interest in the homestead, and that under such statutes both spouses must join in a conveyance of the homestead.

A poll of the members present on the proposal to abolish the inchoate interest disclosed initial adverse reaction on the part of some, while the remainder were undecided at this time and expressed a desire to devote more time to consideration of the proposal. There was an indication that some members might favor abolishing the inchoate interest with the exception of such an interest in the homestead, as provided in the Alaska statutes to which Allison had previously referred.

Allison expressed the opinion that if the inchoate interest were abolished, the abolishment would have to operate prospectively as to property acquired after the effective date of the abolishing legislation, and that the abolishment could not operate retroactively as to property acquired before that date, on the theory that the inchoate interest was a property right. Jaureguy, on the other hand, advanced the view that the inchoate interest could be abolished retroactively; that existing inchoate interests could be abolished.

It was the consensus of the committee that the matter of changing the nature of the dower and curtesy interest in the particulars proposed should be given more consideration and that some research should be done on the matter. Riddlesbarger agreed to contact Lovett and Hampson (Portland attorneys referred to previously in these minutes as perhaps being interested in doing some research work for the committee) and to determine whether either or both would be interested in undertaking some research on the problem of the nature of the dower and curtesy interest and the proposals made for changing it. Upon Zollinger's suggestion, the committee requested that Lundy supply to each member a copy of the Alaska statutes and a copy of the draft of proposed legislation relating to family rights in estates of decedents prepared in the course of the current Wisconsin study on probate law, both of which Allison had previously referred to. Lundy agreed to furnish the materials requested.

b. Guardianship and conservatorship. Carson submitted the report of his subcommittee on guardianship and conservatorship. [Note: A copy of this report constitutes Appendix B to these minutes. This report consists of the comments and recommendations by members of the subcommittee on matters assigned to them by Carson, primarily the comments and suggestions pertaining to guardianship and conservatorship that are reproduced in the "Comments & Suggestions Received" section of the advisory committee notebook.]

(1) Comment & Suggestion No. 2 -- Appraisal of estates of decedents and wards. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 2 that subsection (3) of ORS 126.230 (appraisal of property of ward) and ORS 116.420 (appraisal of property of decedent) be amended to require appraisal of all property unless the court orders that less than all the property be appraised. Lundy pointed out that Comment & Suggestion No. 13 (which Carson had assigned to Butler, but which Butler, because of unexpected illness, was unable to report on) made a similar proposal with respect to subsection (3) of ORS 126.230.

Zollinger indicated that he did not favor the proposal as it applied to guardianship, and commented that in guardianship appraisal should be required only when it served a useful purpose. Frohnmayer and Gooding expressed agreement with Zollinger. Carson suggested that appraisal facilitated determination by the court of the amount of the bond of a guardian. Zollinger expressed the view that the burden of appraisal was greater than was justified for the sole purpose of determining the amount of the bond. Dickson commented that in practice, in determining the amount of the bond, he relied upon the inventory filed by the guardian, and that he seldom required appraisal except when the guardian proposed to sell property of the ward. Allison pointed out that initial appraisal of the property of a decedent is necessary for inheritance tax purposes, but that this reason for appraisal does not exist in the case of a guardianship. He commented that determination of the amount of the bond of a guardian does not have to be based upon appraised value of the property of the ward, and expressed agreement with Dickson on the point that appraisal was not necessary in guardianship except where property was to be sold. Zollinger moved, seconded by Gooding, that the amendment of subsection (3) of ORS 126.230 recommended by Carson and Comment & Suggestion No. 13 not be adopted. Motion carried unanimously.

Allison called attention to the fact that the Bar Committee on Probate Law and Procedure had submitted to the 1963 legislature proposed legislation that would have permitted the court to waive appraisal of property of a decedent in cases where the value thereof could be determined without appraisal, but that the legislature had not enacted the proposal. He indicated that the Bar committee intended to again make this proposal in its current annual report, and that this proposal, if approved by the Bar at its annual meeting next fall, would come before the advisory committee for consideration and action. The committee decided to postpone consideration and action on the amendment of ORS 116.420 (appraisal of property of decedent) recommended by Carson.

Frohnmayer asked whether the committee should communicate with persons who send in comments and suggestions and report

committee action thereon. Riddlesbarger remarked that this might be premature, since the committee might later decide to take different action. Zollinger indicated he was not in favor of corresponding with such persons individually and attempting to explain committee action to them, and suggested that the better approach would be to disseminate information generally that the committee was considering problems raised by such comments and suggestions.

(2) Comment & Suggestion No. 6 -- Guardianship; disposition of nonresident's property by foreign guardian. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 6, concerning the suggestion of Judge Johnson that "some confusion seems to exist as to how to accomplish the provisions of" ORS 126.565, and pointed out that he was unsure as to what constituted the "confusion." Gooding moved, seconded by Carson, that Lundy communicate with Judge Johnson and request more detail on the "confusion." Motion failed, with Carson and Gooding voting yes, and Allison, Dickson, Frohnmayer, Jaureguy, Riddlesbarger and Zollinger voting no.

(3) Comment & Suggestion No. 23 -- Guardianship; access of guardian to ward's safe deposit box. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 23, concerning the requirement of the presence of someone in addition to the guardian at the time of the first opening of the ward's safe deposit box. Allison stated that Mr. Keller (the source of Comment & Suggestion No. 23) had reported on the matter to the Bar Committee on Probate Law and Procedure; that the State Treasurer's office, on being contacted by Keller, had reacted favorably to the proposal that someone in addition to the guardian be present at the time of the first opening of the ward's safe deposit box; that the Bar committee had approved the proposal for inclusion in its current annual report; and that the proposal, if approved by the Bar at its annual meeting next fall, would come before the advisory committee for consideration and action. He suggested, and the committee agreed, that the matter should be postponed until such time as the Bar committee proposal was before the committee.

(4) Conservatorship; winding up affairs after termination. Carson explained his recommendation in the subcommittee report on amendment of subsection (3) of ORS 126.660 (winding up affairs of conservatorship after termination). Zollinger moved, seconded by Carson, that the committee adopt in principle the amendment recommended by Carson and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried unanimously.

(5) Guardianship; winding up affairs after termination; winding up period. Carson explained his recommendation in the subcommittee report on amendment of ORS 126.530 (winding up

guardianship affairs by guardian) to permit the court to extend the 90-day winding up period.

Zollinger asked whether application to the court for extension of the 90-day winding up period should be made within that period. He suggested that the application for extension be served upon the persons, if any, entitled to receive the ward's property from the guardian, and that the application be made at least 10 days before expiration of the 90-day period, so that such persons would have an opportunity to appear and be heard on the requested extension. Frohnmayer agreed that there should be an opportunity for a hearing on the extension, but disagreed with the 10-day notice proposal, which might be the effect of requiring the application to be made at least 10 days before expiration of the 90-day winding up period. After further discussion, in which most members appeared to favor permitting the application for extension to be made after the 90-day period, Zollinger indicated that he was persuaded on this point.

Dickson asked whether one problem in connection with extension of the 90-day winding up period might be an undesirable postponement of delivery of property of a deceased ward by the guardian to the executor or administrator, and commented that in such a case one solution might be to permit the executor or administrator to obtain court approval for a partial delivery of the deceased ward's property. Zollinger suggested that some provision be made for the court, upon application by a deceased ward's executor or administrator, to order immediate delivery by the guardian to the executor or administrator of such of the ward's property not necessary in the winding up of the guardianship.

Allison suggested that ORS 126.530 be revised by dividing it into two parts, one part applying only when the guardianship is terminated by reason of the ward's death, and the other part applying when the guardianship is terminated for any other reason.

Zollinger referred to Comment & Suggestion No. 7 (which Carson had assigned to Butler, but which Butler, because of unexpected illness, was unable to report on), and suggested that some provision be added to the statutes that would assure that banks would honor checks issued by a guardian in winding up the affairs of the guardianship by clarifying the continuing control of the guardian over the ward's property during the winding up period.

Zollinger moved, seconded by Jaureguy, that ORS 126.530 be revised to (a) permit the court to extend the 90-day winding up period, with application therefor made either during or after that period, (b) permit the court to order a partial delivery of property of a deceased ward to the executor or administrator before expiration of the winding up period, (c) include

some provision clarifying the authority of the guardian as to the ward's property during the winding up period, particularly with respect to checks issued by the guardian during this period, and (d) make provision for winding up a guardianship terminated by reason of the ward's death separate from provision for winding up a guardianship terminated for any other reason; and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

Carson suggested that the requirement of paragraph (d) of subsection (1) of ORS 126.336 that a guardian file his final account within 90 days after termination of the guardianship not be changed, and the committee agreed.

(6) Comment & Suggestion No. 5 -- Guardianship; private sale of real property; published notice. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 5 that subsection (2) of ORS 126.441 be amended to require publication of notice of private sale of real property by a guardian in a newspaper of general circulation published nearest to the place of sale, instead of in a newspaper of general circulation in the county in which the property is situated, when there is no newspaper published in the county in which the property is situated. After discussion, the committee agreed that the recommended amendment should not be made. Lundy was directed to bring to the attention of the committee the wording of subsection (2) of ORS 126.441 when the committee considers subsection (2) of ORS 116.760 (published notice of private sale of real property of decedent).

(7) Comment & Suggestion No. 8 -- Guardianship; bond of guardian; waiver of requirement. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 8 that a guardian should be required to have some bond. After discussion, the committee agreed with the recommendation and that ORS 126.171 should not be changed.

(8) Comment & Suggestion No. 9 -- Sale of real property of decedents and wards; terms of sale. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 9, concerning terms and conditions prescribed by the court for the sale of real property of decedents and wards. After discussion, the committee agreed that the guardianship statutes (ORS 126.436 and 126.456) on the subject should not be changed, and that consideration of the decedents' estates statutes (ORS 116.755 and 116.810) on the subject should be postponed.

(9) Comment & Suggestion Nos. 14 and 18 -- Guardianship; accounting by guardian. Jaureguy explained his recommendations in the subcommittee report on Comment & Suggestion Nos. 14 and 18, concerning subsections (4) and (5) of ORS 126.336 (accounting by guardian). Lundy recounted some background on the drafting of subsections (4) and (5) of ORS 126.336 prior to enactment

in 1961, and pointed out that the two subsections appear to overlap and perhaps were inconsistent in so far as a guardian's final account is concerned. Frohnmayer questioned the desirability of giving a copy of each account of a guardian to the State Hospital, for example, under subsection (4). Dickson commented that it might be desirable to give a copy to the Board of Control to assist in administration of the statutes (ORS 179.610 to 179.770) relating to responsibility for the cost of care of persons in the State Hospital and other state institutions. Zollinger expressed the view that the Board of Control did not need a copy of each account for this purpose, but indicated that perhaps the Board of Control should receive a copy of the inventory. He also suggested that a sequence of persons to receive copies of accounts under subsection (4), starting with the competent spouse of the ward, then the competent adult children, then the competent parents and then the competent brothers and sisters. Allison moved that the matter of revision of subsections (4) and (5) be referred to Zollinger for his consideration and recommendation to be submitted at the next meeting of the committee. Motion seconded and carried. Zollinger agreed to undertake the assignment.

(10) Comment & Suggestion No. 10 -- Guardianship; Veterans Administration participation. Zollinger explained his recommendation in the subcommittee report on Comment & Suggestion No. 10 that subsection (3) of ORS 126.250 be deleted and that no change be made in ORS 126.131 and 126.346. After discussion, Zollinger moved, seconded by Frohnmayer, that the recommendation be adopted and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

(11) Comment & Suggestion No. 11 -- Guardianship; handling claims of minors and incompetents and transferring property without guardianship. Zollinger explained his recommendations in the subcommittee report on Comment & Suggestion No. 11, concerning handling claims of minors and incompetents and transferring property without guardianship. After discussion, Zollinger moved, seconded by Carson, that the recommendation to restrict the $1,000 limitation in ORS 126.555 to personal property, including choses in action, of the person under legal disability be adopted and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

The recommendation relating to cash sales of real property of a person under legal disability by a person under court order, but without guardianship, was discussed. Allison commented that he would like to see the concept of at least a short-term guardianship retained in such cases, with a guardian appointed for the particular purpose and discharged upon satisfactory proof to the court that he has carried out his task pursuant to the court order. Zollinger suggested that it might be appropriate to consider a guardian's bond in a larger amount in such cases. After further discussion, the committee agreed that the

matter should be referred to Allison for his consideration and recommendation to be submitted to the committee. Allison agreed to undertake the assignment.

(12) Comment & Suggestion No. 16 -- Guardianship; gifts from ward's estate; expenditures for ward's relatives. Zollinger explained his recommendation in the subcommittee report on Comment & Suggestion No. 16 that no change be made in ORS 126.295 (gifts from ward's estate; expenditures for ward's relatives). After discussion, Frohnmayer moved, seconded by Jaureguy, that the recommendation be adopted. Motion carried unanimously.

[Note: Comment & Suggestion Nos. 7, 12, 13, 15 and 20 were assigned to Butler, who, because of unexpected illness, was unable to report on them.] It was pointed out that the committee had previously disposed of Comment & Suggestion Nos. 7 and 13. The committee agreed to postpone consideration of Comment & Suggestion Nos. 12, 15 and 20 until Butler had an opportunity to consider and report on them.

Lundy pointed out that since enactment of the present Oregon guardianship and conservatorship statutes in 1961 there had been two enactments that had changed those 1961 statutes (ORS 116.890, 116.900, 126.436 and 126.490, relating to lease of real property of wards for purposes of exploring for or obtaining oil, gas and minerals; and ORS 126.250, relating to investment by guardians in common trust funds without prior court approval). Lundy suggested that, if the committee agreed, he might examine the provisions of these two enactments and bring to the attention of the committee any problems discovered. The committee agreed that Lundy should do this.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, June 13, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The meeting was adjourned at 2:15 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, May 16, 1964)

Subcommittee on Dower and Curtesy

Report to Advisory Committee

May 16, 1964

Mr. Allison, the chairman of this Subcommittee on Dower and Curtesy, was appointed by Mr. Zollinger pursuant to the latter's appointment by Judge Dickson on April 18 as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the immediate program of the Advisory Committee and to submit recommendations thereon at the meeting of the Advisory Committee scheduled for May 16. Mr. Zollinger is an ex officio member of this subcommittee. Mr. Allison appointed the other members of this subcommittee, who are Mr. Jaureguy and Mr. Riddlesbarger. The members of this subcommittee met on May 7, 1964, to consider preliminary problems involved in a revision of that area of the probate law relating to dower and curtesy, particularly ORS chapter 113.

Preliminary consideration was given to the provisions for release of dower and curtesy interests of incompetents contained in ORS 93.170 and 113.610 to 113.670. These provisions are criticized in Comment & Suggestion Nos. 3, 17 and 26, reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook. These criticisms are considered valid.

ORS 93.170 provides that any real property acquired in sole right by a spouse while the other spouse is committed "to a public insane asylum" may be conveyed without the joinder of the insane spouse during the commitment if the deed is accompanied by a certificate of the superintendent of the "insane asylum." Thus, in contrast to the overinvolved procedure for release of these interests of other incompetents, rights of dower and curtesy are effectively abolished as to property acquired and conveyed during the commitment of the other spouse. On the other hand, ORS 113.610 to 113.670 set up a procedure for release of these interests entirely separate and distinct from the guardianship statutes. The statutory procedure has the following defects:

1. The proceeding is brought in an equity court, not in the probate court where a guardianship may be pending.

2. The proceeding must be brought where the other spouse resides or where the property is situated, not where the guardianship may be pending.

3. The petitioner is the spouse who wishes to sell or mortgage, not the guardian.

4. Service must be made, in addition to the incompetent and his guardian, on his "next of kin, and all persons interested in the land." The problems of proper parties to be served are obvious.

5. If no guardian has been appointed, the court of equity shall appoint a guardian.

6. Persons served in the state have 10 days to appear, but the preceding statute section (ORS 113.620) requires that the hearing must be not less than four weeks from the order.

Mr. Zollinger suggested that the statute sections commented upon (ORS 93.170 and 113.610 to 113.670) be repealed, and that in their stead ORS 113.410 (bar of dower by conveyance) be amended to provide for bar by a conveyance executed by the guardian of an incompetent as provided in ORS 126.476, and that ORS 126.476 (exchange, partition, sale or surrender of ward's property) be amended to include, in subsection (2) thereof, cases where the interest of the ward is an inchoate dower or curtesy interest. The subcommittee supports this suggestion of Mr. Zollinger.

The subcommittee than considered the more fundamental question of a new definition of the interest. There was general agreement that an undivided fee interest, as provided in the 1963 Iowa Probate Code, would constitute on many counts a more substantial, workable and valuable property interest than the present life estate in an undivided one-half part of the land, "including any equitable estate in land."

The present dower or curtesy is valueless on vacant or nonincome property unless sold during the life estate, or unless admeasured and then sold. The difficulties of arriving at values of these interests are well known. Since they must be figured on an actuarial basis, the interest of the young widow or widower with a high life expectancy is much greater than that of the old survivor with usually much greater needs. Thus, the present system of admeasurement or sale value works exactly in reverse on the basis of need and relief to the aged survivor.

It was the consensus of your subcommittee that dower and curtesy should be an undivided one-fourth interest in the realty to conform with the undivided one-fourth interest in personalty allowed under ORS 113.050. Such an undivided fee interest would permit simple determination of the value in case of a sale or an admeasurement, and would permit simple allocation of rents and profits to the tenant in dower or curtesy. It would not operate to the disadvantage of the elderly survivor.

The next question considered was whether this undivided one-fourth interest should be limited to the property of which the deceased spouse died seised, which would then conform to the present interest in the personalty.

Upon analysis this proposal is not as radical as it sounds. This is now the rule for dower or curtesy interests of nonresidents (ORS 113.080). ORS 93.170 bars interests if acquired and conveyed during a commitment. ORS 113.090, which limits to 10 years after death the right to recover dower or curtesy, bars many undisclosed or unrealized inchoate interests. Practically all real estate holdings are now taken as tenants by the entirety or as tenants in common by the husband and wife. The requirement that the wife or husband join in a deed or mortgage to release inchoate dower or curtesy interests is universal. The inchoate interests are terminated by divorce or failure to survive the other spouse.

There may be some social benefit in giving one spouse an effective veto power over the sale or mortgage of property held in the name of the other spouse. As stated, that today is the unusual title holding.

On the other hand, if the proposal is adopted, the survivor would still be entitled to the homestead and to support (ORS 116.005 to 116.025). She would be entitled to one quarter of the real and personal property as against the will. The survivor's interest would be substantial, easily determined and a more valuable estate than under present law. The loss of the inchoate interest might well have a minimum practical effect and would eliminate many of the most difficult areas of interests of incompetents first discussed.

Stanton W. Allison, Chairman
Subcommittee on Dower and Curtesy

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, May 16, 1964)

Subcommittee on Guardianship and Conservatorship

Report to Advisory Committee

May 16, 1964

Mr. Carson, the chairman of this Subcommittee on Guardianship and Conservatorship, was appointed by Mr. Zollinger pursuant to the latter's appointment by Judge Dickson on April 18 as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the immediate program of the Advisory Committee and to submit recommendations thereon at the meeting of the Advisory Committee scheduled for May 16. Mr. Zollinger is an ex officio member of this subcommittee. Mr. Carson appointed the other members of this subcommittee, who are Mr. Butler and Mr. Jaureguy.

Mr. Carson assigned among the members of this subcommittee, for their consideration and recommendation, the comments and suggestions pertaining to guardianship and conservatorship that are reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook and a few other matters pertaining to this area of the probate law.

This report sets forth, for consideration and action by the Advisory Committee, the comments and recommendations by the members of this subcommittee on the matters assigned to them.

Comment & Suggestion No. 2

Subject: Appraisal of estates of decedents and wards.

Source: George H. Layman, Attorney, Newberg,

Commentator: Mr. Carson.

To the extent that this comment and suggestion relates to complete, or partial, appraisal of the estate of a ward, the existing provisions of ORS 126.230(3) do not appear to me to be objectionable, and, as I understand, this subcommittee is not expected at this time to report upon suggested amendments of the statutes governing appraisal of the estate of a decedent.

If any amendment of ORS 126.230(3) is to be recommended, I suggest that the recommendation be that that subsection be amended to read, in substance:

126.230 Inventory and appraisal of ward's property.

* * * * * * * * *

(3) The court may order [~~all or any part of~~] less than all the property of the ward appraised as provided in ORS 116.420 to 116.435. Otherwise, all the property of the ward shall be appraised as provided in ORS 116.420 to 116.435.

Recommendation of a like amendment of ORS 116.420, concerning appraisal of the estate of a decedent, might well be considered by the Advisory Committee on Probate Law Revision at the appropriate time.

Comment & Suggestion No. 6

Subject: Guardianship; disposition of nonresident's property by foreign guardian.

Source: Judge Charles M. Johnson, District Court, Clatsop County.

Commentator: Mr. Carson.

The comment and suggestion received by the Advisory Committee on Probate Law Revision in respect of ORS 126.565 is to the effect that confusion seems to exist in respect of the provisions (or some provision) of the section.

Although it does appear to me that the section could be clarified by causing it expressly to require that the "foreign guardian" therein mentioned be a "foreign guardian of the estate" of the nonresident, I do not suggest that that matter is the cause of the confusion that has been commented upon.

In his letter to me of May 8, 1964, concerning various matters, including this comment and suggestion, Mr. Robert W, Lundy has asked whether details concerning the confusion should be obtained from the judge from whom the comment and suggestion was received. I believe that this should be done.

Comment & Suggestion No. 23

Subject: Guardianship; access of guardian to ward's safe deposit box,

Source: William M. Keller, Attorney, Portland.

Commentator: Mr. Carson,

From a copy of a report dated February 20, 1964, that appears to have been made to the Probate Committee of the Oregon

State Bar by one of the members of that committee upon the question whether that committee should recommend legislation of this nature, the following excerpt is taken:

"ARGUMENTS AGAINST THE
SUGGESTED PROCEDURE

"1. The State Treasurer's office has no interest in a person's property prior to his death.

"2. It is impossible to prevent all defalcation; therefore, it is useless to impose heavy administrative duties to attempt to prevent the rare instance of defalcation under the circumstances suggested.

"3. Many people, particularly elderly, invalid or semi-senile individuals, exercise poor judgment in giving authority to others to enter their safe deposit boxes. The suggested solution only solves a small facet of the problem.

"4. The suggested solution would have no [e]ffect on the entry to a safe deposit box by a joint tenant, having joint access with a person under guardianship.

"The writer has considered such suggestions and recognizes that it is impossible to pass legislation which will make all people honest. However, it is pointed out that the real issue is the fact that, the letters guardianship or conservatorship, issued by the Court itself, can, under present procedures, be used as an instrument of fraud. The writer would oppose any attempt to require the Treasurer's office or bank official to be present at the opening of every safe deposit box. Such might prevent fraud, but it would also no doubt prevent the use of such form of custodial care. In a free society, a person is entitled to privacy, even at the expense of permitting him to make an unfortunate choice of agents, or to otherwise vest his confidence in persons not worthy thereof.

"If it is remembered that the purpose of the suggested legislation is to prevent the Court itself from being used as an instrument of fraud and defalcation, most of the objections which have been raised, vanish."

The arguments quoted above properly could, in my opinion, be supplemented by these additional observations, among others: Those wards who own assets, or evidences of assets, such as those commonly placed in safe deposit boxes, but who do not make use of safe deposit boxes, would not be protected by

enactment of this proposed legislation. Although the same observation might be made in respect of the safe deposit boxes to which deceased persons had rights of access at and before their deaths, nevertheless, the principal objective of the statute (ORS 118.440) which relates to the safe deposit boxes to which deceased persons had rights of access at and before their deaths, is to aid enforcement of the inheritance tax statutes, whereas this proposed legislation would not necessarily be of any benefit for that purpose.

Subject: Conservatorship; winding up affairs after termination.

Source: Mr. Zollinger.

Commentator: Mr. Carson.

[Note: In a letter to Mr. Carson dated April 20, 1964, Mr. Zollinger suggested that provisions for winding up a conservatorship and the discharge of the conservator be added to ORS 126.606 to 126.660. Mr. Zollinger's suggestion is not reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook.]

The statute governing termination of a conservatorship (ORS 126.660) would, in my opinion, be improved by an amendment prescribing in detail the procedure for the winding up of a conservatorship in the event of its termination by reason of the death of the ward. One manner in which this could be accomplished would be that of amending ORS 126.660(3) to read:

> (3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if living and competent, [~~and otherwise to the ward's personal representative.~~] or, if living and incompetent, to the guardian of the estate of the ward, or, if the ward has died, the affairs of the conservatorship shall be wound up in the same manner as provided in ORS 126.530 to 126.545.

Subject: Guardianship; winding up affairs after termination; winding up period.

Source: Mr. Carson.

Commentator: Mr. Carson.

[Note: The following comment and recommendation is not addressed to a comment and suggestion reproduced in the "Comments & Suggestions Received" section of the Advisory Committee

notebook. Rather, it pertains to another matter which Mr. Carson wishes to bring to the attention of the Advisory Committee.]

Because a disadvantageous situation can arise out of the 90-day limitation prescribed by ORS 126.530 for winding up the affairs of the estate of an incompetent ward following his death, I suggest that that section be amended to the extent, at least, indicated below:

> 126.530 Winding up guardianship affairs by guardian. Within 90 days after the date of termination of a guardianship of the estate, or, if necessary, within such further time as the court by order may allow, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties and the provisions of law applicable thereto shall continue for such purpose, as follows:
>
> (1) The guardian shall pay from the guardianship estate:
>
> * * * * *
>
> (c) If the guardianship is terminated by the death of the ward, and if the estate of the ward is solvent, and with prior approval of the court by order, expenses for the proper care, maintenance and support of the ward's surviving spouse and minor children during the [~~90-day~~] winding up period.
>
> * * * * *
>
> (4) Except as otherwise provided in subsection (5) of this section, if the guardianship is terminated by the death of the ward, and if the sale, mortgage or pledge of property of the guardianship estate is necessary for the payment of all expenses and claims referred to in paragraphs (a) and (b) of subsection (1) of this section, and if such sale, mortgage or pledge cannot be made and the proceeds used to pay all such expenses and claims within the [~~90-day~~] winding up period, the guardian shall pay none of such expenses and claims, but such expenses and claims are liens upon and shall be paid first from property delivered under subsection (3) of this section.

For example, this hypothetical situation may be considered: Substantial sums of money are owed on account of expenses and claims lawfully payable out of the estate of an incompetent ward. There are insufficient funds and potential

proceeds of mortgaging, pledging or selling personal properties of the estate with which to pay the expenses and claims. The guardian fails in his efforts to obtain an adequate and satisfactory mortgage loan on the security of any of, or all, the properties of the estate. A guardian's sale of the real property of the estate could provide the funds required for payment of all the expenses and claims. Consequently, the guardian commences proceedings for the sale of the real property of the estate. The guardian's petition for authority to sell the real property is filed before termination of the guardianship (ORS 126.530 (2) (c)) occurs by reason of death of the ward. The court, by order, authorizes the guardian to proceed with the sale. The proceedings for the sale of the real property progress to, and beyond, the final publication of the guardian's notice of sale. Reasonable grounds exist for the guardian's anticipating receipt of a satisfactory bid to purchase the real property before expiration of the 90-day winding up period. Actually, however, it so happens that, while negotiations for the sale remain pending between the guardian and a prospective purchaser, the 90-day period expires. Therefore, the guardian's sale of the real property "cannot be made and the proceeds used to pay all such expenses and claims within the 90-day winding up period," the sale proceedings are abandoned, and the guardian can pay "none of such expenses and claims" (ORS 126.530(4)). If the court could and would have (by order granted upon proper showing made by the guardian concerning the existing circumstances) extended the winding up period for an additional period of 30 days, the sale could have been consummated, and the sale proceeds could have been used in paying all such expenses and claims, within the additional 30-day period.

In view of the unqualified requirement of ORS 126.530 that the affairs of the guardianship be wound up within the prescribed 90-day period, I presume that ORS 126.535 was not intended to, and does not, authorize the court to extend the 90-day period. In any event, I submit that the court should expressly be allowed to exercise the discretion that this proposed amendment would allow.

Comment & Suggestion No. 5

Subject: Guardianship; private sale of real property; published notice.

Source: Mr. Jaureguy.

Commentator: Mr. Jaureguy.

The first sentence of ORS 126.441(2) should be amended to read:

"Except as otherwise provided in this subsection, before proceeding to sell real property at private sale, the guardian shall cause a notice of the sale to be published in a newspaper published in the county in which the property is situated, or if no newspaper is published in such county, then in a newspaper of general circulation published nearest to the place of sale . . ."

Comment & Suggestion No. 8

Subject: Guardianship; bond of guardian; waiver of requirement.

Source: Judge John C. Warden, District Court, Coos County.

Commentator: Mr. Jaureguy.

The letter from Judge Warden has been answered. ORS 709.240 provides that no bond need be given by a trust company when acting as guardian. In any case, the amount of the bond is discretionary with the court.

Comment & Suggestion No. 9

Subject: Sale of real property of decedents and wards; terms of sale.

Source: Judge Teunis J. Wyers, District Court, Hood River County.

Commentator: Mr. Jaureguy.

Judge Wyers suggests that the last sentence of ORS 126.436 is not entirely clear. It reads:

"A sale ordered shall be made as provided in ORS 126.441 to 126.466, and subject to such additional terms and conditions as the court may consider necessary or proper."

Perhaps this should be amended to read:

"and subject to such additional terms and conditions, if any, as the court may consider necessary or proper."

Comment & Suggestion No. 14

Subject: Guardianship; accounting by guardian.

Source: Harold V. Johnson, Attorney, Eugene.

Commentator: Mr. Jaureguy.

I would suggest that ORS 126.336(4) be amended as follows:

> "(4) The guardian of the estate shall give or mail a copy of each account to the person or institution having the care, custody or control of the ward, within 30 days after the same is filed."

Harold Johnson also suggests another amendment to ORS 126.336. He suggests that ORS 126.336(5) be amended to provide that service of the final account must be made "at least ten days prior to the date order approving final account is to be presented to the Court." It seems to me that this is implicit in the statute as it now is, which provides that within 10 days after the service those served may make and file in the guardianship proceeding written objections to the account. Should the guardian obtain an order approving the account before the expiration of such 10 days, such order would necessarily be set aside or modified if proper objections were filed within 10 days after the date of service.

Comment & Suggestion No. 18

Subject: Guardianship; accounting by guardian.

Source: James R. Ellis, Attorney, Portland.

Commentator: Mr. Jaureguy.

James R. Ellis of Portland suggests that in some cases if the "institution having the care, custody or control of the ward" (ORS 126.336(4)) sees the account and learns what the ward's assets are, "the cost of the nursing home's care is going to increase sharply." I would suggest that (1) there should be no necessity for any such service if there is a guardian of the person, and (2) in any case, such service should not be made upon a hospital or nursing home or any other institution except to an (to quote Mr. Ellis) "institution to which the ward has been committed."

Comment & Suggestion No. 10

Subject: Guardianship; Veterans Administration participation.

Source: Judge Samuel A. Hall, District Court, Curry County.

Commentator: Mr. Zollinger.

Prior to 1961, ORS 126.350 (repealed by chapter 344, Oregon Laws 1961) provided that when a ward received funds through the Veterans Administration, the VA might require the guardian to serve its representative with copies of all accounts, petitions for sale, lease or mortgage of property of the estate, petitions for allowances of any nature from funds of the estate and petitions for the investment of the funds of the estate. It also provided for such service at least 10 days prior to the time of hearing, unless waived in writing, and that the VA might appear in opposition to the petition or to require an accounting.

These provisions are preserved in ORS 126.346. They are criticized in Comment & Suggestion No. 10 as casting unnecessary burdens upon guardians, lawyers and courts, consuming time and expense to no purpose "if the court is doing its duty." The criticism may carry overtones of resentment.

Reference is also made to other sections relating to the Veterans Administration, ORS 126.131 and 126.250.

ORS 126.131 identifies the persons who are to be served with citation to show cause why a guardian should not be appointed and provides for service of citation upon the Veterans Administration when the proposed ward receives money from the United States through the Veterans Administration. This was not formerly required, but is appropriate because, as will appear in this note, the Veterans Administration should be afforded an opportunity to object to the appointment of a guardian or to the appointment of the petitioner or his nominee as guardian or to the amount of the bond or the sureties on the bond.

ORS 126.250 relates to investments by guardians and permits investments without court approval (1) in governments and (2) by corporate guardians in common trust funds consisting solely of governments, municipals and time or savings deposits and with court approval in other prudent investments. It preserves the prior provisions of ORS 126.350(3) requiring that notice of proposed investment be served upon the Veterans Administration and, to avoid any possible question, such notice is required even with respect to investments which may be made without court approval. In this respect, Comment & Suggestion No. 10 is justified. This is an unnecessary burden.

ORS 126.250(3) should be amended or deleted. Approval by or notice to the Veterans Administration should not be required for investments by individual guardians in governments or by corporate guardians in governments or qualifying common trust funds. I suggest that the provisions of ORS 126.346 are sufficient in this respect and that the whole of ORS 126.250(3) should be deleted.

It is noted that the former limitations upon guardian's compensation imposed by ORS 126.350 no longer exist and it may be observed that the reasonable compensation which the court may allow to the guardian and the reasonable fees of the attorney for the guardian may and should include compensation for services involving any duties to the Veterans Administration or pursuant to any of these statutes. Perhaps this suggestion should be communicated to the Bar Committee on Economics of Law Practice.

A principal reason for preserving ORS 126.346 and ORS 126.131 is that the Veterans Administration is charged with responsibility under Federal law, 38 U.S. Code 3202, to determine that the guardian is making proper application of funds which are paid to a guardian. I am surprised and somewhat critical of provisions authorizing discretionary suspension of payments for failure to account to the Administration or for maladministration of the estate. This, however, may not be modified by state law.

The Veterans Administration discharges its statutory duties through its Department of Veterans Benefits. Its chief attorneys act on its behalf in the determination whether to distribute to a custodian without requiring a guardianship and, where a guardian is appointed, in advising with the court in the selection of a person to serve in that capacity. The chief attorneys also determine whether accountings are made and, if made, are sufficient, whether funds are properly applied, whether investments should be approved, etc. This is treated at length in Title 38, Code of Federal Regulations, Part 13, defining the duties of the chief attorneys. They are such as require compliance with ORS 126.131 and 126.346. I do not recommend any amendment of these Sections.

Reports of this length may merit and frequently receive attention focused on the last paragraph. To avoid disappointment to readers who are less than avid, I repeat: I recommend that subsection (3) be deleted from ORS 126.250; I recommend no change in ORS 126.131 and 126.346.

Comment & Suggestion No. 11

Subject: Guardianship; handling claims of minors and incompetents and transferring property without guardianship.

Source: Judge Samuel A. Hall, District Court, Curry County.

Commentator: Mr. Zollinger.

A. This comment and suggestion proposes judicial approval of settlement of personal injury claims of minors and incompetents without the appointment of a guardian when the court is satisfied that the settlement is in his interest and that the proceeds will be applied for his benefit. ORS 126.555 does all this and more. It permits a person designated in an order to settle debts and other choses in action, both contract and tort claims, to receive payment thereof and to give acquittances therefor. It provides that funds so received shall be held, invested or used as the court shall order. It applies, however, only to those cases in which the value of the estate of the minor or incompetent does not exceed $1,000.

If the substance of the suggestion is that there should be no limitation in amount, I do not agree. The burdens of a guardianship are real and any which are not necessary should be modified or removed, but those which are deemed necessary are not less necessary because the estate consists of or includes a personal injury claim.

It would be reasonable to propose two amendments to ORS 126.555 - that the maximum value of the estate to which it may apply be increased from $1,000 to, say, $2,500, and that real property owned by the minor or incompetent be excluded from the determination of value. Concerning the increase in amount, I do not feel qualified to make a recommendation. This figure has been used in some other statutes, including ORS 117.315 affecting distribution of decedents' estates, ORS 126.516 relating to the termination of guardianships, ORS 708.520 and ORS 722.375 providing for payment without probate by banks and savings and loan associations. It seems rather clear that the burdens of guardianship are not made more necessary or more bearable by the circumstance that the minor or incompetent claimant owns real property or an interest in real property.

If the minor child has inherited real property from his father - an undivided interest in the home in which he lives with his mother and sister, valued at $25,000 - there is no more reason to require the appointment of a guardian in order to settle a $500 personal injury claim than there would be if he did not own any real estate.

ORS 126.555 now provides: "Where it appears that a guardian of the estate for a person under legal disability has not been appointed and that the value of the estate of such person is not more than $1,000, any court having probate jurisdiction may" etc. This should be amended to read " * * * and that the value of the personal property of such person, including choses in action, is not more than" etc.

B. This comment and suggestion also proposes, without any specific suggestion, that provision be made for transfer of title of real property without guardianship. I am sympathetic with the proposal. The elaborate procedures for sale of real property are certainly inappropriate when the estate of the minor or incompetent is of small value. I can not forget the occasion on which I conducted a guardianship sale of an undivided 1/64th interest in a vacant lot, then went back and did it over again because, early in the proceeding, I entered an order before the return day.

I invite consideration of two proposals:

1. Amend ORS 126.555 to provide also that real property of a person under disability may be sold by a person designated by order of a court having probate jurisdiction, when no guardian of the estate of such person has been appointed and the court finds that the value of his real property in this state does not exceed $1,000. The remaining provisions of the section as it is now enacted would apply to such sales and the proceeds thereof. I think I would limit such sales to cash sales.

2. When a guardian has been appointed, ORS 126.441 now provides for sale of property of a value not exceeding $1,000 without publication of notice of sale. The question arises whether any other corners can and should be cut in order to minimize burdens. I have none to recommend.

Comment & Suggestion No. 16

Subject: Guardianship; gifts from ward's estate; expenditures for ward's relatives.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Commentator: Mr. Zollinger.

ORS 126.295 is one of several new provisions enlarging the powers of probate courts in guardianship proceedings. Others include power to approve elections for or against taking under the will of the ward's deceased spouse and the election among options under life insurance policies.

This section permits the guardian, with the approval of the court, to make reasonable gifts to charitable and religious institutions, e.g., to continue to contribute to the ward's church and to continue to support the charitable institutions in which he had been active while competent, but only to the extent that his estate is not required for his support or the support of others to whom he owes a duty of support.

Subject to the same limitations, the section also permits the guardian, with the approval of the court, to provide or contribute to the support of others to whom the ward does not owe a duty of support but who are or have been related to the ward by blood or marriage, e.g., the orphaned nephew of the ward who has been a member of his household or the children of his deceased spouse.

Subject to the same limitations, the section permits the guardian, with court approval, to pay or contribute to payment of expenses of medical care and treatment and funeral expenses of persons who are or have been related by blood or marriage to the ward, e.g., his mother-in-law.

The suggestion is that the court shall be authorized to enter such orders only when notice of the application has been given to the ward and his spouse and children or, if there be no spouse or child, then to his parents, if any, otherwise to his next of kin.

I do not agree that the court's power to approve such application of the ward's estate upon the guardian's petition should be conditioned upon notice or citation to the relatives of the ward. I would not be critical of an amendment providing, as it is provided in ORS 126.555, that the court may act "with such notice as the court may order or without notice," but I prefer not to propose amendments which do not appear to be needed. On this account, I drag my heels.

If I am overruled, I object strenuously to any requirement for notice to any person under disability. There is little point in notice to the ward, who has been adjudged incompetent to make such decisions. There is still less point in requiring notice to the infant child or the senile parent of the ward. Beyond these relationships, next of kin are affected only to the extent that their windfall inheritance may be reduced in value.

I prefer no change to some change in ORS 126.295. If any change is made, I prefer that the court be authorized to act without notice or upon such notice as the court shall order. If notice is required, I prefer that the persons to be notified shall be limited to the spouse, if competent, the adult children, if competent, and, if there be no competent spouse or adult child, the competent parent or parents of the ward.

The following comments and suggestions were assigned to Mr. Butler. Because of unexpected illness, he was unable to undertake the assignment. Time did not permit reassignment of these matters to another member of this subcommittee. The Advisory Committee may wish to consider and act upon these matters without background comments and recommendations by this subcommittee, or to postpone such consideration and action until this subcommittee has had an opportunity to prepare such background comments and recommendations.

Comment & Suggestion No. 7

Subject: Guardianship; winding up affairs after termination; bank deposits.

Source: Judge Charles M. Johnson, District Court, Clatsop County.

Comment & Suggestion No. 12

Subject: Guardianship; appointment of guardian; service of citation.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Comment & Suggestion No. 13

Subject: Guardianship; appraisal of estates of wards.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Comment & Suggestion No. 15

Subject: Guardianship; appointment of guardian; factors considered.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Comment & Suggestion No. 20

Subject: Guardianship; filing name and address of guardian.

Source: Samuel M. Bowe, Attorney, Grants Pass.

ADVISORY COMMITTEE
Probate Law Revision

Third Meeting

Date: Saturday, June 13, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of May 16 meeting of advisory committee.

2. Report on publicity (Lundy).

3. Report on small estates (Zollinger).

4. Dower and curtesy

   a. Proposed legislation on release of interests of incompetents (Rough Draft, 6/13/64).

   b. Changes in nature of interest. See Staff Report No. 2.

      (1) Report of subcommittee (Allison).

      (2) Report on possibility of outside research assistance (Riddlesbarger).

5. Guardianship and conservatorship.

   a. Proposed legislation (Rough Draft, 6/13/64), and report on 1963 legislation on investment by guardians in common trust funds (Zollinger and Lundy).

   b. Report on 1963 legislation on oil, gas and mineral leases (Carson and Lundy).

   c. Report on accounting by guardians (Zollinger).

   d. Report on sales of real property of persons under legal disability without guardianship (Allison).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Third Meeting, June 13, 1964

Minutes

The third meeting of the advisory committee was convened at 9:05 a.m., Saturday, June 13, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The following members were present: Dickson, Zollinger, Allison, Carson, Gooding (arrived 10:05 a.m.) and Jaureguy. Butler, Frohnmayer and Riddlesbarger were absent. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Before the meeting was convened, Dickson called to the attention of those present a matter involving the preference to be given expenses of last sickness in the payment of the various charges and claims against estates of decedents that should be considered by the committee at an appropriate point in the course of its deliberations. He referred to ORS 117.110, and pointed out that before 1953 expenses of last sickness followed taxes due the United States in the order of preference of payment, but that the statute section was amended in 1953 to add expenses of last sickness to funeral charges in subsection (1) thereof. He expressed the opinion that, by reason of the applicable federal statute, expenses of last sickness could not be given preference over taxes due the United States, and indicated that he recently had ruled to this effect.

Dickson announced that he had been notified by the Board of Governors of the Oregon State Bar that the Board had appointed Allison to act in a liaison capacity between the Bar and all Bar committees and the advisory committee. Allison reported that he was in the process of preparing the annual report of the Bar Committee on Probate Law and Procedure, of which he currently is chairman; that the Bar committee's recommendations for changes in the probate law would be submitted to the advisory committee and the Law Improvement Committee for their consideration and action [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 2]; and that he would send Lundy a copy of the Bar committee report.

1. Minutes of Last Meeting. After the meeting was convened, Jaureguy moved, seconded by Zollinger, that reading of the minutes of the last meeting (May 16, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity. Lundy reported that news releases on the last meeting had been prepared and sent to the Oregon State Bar Bulletin, to newspapers published in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. He pointed out that the news release sent to the Bar Bulletin

was published in the May issue. Lundy expressed some doubt that news releases on committee activities would be published in newspapers unless particularly newsworthy, and asked whether he should continue routinely to send copies of all news releases to local newspapers and wire service representatives. Dickson expressed the view, and other members agreed, that this practice should be continued for public relations purposes, even though newspapers did not publish the news releases in every case.

Lundy also reported on the response to the form letter, calling attention to the existence and work of the committee and inviting comments and suggestions on problem areas in Oregon's probate and related law, sent to all probate judges, all county clerks, executives of certain banks and trust companies, state and federal tax agencies, presidents of local bar associations and deans of the three Oregon law schools. He indicated that 116 letters had been sent and 8 responses received thus far. He noted that comments and suggestions on problem areas in Oregon's probate and related law embodied in these responses had been reproduced and distributed to members for insertion in the "Comments & Suggestions Received" section of their notebooks.

Allison commented that he had used the news release on the last meeting as the basis for an item published in a newsletter distributed to title companies.

3. Report on Small Estates. [Note: At the last meeting Zollinger had agreed to contact Campbell Richardson, attorney, Portland, who had volunteered to undertake some research for the committee in the area of summary proceedings for administration of small estates of decedents, in order to get that research started.] Dickson reported that he had asked Richardson to undertake research for the committee in the area of probate courts and their jurisdiction instead of in the area of small estates, and that Richardson had agreed to do so.

Zollinger reported that Dickson had suggested to him that Denny Z. Zikes, attorney, Portland, might be willing to undertake the small estates research, in lieu of Richardson; that he had contacted Zikes, who agreed to undertake the research with the understanding that the committee would not expect to receive a report on the research until late September or early October 1964. Zollinger indicated that he had sent Zikes a copy of Model Small Estates Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1951 and some information on small estates legislation in other states; that Lundy, at his request, had sent Zikes some additional information on the subject.

Zollinger remarked that he had previously appointed Butler as chairman of a subcommittee to consider the matter

of summary proceedings for administration of small estates of decedents, and that Butler had prepared and submitted to him a report on the subject. Zollinger distributed copies of Butler's report to the members present and asked whether they wished to consider the report at this time. The committee agreed that such consideration should be postponed until a future meeting. Dickson suggested, and the committee agreed, that the matter of small estates should be scheduled for consideration at a meeting to be held in October 1964.

After brief discussion, the committee agreed that Zikes should report to Zollinger, rather than to Butler.

4. Dower and Curtesy.

a. Release of interests of incompetents. Allison referred to the rough draft of proposed legislation on release of incompetent's dower or curtesy (dated June 13, 1963), which Lundy had prepared pursuant to action by the committee at the last meeting [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 4] and distributed to the members. Allison commented that if the committee ultimately approved the proposal to abolish the inchoate interest, which appears to be in line with a trend evidenced in recent revisions of the probate law in other states, there would be no problem of release of interests of incompetents to deal with. He suggested, and the committee agreed, that consideration of the rough draft be postponed pending consideration and action by the committee on the matter of abolishing the inchoate interest.

b. Changes in nature of interest. Allison recalled that at the last meeting he had expressed the opinion that abolishment of the inchoate dower and curtesy interest could not operate retroactively as to property acquired before the effective date of the abolishing legislation, on the theory that the inchoate interest was a property right. He commented that, after some study of the matter, he was satisfied that the inchoate interest could be abolished retroactively; that the interest was not a constitutionally protected property right and therefore could be changed or abolished.

Allison commented that at the last meeting the committee appeared to be in substantial agreement that the nature of the dower and curtesy interest should be changed from a life estate in one-half of the deceased spouse's land to a fee estate in an undivided one-fourth, but undecided on or initially opposed to a proposal to abolish the inchoate interest. He recalled that at the last meeting he had referred to an Alaska statute providing the surviving spouse some protection against inter vivos disposition of the family home or homestead by a requirement that both husband and wife join in a conveyance thereof. [Note: See Staff Report No. 2 ("Materials on Family Rights in Decedents' Estates -- A Staff Report to the Advisory Committee on Probate Law Revision," dated June 1964), pages 2 to 4.]

Allison pointed out that the practical effect of the Alaska statute was that the title companies required that both spouses join in any conveyance or mortgage, since from an examination of the title records it was impossible to determine whether property described was in fact the family home or homestead. He stated that in many cases titles were determined to be defective because of failure of both spouses to join in conveyances. He indicated that the problem was so acute that the 1953 Alaska legislature amended the statute by adding provisions that failure of a spouse to join in a conveyance did not affect its validity unless the spouse appeared on the title and that a conveyance would be valid unless the spouse who failed to join filed suit within one year after the recording of the conveyance or filed a notice of interest in the property within that period.

Allison expressed the view that the 1953 additions to the Alaska statute were not completely satisfactory because of the one-year waiting period before good title was assured. He suggested that the practical problem experienced under the Alaska statute constituted a strong argument against adoption of this approach in Oregon.

Allison suggested that, instead of the Alaska approach, the committee consider a proposal that the inchoate dower and curtesy interest be retained only in homestead property owned by one spouse as to which the other spouse had recorded in the title records a declaration of claim of such inchoate interest. He also suggested that the inchoate interest so retained be limited to property acquired during the marriage and that it not apply to property acquired by devise or inheritance, thus, in effect, limiting the interest to what in community property states is the community property. He indicated that the declaration of claim of inchoate interest might be filed in much the same manner as the present procedure for filing a declaration of homestead for exemption purposes. He stated that a guardian could file the declaration on behalf of an incompetent spouse. Allison commented that the interest of a spouse could easily be protected and preserved by such a declaration, but the filing thereof could readily be ascertained from a search of the title records, and in the absence of a recorded declaration the spouse owning the property would be free to convey or mortgage without joinder of the other spouse.

Allison reported that he had discussed his proposal with Jaureguy, who agreed that the proposal was practical, but indicated a belief that the filing of declarations would seldom be done because of lack of knowledge of the existence of the procedure.

Zollinger suggested that the committee consider and decide separately the matter of abolishing the inchoate dower and curtesy interest and the matter of protecting the interest

of a surviving spouse by means of the declaration proposed by Allison or some other method. All members present (Dickson, Zollinger, Allison, Carson and Jaureguy) agreed that Allison and Lundy should proceed with the preparation of a rough draft of proposed legislation changing the dower and curtesy interest to a fee estate in an undivided one-fourth of the land owned by a deceased spouse at the time of his death, thus abolishing the inchoate interest, although all members were not yet in agreement on such abolishment.

Jaureguy suggested that the undivided one-fourth should be of the net estate in land; that is, after payment of debts and administration expenses and subject to being sold for the best interests of the estate of the decedent and the heirs. He commented that if, for example, a decedent died owning land of a value of $100,000 and owing debts amounting to $75,000, the surviving spouse would get one-fourth, but children, if any, likely would get nothing. In response to questions by Allison, Jaureguy indicated that the undivided one-fourth interest in personal property a surviving spouse presently might take by electing against the will of a decedent was an interest in net personal property [Note: See ORS 113.050], and that, under his suggestion, the undivided one-fourth of the net estate in land would be the same kind of interest as descends to children in the intestate situation [Note: See ORS 111.020] and the undivided one-fourth to the surviving spouse would be the same whether taken in the intestate situation or in the testate situation by election against will. The committee agreed that the rough draft of proposed legislation should embody Jaureguy's suggestion.

The committee turned to consideration of the separate matter of protecting the interest of the surviving spouse by means of the declaration proposed by Allison or some other method. Allison commented that the protection contemplated would have two advantages: First, the protection against conveyance or mortgage of property inter vivos by an improvident spouse without the other spouse having any voice in the matter, and second, the possibility that if the proposal for abolishing the inchoate interest was submitted to the legislature, it might appear somewhat less drastic and generate less opposition if retention of some protection of this nature could be pointed to. He indicated that his conception of the interest protected was an inchoate interest, in a sense, in an undivided one-fourth of a fee estate, subject to limitations presently existing on the inchoate dower and curtesy interest; in other words, it would be the same as the present inchoate interest except it would be an undivided one-fourth interest in a fee estate.

Zollinger proposed that, instead of an undivided one-fourth interest in a fee estate of all land, the protected interest be a life estate in property owned by a deceased spouse in which the spouses resided at the time of the death

of the deceased spouse, without limitation on value and possibly without limitation on quantity, but subject to existing encumbrances. In answer to a question by Jaureguy, Zollinger indicated that, under his proposal, the personal representative would not have the right to satisfy encumbrances on the family residence out of personal property of the estate of the decedent without the consent of heirs other than the surviving spouse. Zollinger remarked that it appeared sensible not to consider the matter in terms of "homestead," but rather in terms of the family residence, without the limitations as to property exempt from execution, and that the interest of the surviving spouse should be limited to a life estate. In response to a question by Jaureguy, Zollinger commented that he saw no reason why the life estate should not be subject to sale.

Zollinger stated that he was not inclined to favor the final nature of a filed declaration that certain property was the family residence, and indicated that he preferred some limitations on such finality, such as penalties for a false declaration and some means of challenging or testing the truth or falsity of a declaration in a judicial proceeding while both spouses were living. Allison agreed that some provision was desirable to prevent overreaching or fraud by means of a declaration filed by a spouse, and suggested that perhaps the other spouse should be given notice of the filing and afforded a period of time in which to object thereto. Zollinger questioned the value of such notice in a situation where the purpose of the filing of a declaration by one spouse would not be clear to the other, for example where the other spouse moved out of the family residence. Allison responded that such a situation would give rise to a problem only if both spouses did not join in a conveyance or mortgage of the property and a declaration had been filed and not objected to, thus preventing the other spouse from giving clear title without joinder of the spouse who filed the declaration. He indicated that he did not think the problem in such a situation was particularly serious.

Gooding arrived at this point (10:05 a.m.). Dickson explained the current discussion to Gooding and summarized the preceding discussion.

Allison asked for the views of members on that part of his proposal limiting the protected interest to property acquired during the marriage and not acquired by devise or inheritance, or whether the interest should be in any property in which the spouses might reside. Zollinger expressed the view that Allison's proposed limitation should not be made if the committee adopted his suggestion that the interest be a life estate in the family residence. Other members appeared not to agree with Allison's proposal on this particular point.

Lundy asked for the views of members on the approach to protecting the interest of a surviving spouse by treating some inter vivos transfers by the other spouse as being in fraud of the marital rights of the surviving spouse and the transferred property subject to being recovered by means of an action brought by the surviving spouse. He referred to section 6 of the preliminary draft of proposed legislation relating to family rights in decedents' estates prepared in the course of the current Wisconsin study on probate law [Note: See Staff Report No. 2, page 15], section 474.150 of the Missouri Revised Statutes [Note: See Staff Report No. 2, page 27] and section 33 of the Model Probate Code [Note: See Staff Report No. 2, page 42]. Allison commented that he did not favor this approach since under it possible clouds on the title of property conveyed might exist for many years, and that he would rather have some record in existence at the time of a conveyance that could be relied upon. Other members appeared to agree with Allison on this point.

Dickson remarked that Zollinger's proposal would not protect a second wife as to business property her husband owned before his second marriage, where the husband lived with the second wife 30 years and before his death his children by his first wife persuaded him to convey the property to them with a life estate reserved to him. Allison called attention to a similar situation under existing law where there is joint ownership of property by a husband and a third party with survivorship rights, and thus no protection for the wife since she has no inchoate dower in such a joint estate with survivorship.

Allison suggested that the interest to be protected by a declaration filed by a spouse be in any property in the name of the other spouse alone, and not be limited to family residence or homestead property. Some members expressed approval of Allison's suggestion and others expressed disapproval, but it was agreed that Allison and Lundy should proceed with the preparation of a rough draft of proposed legislation incorporating the suggestion.

Allison commented that there would be two rough drafts of proposed legislation: One changing the dower and curtesy interest to a fee estate in an undivided one-fourth of the land owned by a deceased spouse at the time of his death, and the other providing a means of protecting the interest of a surviving spouse by a filed declaration claiming such interest in any property in the name of the other spouse alone during the marriage. There was a brief discussion of the terminology to be used in the rough drafts in lieu of dower and curtesy terminology. Allison indicated that he would work out some new terminology to describe the interests to be embodied in the rough drafts, and suggested that the declaration might be referred to as a declaration of right of inheritance. He

stated that he would prepare rough drafts embodying the ideas considered by the committee and tentatively approved for drafting purposes, and send them to Lundy.

Dickson suggested that Gooding, who at the last meeting had expressed some objection to abolishing the inchoate dower and curtesy interest and predicted similar objection by others in eastern Oregon, be asked to prepare and present objections to the rough drafts and offer alternative suggestions as to how to handle the matters involved, and that Gooding might be able to obtain the views of others in eastern Oregon on the matters. Gooding commented that he was not sure there would be as much opposition in eastern Oregon to abolishing the inchoate interest as he had previously thought. He questioned the purpose of his presenting opposing and alternative views if members of the committee were in agreement. Dickson remarked that all members were not necessarily in agreement. Jaureguy commented that the committee should have the views of persons other than members, and particularly of those in eastern Oregon. Dickson suggested that Gooding ask Riddlesbarger to join with him in presenting opposing and alternative views. Gooding agreed to undertake the assignment.

Zollinger suggested that the rough drafts be prepared and copies distributed to members as soon as possible, so that members would have an opportunity to consider them, prepare critical comment and be ready to discuss them at a meeting to be held in September. It was agreed that the rough drafts should be scheduled for consideration at a meeting to be held in September 1964.

Dickson suggested that the committee should endeavor to have ready for submission to the 1965 legislature proposed legislation in the areas of dower and curtesy, simplified administration of small estates of decedents and guardianship and conservatorship. He expressed the view that the proposed legislation in the area of dower and curtesy might be the most controversial and constituted a major hurdle to be crossed, and indicated that he would like to see this matter considered by the legislature before the committee embarked upon its program for 1965-1967.

5. Guardianship and Conservatorship. [Note: Before the meeting copies of the following had been distributed to members: (1) A rough draft of proposed legislation on guardianship and conservatorship (dated June 13, 1964) prepared by Lundy pursuant to and based upon action by the committee at the last meeting; (2) a report on investment by guardians in common trust funds prepared by Zollinger; (3) a report on oil, gas and mineral leases of wards' real property prepared by Carson; (4) a report on accounting by guardians prepared by Zollinger; and (5) a report on sales of property of persons under legal disability without guardianship prepared by Allison.] It was agreed that

consideration of the rough draft of proposed legislation on guardianship and conservatorship (dated June 13, 1964) prepared by Lundy should be postponed until the next meeting.

a. Investment by guardians in common trust funds. Zollinger referred to his report on investment by guardians in common trust funds and explained his recommendation therein for amendment of the second sentence of subsection (1) of ORS 126.250 by placing time or other deposits of cash first in the list of property in which a guardian of the estate might invest without prior approval of the court and by placing common trust funds composed solely of other property in which a guardian might invest without prior approval of the court last in such list. [Note: A copy of this report constitutes Appendix A to these minutes.]

Lundy suggested that the second sentence of subsection (1) of ORS 126.250 might be made somewhat easier to read and understand if each category of property in which a guardian of the estate might invest without prior approval of the court was made a separate paragraph. Zollinger indicated he had no objection to this suggested change in the form of the sentence.

After discussion, Allison moved, seconded by Gooding, that Zollinger's recommendation on the change in substance of the second sentence of subsection (1) of ORS 126.250 and Lundy's suggestion on the change in form be adopted. Motion carried unanimously. Lundy was requested to prepare a rough draft of proposed legislation based on the motion.

Lundy questioned certain terminology used in the common trust fund provision. He asked whether the investment was "in the fund" or "in interests in the fund," and whether the fund was "composed of" the subjects of investment or "maintained for" investment in those subjects. Zollinger responded that investment "in participations in the fund" might be appropriate and that investments in the fund were evidenced by certificates representing shares in the fund, but commented that he did not consider changes in terminology necessary in the respects referred to by Lundy. Lundy suggested that the intent that only bank or trust company guardians might invest in common trust funds might be made more clear if the reference to common trust funds "as defined in ORS 709.170" were changed to "as provided in ORS 709.170." Zollinger indicated he had no objection to this suggested change, and commented that the terminology might be changed by specifically stating that the investment in a common trust fund was to be made by a corporate guardian authorized by ORS 709.170 to maintain such fund.

b. Oil, gas and mineral leases of wards' real property. Carson referred to his report on oil, gas and mineral leases of wards' real property and explained his recommendations therein for deletion of the words "from a well drilled" in

ORS 116.890, 126.436 and 126.490 and with respect to the words "or other instrument" in ORS 126.436. [Note: A copy of this report constitutes Appendix B to these minutes.]

Zollinger commented that perhaps the use of the words "or other instrument" reflected a feeling on the part of the sponsors of the 1963 legislation that the right to explore or prospect for and extract, remove and dispose of oil, gas and minerals might not involve in all cases a lease, strictly speaking, but might involve in some cases an easement. Allison expressed the view that the use of the words "or other instrument" was confusing, indicated that he was unsure as to what these words might mean and suggested deletion of these words. In response to a question by Dickson, Allison commented that a right given to make seismographic surveys for oil might involve only a right of access.

Zollinger questioned the provision added to ORS 126.436 in 1963 requiring the court to fix the period of the oil, gas or mineral lease but specifying that the period should be "for a primary period of 10 years and so long thereafter * * *", and expressed disapproval of requiring the court to order such a term or condition of the lease about which the court had no knowledge and over which the court had no control. Carson suggested that perhaps the 10-year period should be a maximum, with the court being authorized to fix a lesser period. Zollinger indicated his doubt that Carson's suggestion was the best approach to the problem, and commented that the statute might either fix the period of the lease with no reference to inclusion thereof in the court order or that the provision fixing the period of the lease might be deleted and the matter left to the discretion of the court.

Lundy noted that the 1963 legislation inserted the word "surface" before "lease" in the second sentence of ORS 126.436, and added the new third sentence relating to oil, gas and mineral leases. He commented that the statute purported to govern all kinds of leases, and questioned whether "surface" leases included all leases other than the oil, gas and mineral leases described in the new third sentence.

Allison suggested that it might be advisable to attempt to ascertain more clearly the intention of the sponsors of the 1963 legislation on oil, gas and mineral leases in order that the committee might have some guidance in its efforts to improve the 1963 provisions. Zollinger commented that Ronald W. Husk, attorney, Eugene, and Vernon D. Gleaves, attorney, Eugene, might have been involved in the preparation of the 1963 legislation and that, if so, their explanation and comment should be invited. Dickson expressed the view that the committee should not take any action with respect to the provisions of the 1963 legislation until more information thereon had been obtained.

Lundy suggested that the committee might postpone consideration of the 1963 provisions on oil, gas and mineral leases as they pertain to guardianship and conservatorship until such time as the committee also considers similar 1963 provisions in the decedents' estates statutes, and that changes in the 1963 provisions, if any, be made in both areas at the same time. Zollinger concurred in this suggestion, and the committee agreed that the matter should be postponed as suggested.

c. Accounting by guardians. Zollinger referred to his report on accounting by guardians and explained his recommendations therein for amendment of subsections (4) and (5) of ORS 126.336. [Note: A copy of this report constitutes Appendix C to these minutes.]

Gooding referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts of a guardian of the estate to certain persons "at or prior to the time of filing each account," and questioned the mailing or delivering "prior to" the filing. Dickson asked whether the mailing or delivering should be at least 10 days before the filing. Zollinger indicated that he did not favor a 10-day notice of filing accounts other than final accounts, that such notice was not necessary and that, under subsection (6) of ORS 126.336, settlement of accounts other than final accounts did not preclude objections thereto at the time of the final account. Lundy suggested, and Zollinger agreed, that, since the guardian would be required by Zollinger's proposed amendment to file proof of the mailing or delivering at the time of filing an account, the mailing or delivering should be "prior to" and not "at or prior to" the time of filing the account. Lundy also suggested, and the committee agreed, that the guardian should "cause" the mailing or delivering of the copies of the account.

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the "superintendent or other principal administrative officer" of a state institution (i.e., Oregon State Hospital, F. H. Dammasch State Hospital, Eastern Oregon State Hospital, Oregon Fairview Home or Columbia Park State Home) to which the ward had been committed, and asked whether the quoted words meant the superintendent or, in his absence, some other officer of the institution, or the superintendent whether designated by that title or another. He pointed out that the title of the executive heads of all the state institutions referred to presently was "superintendent." Zollinger responded that he intended the mailing or delivering to be made to the superintendent whether designated by that title or another, and expressed the view that "or other principal administrative officer" should be deleted.

Dickson suggested that, since the Board of Control is charged with administration of the statutes relating to responsibility for the cost of care of persons in state institutions, copies of accounts should be mailed or delivered to the Secretary of the Board, rather than to the superintendent of one of the state institutions. The matter of the possible abolishment or transfer of functions of the Board in the future was discussed, but the committee agreed that copies of accounts should be mailed or delivered to the Board and that, if the Board were abolished or its functions transferred in the future, the provision for mailing or delivering accounts of guardians could at that time be adjusted. Carson commented that mailing or delivering to the superintendents should be retained since personnel of the state institutions have occasion to check into the background on wards and the information contained in the accounts of guardians would be useful to them. Dickson suggested, and the committee agreed, that copies of accounts should be mailed or delivered to both the Board of Control and the superintendent of the appropriate state institution.

Lundy suggested that the reference to a state institution be the one to which the ward had been committed "or admitted," in order to cover the voluntary commitment situation. Carson suggested that, instead of the "committed or admitted" wording, the reference be to a state institution "in which the ward is a patient." Lundy questioned whether the "patient" wording would cover a ward committed or admitted but out of the institution on trial visit, and referred to the possibility of the use of outpatient services of the institution by wards not committed or admitted thereto. Zollinger suggested, and the committee agreed, that the reference should be to a state institution to which the ward had been "committed or admitted and not discharged."

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the "guardian of the person of the ward, if there be a guardian of his person other than the guardian of his estate," and suggested that the wording be changed to "separate guardian of the person, if any, for the ward." Zollinger commented that he preferred his wording, and the committee expressed approval thereof.

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the ward's spouse, or children, or parents or brothers and sisters, and suggested, and the committee agreed, that the alternatives specified in these provisions be set forth in a single paragraph, rather than in four separate paragraphs. He also suggested, and the committee agreed, that the proof of mailing or delivering filed at the time of filing an account under Zollinger's proposed amendment of subsection (4) be "proof satisfactory to the court" instead of the "certificate of the guardian or his attorney."

Dickson asked whether some wards, such as spendthrifts and adult wards who were not mentally incompetent, should receive copies of accounts other than final accounts. Jaureguy expressed the view that spendthrift wards should receive such copies. Zollinger suggested, and the committee agreed, that a ward "not a minor or an incompetent" should be added to the list of persons entitled to receive copies of accounts under his proposed amendment of subsection (4) of ORS 126.336, and that the wording "a ward not under legal disability" in subsection (5) be deleted.

The matter of authorizing objections to accounts other than final accounts under Zollinger's proposed amendment of subsection (4) of ORS 126.336 was discussed. Zollinger expressed disapproval of such authorization, indicated that, as provided in subsection (6) of ORS 126.336, settlement of such accounts was without prejudice to objections thereto made at the time of the final account and commented that the objections of other persons to accounts other than final accounts should not preclude objections thereto by the ward or his personal representative when the guardianship is terminated. After further discussion, the committee agreed that objections to accounts other than final accounts should not be provided for, and that the second sentence of subsection (5) of ORS 126.336 should continue to apply only to final accounts.

Lundy referred to the previous decision of the committee to delete the wording "a ward not under legal disability" from subsection (5) of ORS 126.336, and asked whether there should not be personal service of the final account on such ward. Zollinger agreed there should be such service, and indicated that he contemplated personal service of the final account on the persons entitled to receive copies of accounts under his proposed amendment of subsection (4) as well as persons referred to in subsection (5). Lundy asked whether the distinction between subsection (4) and subsection (5) was the manner of giving copies of accounts, rather than the categories of persons entitled to receive them, and the committee agreed that the manner of giving copies of accounts was the distinction.

Lundy was requested to prepare a rough draft of proposed legislation based upon Zollinger's proposed amendments of subsections (4) and (5) of ORS 126.336, and modifications thereof approved by the committee in the course of discussion thereof.

d. Sales of property of persons under legal disability without guardianship. Allison referred to his report on sales of property of persons under legal disability without guardianship and explained his recommendations therein for amendment of ORS 126.555 by increasing the maximum dollar amount limitation from $1,000 to $2,500, and extending

application of the statute section to cash sales, subject to confirmation by the court, of real and personal property of a person under legal disability. [Note: A copy of this report constitutes Appendix D to these minutes.]

Allison referred to the action by the committee at the last meeting restricting the $1,000 maximum dollar amount limitation to the personal property of a person under legal disability, instead of the "estate" of such person. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 11.] He indicated that this restriction created some difficult drafting problems when he attempted to extend the application of ORS 126.555 to cash sales of real and personal property, and that for purposes of simplicity in drafting he increased the maximum dollar amount limitation to $2,500 and retained the "estate" as the basis therefor for purposes of all transactions contemplated by the statute section.

Zollinger referred to the requirement of Allison's proposed amendment of ORS 126.555 that the cash sale of property be "subject to confirmation by the court," asked whether "confirmation" contemplated the filing of a report of sale and a hearing thereon by the court and commented that it might be sufficient if the sale were merely "approved" by the court. Allison expressed his approval of substituting "approved by the court" for "subject to confirmation by the court." Zollinger suggested that the sale be for cash "in an amount approved by the court." Allison commented that the court should approve the sale transaction rather than just the amount, and that the approval should be an affirmative requirement, rather than the sale being "subject to" the approval. The committee agreed that the sale should be approved by the court.

Dickson questioned the advisability of having the procedure set forth in ORS 126.555, and commented that the court had no practical supervision or control over funds or other property received by a person for another under legal disability under the statute section after the conclusion of the proceeding. He expressed the opinion that the only justification for the procedure was found in the situation involving settlement of small claims for damages, and that he did not favor using the procedure in other situations. Zollinger referred to his previous illustration of a need to extend the application of ORS 126.555 to sales of real property interests of small value [Note: See Appendix B, Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12], and expressed the view that in such situations it should not be necessary to appoint a guardian of the estate. Dickson indicated that he agreed the procedure would be useful in such situations.

Zollinger expressed regret that a method of providing for settlement without guardianship of small personal injury claims of a minor had not been devised for the situation where, for example, the minor might own real property of relatively large

value but did not require a guardian of the estate therefor. Lundy noted that at one point in the course of its deliberations the advisory committee that produced the revision of the guardianship and conservatorship statutes enacted in 1961 considered a maximum dollar amount limitation on the procedure embodied in ORS 126.555 in terms of the value of the transaction (i.e., the debt or other chose in action to be settled or the property to be received), rather than in terms of the total estate of the person under legal disability, and suggested that this approach might be reconsidered. Zollinger expressed approval of this approach, and the committee agreed.

The matter of increasing the maximum dollar amount limitation in ORS 126.555 to $2,500 was discussed at some length. Zollinger pointed out that the $1,000 figure was presently used in procedures for disposing of small estates of decedents (ORS 116.020) and small guardianship estates (ORS 126.516). In answer to a question by Lundy, Zollinger indicated he did not think a distinction should be made between sales of property and other transactions covered by ORS 126.555 in terms of the maximum dollar amount limitation, although the $1,000 figure was so small that the procedure would probably seldom be used in the case of cash sales of real property. Lundy commented that perhaps, as a result of future consideration by the committee of summary proceedings for administration of small estates of decedents and a definition of small estates for such purposes, the present concept of the value of "small" estates might be revised upward. Allison pointed out that the trend evidenced in recent probate law revisions in other states appears to be to increase materially the value of property that may be dealt with in an informal manner.

Allison suggested that perhaps the problem of the transaction involving a person under legal disability without guardianship was not so much a matter of limitations on availability of the procedure, such as on the value of the transaction, but a question of proper supervision and control over the use of the funds or other property involved. Dickson commented that perhaps close supervision and control by the court should not be sought, that the maximum dollar amount limitation should be increased and that reliance should be placed upon the character and integrity of the person who handled funds or other property of a person under legal disability. Zollinger expressed the opinion that the approach referred to by Dickson might be better than requiring a more expensive and complicated procedure, and that perhaps the advantages of a less expensive and complicated procedure outweighed the disadvantages of some lack of practical close supervision and control by the court. The committee agreed, at least tentatively, that the maximum dollar amount limitation in ORS 126.555 should remain $1,000.

Lundy was requested to prepare a rough draft of proposed legislation based upon Allison's proposed amendment of ORS 126.555, and modifications thereof approved by the committee in the course of discussion thereof.

6. Next Meeting of Advisory Committee. The matter of whether or not meetings of the committee should be held during the summer months was discussed. Lundy commented on his availability to serve the committee during the balance of 1964, and indicated that his availability would be severely curtailed after the first part of August. The committee agreed to hold meetings during the summer months.

The next meeting of the advisory committee was scheduled for Saturday, July 18, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The matters to be scheduled for consideration at the next meeting were discussed. Lundy commented that the principal matter for consideration at the next meeting would probably be a rough draft of proposed legislation relating to guardianship and conservatorship, which would include revisions of certain provisions of the Oregon statutes on the subject based upon action by the committee at the last meeting and this meeting.

Zollinger indicated that Butler had prepared reports on Comment & Suggestion Nos. 12, 15 and 20, all relating to guardianship and conservatorship matters. [Note: Carson, as chairman of the Subcommittee on Guardianship and Conservatorship, had assigned to Butler, for his consideration and recommendation, certain of the comments and suggestions pertaining to guardianship and conservatorship reproduced in the "Comments & Suggestions Received" section of the advisory committee notebook. Because of unexpected illness, Butler was unable to undertake the assignment before the last meeting. See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12.] Zollinger distributed copies of Butler's reports to the members present, and commented that these reports should be considered at the next meeting.

Zollinger asked if the comments and suggestions received that were most recently reproduced and distributed to members contained matters on guardianship and conservatorship that should be assigned to someone for comment and recommendation. Lundy responded that only one of those comments and suggestions (Comment & Suggestion No. 30) pertained to guardianship and conservatorship; that this one was submitted by the county clerk of Gilliam County, who expressed the view that the responsibilities of a conservator with respect to inventories and appraisals were not clear; and that he had responded to the county clerk and pointed out that a conservator appeared to be subject to the same provisions of law applicable to a guardian of the estate with respect to inventories and appraisals (i.e., ORS 126.636 appeared to make the provisions of ORS 126.230 applicable to conservatorships).

Allison indicated that he would submit the recommendations for changes in the probate law by the Bar Committee on Probate Law and Procedure to the advisory committee at the next meeting.

The meeting was adjourned at 1:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 8, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Clifford E. Zollinger

Subject: Investment by guardians in common trust funds

Prior to the enactment of the 1961 Guardianship Code, there was no statutory provision for investments by guardians without court approval. ORS 126.320 (2) declared that it was the duty of the guardian "with the approval of the court, to invest the funds of the ward in accordance with the statutes of the State of Oregon then pertaining to investments by fiduciaries." ORS 126.325 (2) added that "A guardian may, with the approval of the court, invest the funds of his ward in participations in common trust funds * * * ."

The 1961 Code provided in ORS 126.250 (1) for investment of the property of the ward pursuant to the Prudent Man Rule and provided further:

> "No investment shall be made without prior approval of the court by order in any property other than interest-bearing obligations of or fully guaranteed by the United States or interest-bearing obligations of this state or any county, city, port district or school district of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment."

The foregoing was amended in 1963 to permit a corporate guardian to invest the estates of its wards, without court order, in common trust funds consisting exclusively of interest-bearing obligations of or fully guaranteed by the United States and time or other deposits of cash.

The provision for investments in common trust funds was introduced in the middle of the subsection, following the authority to invest in obligations of or fully guaranteed by the United States and preceding the authority to invest in obligations of this state and certain of its political subdivisions.

At our last meeting, I reported on Comment & Suggestion No. 10 relating to the function of the Veterans Administration in respect to the estates of wards who receive federal

funds through the Veterans Administration. I prefaced my recommendation that ORS 126.250 (3) be deleted with the observation that:

> "ORS 126.250 relates to investments by guardians and permits investments without court approval (1) in governments and (2) by corporate guardians in common trust funds consisting solely of governments, municipals and time or savings deposits."

I call attention to this error because it demonstrates that, at least to the casual reader, the statute in its present form may be read as meaning that guardians may not, without court approval, invest in obligations of this state or of counties, cities, port districts or school districts of this state, although such obligations may be included among the investments of common trust funds in which the estate of ward may be invested.

I am convinced that the construction which I put on the statute when I was reading it with another question primarily in mind is not a correct construction, but I think the statute should be amended so that the purpose of the 1963 amendment will be expressed more accurately.

I therefore propose that, in addition to the deletion of subsection (3), subsection (1) of ORS 126.250 be amended to read as follows:

> "(1) A guardian of the estate may invest the property of the ward as provided in this section, ORS 128.020 and any other law applicable to investments by guardians. No investment shall be made without prior approval of the court by order in any property other than <u>time or other deposits of cash,</u> interest-bearing obligations of or fully guaranteed by the United States, [or common trust funds, as defined in ORS 709.170, composed of investments in interest-bearing obligations of or fully guaranteed by the United States, and time or other deposits of cash,] or interest-bearing obligations of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment, <u>or common trust funds, as defined in ORS 709.170, composed solely of assets in which guardians may invest without prior approval of the court.</u>"

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 9, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Wallace P. Carson

Subject: Oil, gas and mineral leases of wards' real property

The title of chapter 417, Oregon Laws 1963, reads: "Relating to powers of executors, administrators and guardians; creating new provisions; amending ORS 116.745, 116.825 (decedents' estates), 126.436 and 126.490 (guardianship estates); * * * ." As is indicated by the title of this Act, certain of its provisions are applicable to decedents' estates and others are applicable to guardianship estates.

This report relates principally to the provisions of this Act that apply to guardianship estates, it being understood that its provisions affecting decedents' estates will be considered later by the Advisory Committee on Probate Law Revision when the statutes governing decedents' estates are considered.

The amendments made by this Act primarily concern leases providing for "exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons." The amendments apply, also, to "all other minerals or substances, similar or dissimilar." Nevertheless, the amendments ostensibly confine their application to substances "produced from a well drilled by the lessee" (emphasis supplied).

Accordingly, it would seem that the phrases indicated below should be deleted, by further amendment, from ORS 126.436 and 126.490, respectively, and, also, from ORS 116.890 (because of its application to a guardian, as well as to other fiduciaries):

ORS 126.436, line 17: [~~from a well drilled~~].

ORS 126.490, line 10: [~~from a well drilled~~].

ORS 116.890, lines 12 and 13: [~~from a well drilled~~].

As has been suggested above, similar phrases appearing in the statutes governing decedents' estates should be considered by the Advisory Committee on Probate Law Revision at some appropriate time in the future. For examples, see ORS 116.745, 116.825, 116.880 and 116.890.

Other words contained in ORS 126.436, as amended by chapter 417, Oregon Laws 1963, that should be given attention are:

ORS 126.436, lines 11 and 12: "or other instrument."

Those words ("or other instrument") have been included in a sentence in ORS 126.436, as amended by chapter 417, Oregon Laws 1963, that, in part, reads: "An order authorizing the execution of a lease or other instrument for the purpose of exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons, * * *" (emphasis supplied).

In view of the fact that the words "or other instrument" have not been used in connection with the word "lease" in ORS 126.490, as amended by chapter 417, Oregon Laws 1963, or in other sections of the statutes governing leases that guardians may execute (for examples, see ORS 126.406 et. seq.), would it not be advisable either to cause "or other instrument" to be deleted from ORS 126.436, or to cause those words, or words of like meaning, to be inserted in the other sections of the statutes concerning leases that guardians may execute?

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 10, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Clifford E. Zollinger

Subject: Accounting by guardians

At pages 10 and 11 of the Probate Advisory Committee Minutes of its meeting on May 16, 1964, a record is made of the discussion of proposed amendments to subsections (4) and (5) of ORS 126.336. The section relates to accountings by guardians.

Subsection (4) provides that a copy of each accounting shall be given "to the person or institution having the care, custody or control of the ward."

Subsection (5) provides that the final account shall be served personally on a ward not under legal disability, the person or institution having the care, custody or control of a ward under legal disability, the executor or administrator of a deceased ward and a successor guardian. Provision is made for an appearance by any person so required to be served for the purpose of objecting to the final account.

There is no provision for appearances in response to the receipt of intermediate accountings. Subsection (6) provides for settlement of any account but that settlement shall be without prejudice to objections thereto at the time and in the manner that objections may be made to a final account.

Several questions are raised in this connection, among them:

In the case of an incompetent adult ward who is receiving care at a nursing home, does this require that the nursing home shall receive a copy of each accounting?

Does the provision requiring the guardian to "give" a copy of the intermediate accounting require evidence that this duty has been performed? Is a distinction to be made between "give" in subsection (4) and "serve" in subsection (5) of this section? Precisely what is the distinction?

Should a distinction be made between state institutions for the care of mentally diseased persons on the one hand and nursing homes and homes for the aged, whether privately or publicly owned and operated?

I suggest the following amendment to subsection (4):

(4) The guardian of the estate shall, [give a copy of each account to the person or institution having the care, custody or control of the ward.] at or prior to the time of filing each account, mail or deliver a copy thereof to:

(a) The superintendent or other principal administrative officer of any of the institutions described in ORS 426.010, 427.010 or 428.420 to which the ward shall have been committed and

(b) The guardian of the person of the ward, if there be a guardian of his person other than the guardian of his estate and

(c) The ward's spouse, if a resident of Oregon and not under legal disability or

(d) The ward's child or children resident in Oregon and not under legal disability, if the ward does not have a spouse resident in Oregon and free from legal disability or

(e) The ward's parent or parents resident in Oregon and not under legal disability, if the ward does not have a spouse or child resident in Oregon and free from legal disability or

(f) The ward's brothers and sisters resident in Oregon and not under legal disability, if the ward does not have a spouse or child or parent resident in Oregon and free from legal disability.

There shall be filed with each account the certificate of the guardian or his attorney that copies thereof have been mailed or delivered as herein provided, showing the names of the

persons to whom such mailing or delivery was made and the addresses to which or at which such copies were mailed or delivered.

Because "each account" includes the final account, there does not appear to be any occasion to repeat the foregoing in subsection (5), which may be amended to read:

(5) The guardian of the estate shall cause a copy of his final account to be served personally on a ward not under legal disability, [the person or institution having the care, custody or control of a ward under legal disability,] the executor or administrator of a deceased ward and a successor guardian. [Within 10 days after the date of the service,] Any person [or institution so] required by subsections (4) and (5) of this section to be served or to whom a copy of the account must be mailed or delivered may make and file in the guardianship proceeding written objections to the account within 10 days after the date of service, mailing or delivery thereof to or upon him.

I do not think that it is necessary to make any amendment to subsection (6).

APPENDIX D

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 9, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison

Subject: Sales of property of persons under legal disability without guardianship

At the last meeting of the Advisory Committee I was requested to prepare a proposed amendment to ORS 126.555 to provide for sales of property of minimum value where no guardian is appointed. I suggest the following amendment to this section:

Section . ORS 126.555 is amended to read:

126.555. Where it appears that a guardian of the estate for a person under legal disability has not been appointed and that the value of the estate of such person, including choses in action, is not more than [$1,000] $2,500, any court having probate jurisdiction, upon petition therefor and with such notice as the court may order or without notice, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to sell for cash, subject to confirmation by the court, any or all of the real and personal property of the estate, to settle debts and other choses in action due to such person under legal disability and receive payment [thereof] therefor, and to receive property of such person under legal disability. The person so designated in the order of the court may deliver a bill of sale or a conveyance of such personal or real property sold, may give a release and discharge for any such debt or

other chose in action or for any such property, and shall hold, invest or use all funds or other property so received as ordered by the court.

ADVISORY COMMITTEE
Probate Law Revision

Fourth Meeting

Date: Saturday, July 18, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of June 13 meeting of advisory committee.

2. Report on publicity and miscellaneous matters (Lundy).

3. Report on 1964 proposals of Bar Committee on Probate Law and Procedure (Allison).

4. Report on dower and curtesy -- progress and problems (Lundy).

5. Guardianship and conservatorship.

   a. Proposed legislation (Rough Draft, 7/18/64) (Lundy).

   b. Service of citation on appointment of guardian (Comment & Suggestion No. 12) (Butler).

   c. Factors considered by court in appointing guardian (Comment & Suggestion No. 15) (Butler).

   d. Filing name and address of guardian (Comment & Suggestion No. 20) (Butler).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Fourth Meeting, July 18, 1964

Minutes

The fourth meeting of the advisory committee was convened at 9:05 a.m., Saturday, July 18, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The following members were present: Zollinger, Allison, Butler, Carson, Jaureguy and Riddlesbarger. Dickson, Frohnmayer and Gooding were absent. Also present were William E. Love, a member of the Law Improvement Committee, and Robert W. Lundy, Chief Deputy Legislative Counsel.

Vice Chairman Zollinger presided in the absence of Chairman Dickson.

Before the meeting was convened, Lundy distributed to the members present copies of the 1942 annual report of the Bar Committee on Probate Law and Procedure, containing a draft of proposed legislation embodying a revised code of probate procedure, and a supplement consisting of a table comparing sections of the 1942 proposed code of probate procedure and the statute sections presently compiled in Oregon Revised Statutes.

1. Minutes of Last Meeting. Allison moved, seconded by Butler, that reading of the minutes of the last meeting (June 13, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting had been prepared and sent to the Oregon State Bar Bulletin, to newspapers published in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. He indicated that he had started and would continue the practice of sending such news releases to the members of the Law Improvement Committee, with the thought in mind that such news releases might constitute progress reports by the advisory committee to the Law Improvement Committee. He also indicated that he had reported orally on the progress of the probate law revision project to the Law Improvement Committee at its meeting on July 10, 1964, and that members of the Law Improvement Committee had expressed interest in the content of the advisory committee's immediate program and in when the immediate program would be ready for consideration by the Law Improvement Committee.

Lundy noted that no comments and suggestions on problem areas in Oregon's probate and related law had been received since the last meeting. Riddlesbarger remarked that he had been asked by a representative of the Internal Revenue Service

about suggestions sent by that representative to his superior for forwarding to the committee, and that he (Riddlesbarger) had responded that to his knowledge these suggestions had not been brought to the attention of the committee. Lundy pointed out that the only suggestions he had received from IRS personnel were embodied in Comment & Suggestion No. 29, a memorandum from H. E. Green, Group Supervisor, IRS, forwarded by Arthur G. Erickson, District Director of Internal Revenue.

Riddlesbarger stated that he recently had occasion to discuss briefly the probate law revision project with two members of the faculty of the University of Oregon School of Law (Frank R. Lacy and Hans A. Linde); that they had referred to a European practice that apparently permits a testator, during his lifetime, to have his will probated in a court proceeding, and had agreed to furnish Riddlesbarger with more information on this matter, but thus far had not done so. At Riddlesbarger's request, Lundy agreed to note the matter for follow-up investigation and possible future consideration by the committee.

Riddlesbarger outlined a situation in which the widow of a decedent had filed a claim against the estate of the decedent, to which a daughter of the decedent (an heir) wished to object. He indicated that the executor of the will of the decedent had contended that the daughter was not a proper person under the law to object to the claim. He suggested, and Zollinger agreed, that the matter of who might object or appear in opposition to claims against estates of decedents was one the committee should consider at some appropriate time in the future.

Lundy reported that he had sent more background materials on administration of small estates of decedents, including a recently enacted New York statute and supporting research report on settlement of small estates without administration, to Denny Z. Zikes, who had agreed to undertake research for the committee in the area of summary proceedings for administration of small estates. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 2.]

3. Report on 1964 Proposals of Bar Committee on Probate Law and Procedure. Allison referred to and briefly summarized the content of the 1964 annual report of the Bar Committee on Probate Law and Procedure, of which he was chairman. He pointed out that the report recommended that the proposals therein for changes in the probate law, if approved by the Bar at its annual meeting next fall, be submitted to the advisory committee and the Law Improvement Committee for their consideration and action. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 2.] Allison indicated that copies of the Bar committee's report, when available, would be distributed to members of the advisory committee and the Law Improvement Committee.

a. Objection to confirmation of sale of real property by personal representative. Allison explained the Bar committee's proposed legislation amending ORS 116.805 to permit any interested person to file objection to confirmation of the sale of real property by an executor or administrator, pointing out that this proposed legislation was similar to Senate Bill 188 (1963), which failed to pass. Zollinger asked whether there might not be some difficulty in determining who was an "interested" person, and commented that this matter was considered in the course of revision of the guardianship and conservatorship statutes in 1960-1961 and a decision made to permit any "person," rather than any "interested person," to object to confirmation of the sale of real property by a guardian. [Note: See ORS 126.451.] Zollinger suggested, and Allison agreed, that at the appropriate time some consideration should be given to conforming ORS 116.805 to ORS 126.451.

b. Revocation of will by subsequent marriage, divorce or annulment of marriage of testator. Allison explained the Bar committee's proposed legislation relating to revocation of the will of a testator by his subsequent marriage, divorce or annulment of his marriage [Note: See ORS 114.130], pointing out that this proposed legislation was similar to Senate Bill 197 (1963), which failed to pass.

c. Guardian's access to ward's safe deposit box. Allison explained the Bar committee's proposed legislation to require the presence of a representative of the State Treasurer's office at the time of the first opening of a ward's safe deposit box by the guardian. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 8; Appendix B, pages 2 to 4.] Zollinger suggested that one advantage that might be derived from the proposed legislation would be an opportunity for the court to reconsider the amount of a guardian's bond in the light of the contents of the safe deposit box. He asked whether the representative of the State Treasurer's office should not be required to file in the guardianship proceeding an inventory of the contents of the safe deposit box within a specified period of time. Allison pointed out that the proposed legislation would require such an inventory within 10 days after the opening of the safe deposit box. Zollinger suggested, and Allison indicated he was inclined to agree, that the guardian's access to the safe deposit box should be denied or restricted until such an inventory had been filed and the court reconsidered the amount of the guardian's bond.

d. Waiver of appraisal of estates of decedents. Allison explained the Bar committee's proposed legislation amending ORS 116.420 to permit the court to waive the appointment of appraisers to appraise property of a decedent in certain specified circumstances, pointing out that this proposed legislation was similar to Senate Bill 185 (1963), which failed to pass.

e. Sale of property of decedent under power in will. Allison explained the Bar committee's proposed legislation relating to sale or disposition of property of a decedent under a provision made in the will of the decedent [Note: See ORS 116.825], pointing out that this proposed legislation differed somewhat from Senate Bill 198 (1963), which failed to pass.

f. Payment of mortgages or other encumbrances on property of decedent. Allison explained the Bar committee's proposed legislation relating to the obligation of a personal representative to pay mortgages or other encumbrances on property of a decedent. He indicated that Jaureguy had drafted the proposed legislation. [Note: See ORS 116.140.] In answer to a question by Zollinger, Jaureguy indicated that it was not the intention of the proposed legislation to preclude a person having a secured claim against a decedent from submitting a claim against the estate based on the obligation of the decedent and having the claim allowed and paid, rather than relying solely on the security for the obligation. Jaureguy expressed the view, with which Zollinger agreed, that the proposed legislation should be revised to clarify this matter.

Riddlesbarger suggested that a related matter was that of apportionment of Federal estate tax liability among the distributive shares of an estate of a decedent, and that this matter was one the committee should consider at some appropriate time in the future. [Note: See Comment & Suggestion No. 29.]

g. Reopening of estate of decedent for further administration. Allison explained the Bar committee's proposed legislation relating to reopening the estate of a decedent for further administration after it had been closed. He pointed out that a principal drawback of the present law on this subject was that it was too limited with respect to the grounds for reopening an estate.

4. Report on Dower and Curtesy. Lundy reported that he had prepared and sent to Allison a rough draft of proposed legislation changing the dower and curtesy interest of a surviving spouse to a fee estate in an undivided one-fourth of the real property owned by the deceased spouse at the time of his death [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 5], and another rough draft of proposed legislation designed to protect this inheritance interest of a spouse in real property in the name of the other spouse alone by means of a filed declaration [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 7]. Allison summarized the principal features of the two rough drafts and his proposals for changes therein. He indicated that he would send his proposals for changes to Lundy.

Allison pointed out that the rough draft changing dower and curtesy expressly abolished dower and curtesy, including the inchoate interest, but saved interests already vested; and gave a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse died possessed if the decedent died intestate and left children or other lineal descendants (by amending ORS 111.020), and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent died possessed (by amending ORS 113.050). He indicated that the rough draft also amended ORS 113.060 by adding a new provision relating to waiver of the right to elect against the will, and commented that his initial reaction was that such a provision was not necessary. Carson expressed the view that a specific statutory provision on waiver might serve a useful purpose; that waiver of the right to elect against a will would permit an estate plan to be made with more certainty that the plan would be carried out, and that a specific statutory provision on waiver might facilitate this.

Allison indicated that his proposals for changes in the rough draft protecting a spouse's inheritance rights included a description of the rights to be protected as "inchoate" inheritance rights; a specification that the effect of a conveyance or mortgage of real property not joined in by both spouses after the filing of a declaration of inheritance rights with respect to such property was failure of the conveyance or mortgage to affect the inheritance rights (i.e., the grantee or mortgagee would take subject to the inheritance rights, if exercised), rather than invalidity of the conveyance or mortgage; and a requirement that the declaration describe the particular real property to which it was applicable, rather than be applicable to all real property situated in the county. Jaureguy questioned, and Allison defended, the appropriateness of describing the rights to be protected as "inchoate" inheritance rights. Zollinger expressed approval of the requirement that the declaration describe the particular real property to which it was applicable.

Riddlesbarger indicated that he had received a letter from Gooding asking him to serve with Gooding on a subcommittee having some sort of function with respect to the proposed legislation relating to changing dower and curtesy, and requested clarification of this matter. Lundy responded that at the last meeting Dickson had asked Gooding to prepare and present objections to the rough drafts on this subject and offer alternative suggestions as to how to handle the matters involved, and had suggested that Gooding ask Riddlesbarger to join with him in presenting opposing and alternative views. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 8.]

5. Guardianship and Conservatorship.

a. Proposed legislation (Rough Draft, 7/18/64). [Note: Before the meeting, copies of a rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964) prepared by Lundy pursuant to and based upon action by the committee at the May 16 and June 13, 1964, meetings had been distributed to members.] Zollinger suggested, and the committee agreed, that each section of the rough draft be read at length by Lundy, and that all provisions of each section be subjected to a careful and detailed examination.

(1) Investment by guardians. Lundy pointed out that section 1 of the rough draft amended ORS 126.250 (relating to investment by guardians) by rearranging the list of investments in subsection (1) thereof a guardian of the estate might make without prior court approval and by placing each category of investment in a separate paragraph, and by deleting subsection (3) thereof (containing specific provisions for investment by guardians of the estate for wards receiving federal veterans benefits). He then proceeded to read ORS 126.250, as amended, at length.

Carson question whether the clause "and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment" in paragraph (c) of subsection (1) of ORS 126.250, as amended, should apply to obligations of the state. Lundy commented that this was a matter he had considered bringing to the attention of the committee; that prior to 1963 it appeared to be clear that the quoted clause applied to obligations of all the specified issuers (i.e., United States, State of Oregon and counties, cities, port districts and school districts of Oregon), but that insertion of the common trust fund clause by amendment in 1963 tended to create some doubt that the quoted clause applied to obligations of the United States. Zollinger suggested, and the committee agreed, that the quoted clause should apply only to obligations of counties, cities, port districts and school districts; that obligations of the state should be placed in a separate paragraph; and that obligations of the state and local governmental units should be "general" obligations, thus requiring prior court approval for investment in revenue bonds.

Lundy asked whether the wording of paragraph (a) of subsection (1) of ORS 126.250, as amended (i.e., "time or other deposits of cash"), constituted a sufficient description of a category of investment which might be made without prior court approval; whether some specification of the financial institutions with which the deposits are made should be added. Jaureguy questioned whether deposits with a bank of cash of a ward by his guardian should be regarded as investments. Zollinger expressed the view that such deposits should not be

regarded as investments, but rather as an aspect of the general duty of a guardian of the estate to protect and preserve the estate of the ward and an obligation of the guardian to be performed whether or not he had prior court approval. Carson and Zollinger suggested, and the committee agreed, that paragraph (a) of subsection (1) of ORS 126.250, as amended, should be deleted.

Lundy pointed out that "time or other deposits of cash" appeared in the common trust fund category of investment in subsection (1) of ORS 126.250, and asked whether, in view of the committee's decision to delete the quoted words as a separate category of investment, the quoted words should be added to the common trust fund category described in paragraph (d) of subsection (1) of ORS 126.250, as amended. Zollinger suggested, and the committee agreed, that the common trust fund category of investment should be described as being composed of "cash" (not using "time or other deposits of") or obligations in which a guardian of the estate may invest without prior court approval or both.

In answer to a question by Butler, Zollinger indicated that representatives of the Veterans Administration had not objected to deletion of subsection (3) of ORS 126.250.

(2) Accounting by guardians. Lundy pointed out that section 2 of the rough draft amended ORS 126.336 (relating to accounting by guardians) by specifying with more particularity therein the persons who were to receive copies of final and other accounts made and filed by a guardian of the estate and the procedure for giving copies of accounts other than final accounts. He then proceeded to read ORS 126.336, as amended, at length.

Lundy commented that ORS 126.336, as amended, was quite lengthy, and suggested that the section might be divided into two or more sections. Zollinger agreed, suggesting that subsections (1) to (3) might constitute a separate section, subsections (4) and (5) a second separate section and subsection (6) a third separate section.

Zollinger suggested that "next previous account" in paragraph (b) of subsection (2) of ORS 126.336, as amended, be changed to "last previous account." Lundy commented that "next previous" might be standard terminology used in the guardianship statutes, and indicated that he would check into the matter.

Lundy referred to paragraph (a) of subsection (4) of ORS 126.336, as amended, and asked whether he should solicit the views of the present Secretary of the Board of Control on the matter of receiving copies of accounts of guardians of the estate for wards committed or admitted to, and not discharged

from, state mental institutions. The committee indicated that Lundy should not do so at this time.

Carson suggested, and the committee agreed, that the wording of paragraph (d) of subsection (4) of ORS 126.336, as amended, should be changed in two particulars, as follows: "* * * if there [is] are no such spouse and no such children, * * * if there [is] are no such spouse, no such children and no such parents, * * *."

The committee discussed subsection (4) of ORS 126.336, as amended (relating to the distribution of copies of guardians' accounts other than final accounts), at considerable length. Butler expressed the view, with which Allison indicated agreement, that subsection (4) imposed a substantial burden on guardians; that in some instances it would be necessary for guardians, in complying with subsection (4), to prepare and distribute many copies of each of their accounts; that subsection (4) would tend to cause an increase in the expense of administering estates of wards; and that the present statutory provision on distribution of accounts other than final accounts was adequate. Love commented, and some members apparently agreed, that, while recognizing that some burden would be imposed on guardians by subsection (4), it appeared to be desirable that as many interested persons as possible receive the information contained in accounts of guardians, and that there appeared to be ways available to reduce the expense of preparing and distributing multiple copies of such accounts.

Butler suggested, and Riddlesbarger agreed, that the burden imposed on a guardian by subsection (4) might be reduced somewhat if the guardian mailed or delivered copies of his accounts to the persons specified "so far as known by the guardian." Jaureguy commented that a provision might be added to subsection (4) to the effect that a guardian had complied therewith by mailing or delivering copies of his accounts to the last-known addresses of the persons specified. Zollinger suggested, and the committee apparently agreed, that a provision be added to subsection (4) to the effect that if a guardian was unable, after diligent efforts, to ascertain the name or address of any person entitled to receive a copy of an account, and filed in the guardianship proceeding, with the account, a certificate to such effect, he would be considered to have complied with subsection (4) as to such person.

Jaureguy referred to that part of subsection (4) requiring a guardian to file with each account "proof satisfactory to the court" that copies of the account had been mailed or delivered as provided in the subsection, and suggested that instead of "proof satisfactory to the court" the guardian be required to file an "affidavit," "certificate" or "signed statement" of compliance with the subsection. Zollinger pointed out that his draft considered at the last meeting required the filing with each account of "the certificate of the guardian or his

attorney" that copies of the account had been mailed or delivered as provided in subsection (4), and that "proof satisfactory to the court" had been substituted in order to avoid specifying the exact nature of evidence of compliance with the subsection. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 12; Appendix C, pages 2 and 3.] He suggested, and the committee apparently agreed, that there be filed with each account "the certificate of the guardian or his attorney or other proof satisfactory to the court" of compliance with subsection (4).

The committee discussed in detail and at considerable length the matters of which persons should receive copies of accounts of guardians under subsection (4) of ORS 126.336, as amended, which persons should receive notices of the filing of accounts and which persons should receive neither copies nor notices of filing unless they requested them. In summary, this discussion and the committee action based thereon were as follows:

(a) Superintendent of state institution; Board of Control. Riddlesbarger expressed the view, in which Butler concurred, that if a ward had been committed or admitted to, and not discharged from, a state mental institution, both the superintendent of the institution and the Secretary of the Board of Control should receive copies of accounts of the guardian. Zollinger suggested that although the Secretary of the Board of Control certainly should receive copies of accounts, perhaps the superintendent of the institution should receive only notices of the filing of accounts. The committee apparently agreed that the Secretary of the Board of Control should receive copies of accounts, and that the superintendent of the institution should receive notices of filing.

(b) Guardian of person. Allison commented, and Butler and Riddlesbarger agreed, that if there was a guardian of the person for a ward other than the guardian of the estate, the guardian of the person should receive copies of accounts of the guardian of the estate. Zollinger suggested that it might be sufficient if the guardian of the person received only notices of the filing of the accounts. The committee apparently agreed that the guardian of the person should receive copies of accounts.

(c) Ward not minor or incompetent. Butler, Riddlesbarger and Zollinger expressed the view, and the committee apparently agreed, that a ward not a minor or an incompetent should receive copies of accounts of the guardian.

(d) Minor or incompetent ward. Love suggested, and Zollinger agreed, that many minor wards 16 years of age or older, for example, were probably capable of understanding the accounts of their guardians, and that there were circumstances in which the information contained in such accounts

would be useful to such wards. Butler commented that minor wards should not receive either copies of accounts or notices of the filing thereof; that there were circumstances in which it would be harmful for minor wards to receive copies of accounts. He gave as an example the possible temptation to a minor ward to marry and thus terminate the guardianship and gain control of the estate. Riddlesbarger remarked that he could visualize situations in which minor wards should be reminded of their estates and the administration thereof by their guardians. Allison indicated that he favored some minor wards receiving notices of the filing of accounts over receiving copies of accounts. A majority of the committee apparently agreed that some minor wards should receive copies of accounts.

The committee then discussed the minimum age of minor wards who should receive copies of accounts. Minimum ages of 14, 16 and 18 were considered. Zollinger pointed out that other guardianship statutes referred to minor wards 14 years of age or older [Note: See, for example, ORS 126.131 (citation in proceeding for appointment of guardian for minor), 126.136 (appointment of parent as guardian for minor without citation) and 126.166 (request by minor for appointment of particular guardian)], but expressed the view that a minimum age of 14 appropriate for purposes of these other statutes was not necessarily appropriate for the purpose of a minor ward receiving copies of accounts of the guardian. Carson suggested, and a majority of the committee apparently agreed, that the minimum age of a minor ward for receipt of accounts should be 14; that consistency with other guardianship statutes in this respect was desirable.

Zollinger suggested that it might be desirable for incompetent wards to receive copies of accounts of their guardians; that if an incompetent ward was able to understand the accounts his receipt of copies thereof might serve a useful purpose in some instances, and in any event would not be harmful. Butler expressed the view, and the committee apparently agreed, that incompetent wards should not receive copies of accounts or notices of the filing thereof.

(e) Spouse of incompetent ward. Butler indicated he did not object to the spouse of an incompetent ward receiving copies of accounts of the guardian. Riddlesbarger remarked that he would prefer that the spouse receive notices of the filing of accounts. A majority of the committee apparently agreed that the spouse should receive copies of accounts, and that the spouse need not be a resident of this state.

(f) Children of incompetent ward. Love suggested that the children of an incompetent ward should receive copies of accounts of the guardian, and whether or not such children were residents of this state. Butler, Jaureguy, Riddlesbarger and Zollinger indicated their preference, and a majority of the

committee apparently agreed, that the children, wherever residing, receive notices of the filing of accounts.

(g) Parents of minor or incompetent wards. Zollinger commented that it might be sufficient for the parents of a minor or incompetent ward to receive notices of the filing of accounts of the guardian. Butler, Carson and Jaureguy expressed the view, and a majority of the committee apparently agreed, that the parents should receive copies of accounts. A majority of the committee also apparently agreed that the parents need not be residents of this state.

(h) Brothers and sisters of minor or incompetent ward. Butler indicated that his preference was that brothers and sisters of a minor or incompetent ward should not receive either copies of accounts of the guardian or notices of the filing thereof, and Carson remarked that this was his preference also. Riddlesbarger suggested that copies of accounts or notices of the filing thereof might be mailed or delivered to one of the brothers or sisters, rather than to all of them. Allison, Butler, Love and Zollinger indicated they would not object to brothers and sisters receiving notices of the filing of accounts. Butler, Jaureguy and Zollinger suggested, and a majority of the committee apparently agreed, that copies of accounts, notices of the filing thereof or both should be sent to brothers and sisters, wherever residing, who had requested such copies or notices, but that neither copies nor notices should be mailed or delivered to brothers and sisters without such request.

(i) Notices of filing of accounts. Butler suggested that notices of the filing of accounts, in lieu of mailing or delivering copies of accounts to certain persons specified in subsection (4) of ORS 126.336, as amended, might be published or mailed or delivered to such persons. Carson commented that publishing notices perhaps would be as burdensome on guardians as mailing or delivering copies of accounts. Zollinger suggested, and the committee agreed, that the notices of the filing of accounts mailed or delivered to certain persons indicate that such persons might, on written request to the guardian, receive from him copies of accounts. In response to a question by Riddlesbarger, Jaureguy commented that the requests for copies of accounts should go to the guardian, and not the court or the clerk thereof, since such request in any event would have to be forwarded to the guardian.

The committee discussed the matter of when copies of accounts and notices of the filing thereof should be mailed or delivered to the specified persons. Jaureguy suggested, and Zollinger agreed, that the mailing or delivering of such copies and notices need not occur before the filing of the accounts in the guardianship proceedings, and that perhaps it might be specified that such mailing or delivering occur within

10 days after such filing. Riddlesbarger commented that there should be some proof of the mailing or delivering filed with the accounts, but that such proof should extend only to automatic mailings or deliverings, and not to mailings or deliverings dependent upon the receipt of requests therefor. He suggested that a guardian's responsibility to file such proof should end when the guardian has mailed or delivered the copies of accounts or notices of the filing thereof as required of the guardian at the time of the filing of the accounts. Riddlesbarger asked if there should be some time period established within which requests for copies of accounts or notices of the filing thereof should be made. Jaureguy suggested that such requests should be received before the filing of the accounts.

The committee turned to consideration of subsection (5) of ORS 126.336, as amended (relating to final accounts of guardians). Riddlesbarger and Zollinger pointed out that subsection (5) required personal service of copies of final accounts of guardians on the persons specified in subsection (4), and that in considering this aspect of subsection (5) the committee should keep in mind its discussion and tentative revision of subsection (4). Zollinger commented that the persons to be personally served with copies of final accounts should be limited to those entitled to receive copies of accounts under subsection (4) automatically or by reason of having requested them and those having requested copies of final accounts.

Zollinger remarked that personal service of copies of final accounts of guardians on persons outside the state might involve some problems, and asked whether some provision should be made for service by mail on such persons and a period of time after such service and before hearings on the final accounts. Lundy asked about the meaning of "served personally"; whether the quoted words contemplated service and return as in the case of a summons in a civil action. Zollinger expressed the view that the manner of service of copies of final accounts should be similar to that of service of summons in civil actions, including mailing and publication, although mailing to persons outside the state should be sufficient and publication not required.

Allison questioned the need for separate and different provisions for accounts other than final accounts (i.e., subsection (4)) and final accounts (i.e., subsection (5)). Lundy pointed out that two principal distinctions between the two categories of account were recognized in the two subsections; that is, a distinction as to the manner in which copies of accounts were distributed and the provision for objections to final accounts but not to other accounts. Zollinger commented that there was no occasion for objections to accounts other than final accounts since the right to make such objections was reserved until the final accounts were filed [Note: See subsection (6) of ORS 126.336], and interested persons

were not bound by court settlement of accounts other than final accounts.

Allison expressed the view that whether objections were allowed or not should not be a ground for distinction between the manner of distributing copies of accounts of guardians. He asked why there should be personal service of copies of final accounts, pointing out that there was published service, but not personal service, in many decedents' estates proceedings. Zollinger commented that some decedents' estates proceedings were proceedings in rem and not adversary in nature, and that this circumstance justified the view that a court might make a determination in such proceedings without the usual requirements met in adversary proceedings. He expressed the opinion that proceedings involving settlement of final accounts of guardians were not proceedings in rem; that such proceedings should be adversary in nature, with interested persons served and afforded opportunity to object and be heard on their objections; that service in such proceedings was as important as in civil actions. Allison commented that mailed service on nonresidents in civil actions was difficult because of lack of knowledge of the whereabouts of such persons, but this difficulty did not exist to the same extent in proceedings involving settlement of final accounts of guardians.

In response to a question by Butler, Zollinger indicated his belief that if a ward, for example, was personally served with a copy of the final account of the guardian and failed to object thereto, the ward would be foreclosed from later raising objections based on purported irregularities in the final account. Butler suggested that it was not desirable that a guardian should be released from liability for fraudulent acts, for example, by reason of the settlement of the final account, and not similarly released by reason of the settlement of other accounts. Riddlesbarger suggested that a guardian might be so released from liability except for fraud or inexcusable neglect. Jaureguy called attention to the statute [Note: See ORS 18.160] allowing one year for relief from action by a court under certain circumstances. He expressed the opinion that this statute applied to settlement of final accounts of guardians, but allowed that the committee might wish to make a similar specific provision applicable to such settlement.

Zollinger commented that the responsibility of a guardian should be terminated at some point, and indicated that he favored settlement of the final account as that termination point; that he did not object to the one year provision referred to by Jaureguy, but did not favor permitting a person to raise objections after that time. Allison remarked that it had been his understanding that a proceeding involving settlement of a guardian's final account and discharge of the guardian was not

an adversary proceeding in the same sense as a civil action; that if fraud on the part of a guardian, for example, were discovered within one year, an interested person had a right to object and to have his objection heard and determined by the court.

Riddlesbarger suggested that before the committee made any decisions with respect to revision of subsections (5) and (6) of ORS 126.336, it should have more information on the effect of settlement of a guardian's final account and the discharge of the guardian, the liability of the guardian thereafter and related matters. He expressed his willingness to do some research on these matters and report his findings to the committee. The committee agreed that Riddlesbarger should do this.

Lundy was requested to prepare a revised draft of subsection (4) of ORS 126.336, embodying, in so far as possible, the revisions apparently agreed upon by the committee at this meeting. He was instructed to postpone preparation of a revised draft of subsection (5).

b. Service of citation on appointment of guardian. Butler referred to his report on Comment & Suggestion No. 12. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that, under subsection (3) of ORS 126.146, service of citation in a proceeding for the appointment of a guardian was not necessary on a "person" who had signed the petition, had signed a written waiver of service of citation or made a general appearance, and that "person" apparently meant those on whom subsection (2) of ORS 126.131 required service of citation, including a proposed ward, whether an incompetent, a minor 14 years of age or older or a spendthrift. Butler indicated that Comment & Suggestion No. 12 objected to the interpretation of "person" as including a proposed ward who was an incompetent. He expressed the opinions that the matter was not one of serious consequence and that the application of subsection (3) of ORS 126.146 to proposed wards was not harmful. He recommended, and the committee agreed, that no change be made in subsection (3) of ORS 126.146.

c. Factors considered by court in appointing guardian. Butler referred to his report on Comment & Suggestion No. 15. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that ORS 126.166 listed several non-exclusive factors which a court might take into consideration in appointing a guardian, and that Comment & Suggestion No. 15 suggested the addition to this list of any request for the appointment as guardian for an incompetent by the incompetent orally in open court. Butler recommended, and the committee agreed, that the suggested addition to the list of factors in ORS 126.166 should not be made.

Riddlesbarger asked whether it was the policy of the committee to communicate with persons who send in comments and suggestions and report committee action thereon, and expressed the opinion, with which Jaureguy agreed, that perhaps this should be done. Lundy indicated that the policy previously established by the committee was not to do this. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, pages 7 and 8.] He commented that the committee might wish to send to such persons copies of proposed legislation in final form recommended by the committee and perhaps copies of any final reports applicable to such proposed legislation. Zollinger expressed approval of the approach suggested by Lundy, and the committee apparently agreed.

d. Filing name and address of guardian. Butler referred to his report on Comment & Suggestion No. 20. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that, under ORS 126.181, a guardian was required, before entering upon his duties, to file in the guardianship proceeding his name and address, and that Comment & Suggestion No. 20 objected to this requirement on the ground that the petition for the appointment of a guardian contained this information [Note: See ORS 126.126]. Butler recommended that the requirement be retained, and outlined his reasons therefor. Lundy commented that in a preliminary draft of proposed legislation prepared in the course of the 1960-1961 revision of the guardianship and conservatorship statutes the requirement that a guardian file his name and address was to be applicable "if such information is not contained in the petition for the appointment of a guardian," but that the quoted wording was subsequently deleted. The committee agreed that the requirement should be retained, and no change made in ORS 126.181.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, August 22, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The committee agreed that the principal matter for consideration at the next meeting should be the two rough drafts of proposed legislation relating to changing dower and curtesy and protecting a spouse's inheritance rights. Allison and Lundy were requested to complete the preparation of the rough drafts as soon as possible, in order that copies thereof might be distributed to members before the next meeting. [Note: The decision of the committee to consider the rough drafts relating to dower and curtesy at the meeting scheduled for August 22 superseded the previous decision of the committee to consider them at a meeting to be held in September. See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 8.]

The meeting was adjourned at 1 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, July 18, 1964)

Subcommittee on Guardianship and Conservatorship

Report to Advisory Committee

June 13, 1964

[Note: Prior to the May 16, 1964, meeting of the Advisory Committee, Mr. Carson, as chairman of the Subcommittee on Guardianship and Conservatorship, assigned to Mr. Butler, for his consideration and recommendation, certain of the comments and suggestions pertaining to guardianship and conservatorship reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook. Because of unexpected illness, Mr. Butler was unable to undertake the assignment before the May 16, 1964, meeting. See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12; Appendix B, page 14. However, Mr. Butler thereafter prepared reports on Comment & Suggestion Nos. 12, 15 and 20, and submitted them to the Advisory Committee, through Mr. Zollinger, at the June 13, 1964, meeting. See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 16. Mr. Butler's reports are set forth below.]

Comment & Suggestion No. 12

Subject: Guardianship; appointment of guardian; service of citation.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Commentator: Mr. Butler.

("126.146(3) has been misunderstood in that the 'person' referred to includes the incompetent which contention I have flatly rejected.")

Subsection (3) of ORS 126.146 specifies that service of the citation issued under ORS 126.131 is not necessary on a "person" who has signed the petition, has signed a written waiver of service of citation or makes a general appearance. Apparently, it has been contended in Judge Jenkins' courtroom that as used in ORS 126.146(3) the word "person" refers among others to the proposed ward. He expresses a refusal to accept that view.

The same question arises as to subsection (3) of ORS 126.431.

Mr. Robert W. Lundy, Chief Deputy Legislative Counsel, advises that he has attempted to trace the history of subsection (3) of ORS 126.146 in the deliberations of the 1960-61 advisory committee but has been unable to find therein anything defining the committee's view as to the identity of those who were referred to by the cited subsection as "person."

To some extent, I am sympathetic with Judge Jenkins' view that as used in ORS 126.146(3) the word "person" should not be interpreted to include a proposed ward. However, I question whether that interpretation can be supported by a strict reading of that subsection in light of the provisions of ORS 126.131 which defines the persons or institutions on whom citation is to be served. Those defined include proposed wards who are incompetent, minors and spendthrifts.

Although the question is an interesting one, I have doubt as to whether it is one of serious consequence. For example, is there reason to suppose that any harm will occur simply because necessity for service of citation on a proposed ward is waived when that person being a spendthrift has signed the petition or has made a general appearance.

If the advisory committee disagrees with this view, perhaps Legislative Counsel should be asked to draft amendments to subsections (3) of both ORS 126.146 and ORS 126.431 specifying that as to the proposed ward, service of citation shall be required in every case.

Comment & Suggestion No. 15

Subject: Guardianship; appointment of guardian; factors considered.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Commentator: Mr. Butler.

> ("RE: ORS 126.166. It is suggested that there be added to subsection (1), a provision that the appointing judge may take into consideration any request made orally by the incompetent in open court.")

It is my understanding that Sec. 203 of the Model Probate Code was used as a guide by the 1960-61 advisory committee in drafting the provisions of ORS 126.166. The committee took the view that the question of who is to be appointed guardian should be solely within the discretion of the court, but that a nonexclusive list of factors to be considered by the court should be included in the statute in order to assist and

fortify the court's exercise of that discretion. The point that the list of factors appearing in the statute is nonexclusive seems self-evident in that the court is instructed to appoint the qualified person most suitable who is willing to serve, having due regard, "among other factors," to those enumerated.

I suggest that there is nothing to prevent the appointing judge from taking into consideration a request made orally by the incompetent in open court and that in appropriate cases he would feel free to do so.

It is recommended that no action be taken toward revision of the cited Code provision.

Comment & Suggestion No. 20

Subject: Guardianship; filing name and address of guardian.

Source: Samuel M. Bowe, Attorney, Grants Pass.

Commentator: Mr. Butler.

> ("Sec. 126.126 ORS provides for the contents of a petition for the appointment of a guardian. Sec. 126.181 provides for the filing in the guardianship proceeding of the name, residence and post office address of the guardian. This is entirely superfluous and unnecessary as all the information is contained in the petition. Sec. 126.181 should provide only for such filing in the event of change of residence.")

Mr. Lundy (Chief Deputy Legislative Counsel) advises me that, according to his recollection, the 1960-61 advisory committee decided that the portion of ORS 126.181 requiring a guardian, before entering upon his duties, to file his name, residence and post office address should be included in the Code additional to a similar requirement of ORS 126.126(4) to cover the unusual situation in which a guardian other than the person identified in the petition is appointed.

I can think of two other reasons justifying continuation of ORS 126.181 in effect, namely:

(1) The name, residence and post office address of the proposed guardian as it appears in the petition for appointment may be expected to be accurate "so far as known by the petitioner." ORS 126.181 has the effect of requiring confirmation or correction of that information.

(2) ORS 126.181 performs the added function of requiring the guardian promptly to file every change in his name, residence or post office address.

ADVISORY COMMITTEE
Probate Law Revision

Fifth Meeting

Date: Saturday, August 22, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of July 18 meeting of advisory committee.

2. Report on publicity and miscellaneous matters (Lundy).

3. Dower and curtesy.

   a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64).

   b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 8/4/64).

   c. Report by Gooding in opposition to proposed legislation.

4. Guardianship and conservatorship (if time permits).

   Continued consideration of proposed legislation (Rough Draft, 7/18/64), starting with section 3 thereof.

5. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Fifth Meeting, August 22, 1964

Minutes

The fifth meeting of the advisory committee was convened at 9:05 a.m., Saturday, August 22, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Before the meeting was convened, Riddlesbarger suggested that a matter the committee might wish to consider at some future time was that of allowing an attorney an advance on his fees for legal services performed for a decedent's estate before the settlement of the account of the executor or administrator thereof. He pointed out that the statutes presently do not provide for such advances, and commented that the committee should give some thought to the advisability of proposing a statutory provision on the matter. [Note: See ORS 117.660.]

1. Minutes of Last Meeting. At Dickson's request, Lundy summarized briefly the proceedings at the last meeting of the committee. Zollinger moved, seconded by Jaureguy, that reading of the minutes of the last meeting (July 18, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting had been prepared and copies thereof distributed according to the established pattern. He indicated that the news release on the June 13 meeting had been published in the July issue of the Oregon State Bar Bulletin. He noted that he had received no comments and suggestions on problem areas in Oregon's probate and related law since the last meeting.

Lundy also reported that Thompson Snyder, attorney, Corvallis (formerly a member of the staff of the Legislative Counsel Committee), had contacted him with regard to the area of the committee's immediate program pertaining to summary proceedings for administration of small estates of decedents. Snyder had indicated that he had noted the committee's interest in this area as reported in the publicity on committee activities, and that he had recently done some research and prepared a paper on simplified probate procedure in certain decedents' estates situations, including small estates, apparently in connection with the current project of special committees of the National Conference of Commissioners on Uniform State Laws and the American Bar Association to work

on a uniform or model probate code. [Note: See Staff Report No. 1 ("Probate Law Revision in Oregon--An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), pages 37 and 38.] Snyder had promised to send a copy of his paper to Lundy, and Lundy remarked that he would forward this to Denny Z. Zikes, who was engaged in research for the committee in the area of summary proceedings for administration of small estates.

Dickson reported that he had recently consulted with Zikes and two other attorneys assisting Zikes on the small estates research project. He indicated that he would inform Zikes of Snyder's interest and suggest that Zikes contact Snyder on the matter. Dickson also reported that those engaged in the small estates research project were tentatively thinking of small estates in terms of a maximum value of $10,000. Some members expressed the view that this maximum value probably was too high, but the committee agreed that this was a matter that should be postponed until the research report was before the committee for consideration and that the maximum value could be adjusted as determined desirable at that time.

Lundy asked Dickson about the progress being made by Campbell Richardson on the research project for the committee in the area of probate courts and their jurisdiction, whether Richardson contemplated the submission of any proposed legislation in this area to the 1965 legislature and whether Richardson needed any assistance from the Legislative Counsel's office in regard to the project. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 2.] Dickson responded that he had not discussed the matter with Richardson recently, but would do so and suggest that Richardson contact Lundy.

3. Dower and Curtesy. [Note: Before the meeting copies of the following had been distributed to members: (1) A rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated August 4, 1964), prepared by Allison and Lundy pursuant to and based upon action by the committee at the June 13 meeting; (2) a rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (dated August 4, 1964), prepared by Allison and Lundy pursuant to and based upon action by the committee at the June 13 meeting; and (3) a report containing critical comment on and expressing views in opposition to the two rough drafts of proposed legislation, prepared by Gooding. A copy of Gooding's report constitutes Appendix A to these minutes.]

Allison outlined the aims of the two rough drafts, referred to some of the details thereof and commented on the policy which they were intended to implement. He expressed the views that the proposed fee estate in one-fourth of a decedent's real

property was a more desirable interest for the decedent's surviving spouse than the present life estate in one-half of such real property, and that there should not be much opposition to this proposal. He commented that the nature of the interest of a spouse to be protected during the marriage by the declaration proposal justified the characterization "inchoate marital right." Allison noted that Gooding's report argued that the device of the recorded declaration to protect an inchoate right would probably seldom be used and that its use involved unusual burdens on the nonowner spouse, such as obtaining knowledge of the owner spouse's separate real property, obtaining legal advice and assistance in connection with preparing and recording the declaration, securing an accurate description of the property and causing personal service on the owner spouse. Allison agreed that the declaration device would probably be used only in unusual cases, since most conveyances of real property to married persons were in the form of tenancies by the entirety, and commented that tenancies in common in such situations were unusual. He expressed the view that the declaration device would most likely be used only with respect to property inherited by the owner spouse or acquired by the owner spouse before the marriage or in cases in which the spouses were separated. He remarked that the proposed form for the declaration included in the rough draft was an uncomplicated one that need not necessarily be prepared by an attorney, and that there would probably be sufficient sources from which a nonowner spouse might learn of the declaration device in those cases in which the protection afforded thereby was necessary or desirable. He suggested that in some instances the owner spouse might urge the use of the declaration device by the nonowner spouse. Allison expressed the views that the present inchoate dower and curtesy caused many problems with respect to real property, as where, for example, spouses had separated but there was no divorce, or a nonowner spouse had disappeared and could not be found, and that the advantages of abolishing the present dower and curtesy and substituting the more substantial interest in real property of the owner spouse at his death, together with the declaration device for use in the unusual situations in which the nonowner spouse needs or wants the protection afforded thereby, outweighed the advantages of the present dower and curtesy.

Gooding summarized the points made in his report in opposition to the two rough drafts. He expressed agreement with the proposal to change the dower and curtesy interest from a life estate in one-half to a fee estate in one-fourth, but argued against abolition of the inchoate interest. He commented that a principal drawback of the proposed declaration device was the requirement of personal service on the owner spouse; that such service would most likely cause marital discord. He also pointed out that if the declaration device

were to become law, every time an owner spouse wished to convey any of his separately owned real property a check on whether the nonowner spouse had recorded a declaration would have to be made, or the nonowner spouse would be joined in every such conveyance as a matter of course.

Allison commented that it was his impression that the trend in recent revisions of probate law in other states was to abolish dower and curtesy, including the inchoate interest. Lundy remarked that there appeared to be such a trend, but that the movement away from dower and curtesy also appeared to be a slow and somewhat reluctant one. He reported that, in so far as he had been able to determine, all aspects of dower and curtesy had been abolished in 13 states (i.e., Alaska, Colorado, Connecticut, Georgia, Mississippi, Missouri, New York, North Dakota, Oklahoma, South Dakota, Tennessee, Vermont and Wyoming), and most recently in Missouri in 1955 and Alaska in 1963. He pointed out that dower and curtesy had been abolished expressly by name in some other states, but the inchoate interest had been retained under some other designation, and referred to section 238 of the 1963 Iowa Probate Code as an example of this. He noted that dower and curtesy had been substantially abolished in England in 1833 by permitting the owner spouse to defeat the inchoate interest by conveyance or will, and that the last remnants of dower and curtesy had been eliminated in 1925. England and many of the Commonwealth countries, Lundy indicated, now had "family maintenance"legislation, which was roughly similar to the allowances to surviving spouses and minor children in this country, but more flexible and with aspects of election against will. He remarked that there was a considerable body of recent literature on the subject of dower and curtesy and proposals for substitutions therefor designed to establish and preserve family rights in decedents' estates. Such proposals, he commented, included treatment by the Model Probate Code of certain inter vivos gifts by a decedent as in fraud of marital rights, extension of election against will to inter vivos transfers by a decedent that are included in the decedent's estate for federal estate tax purposes, subjection of a portion of all real and personal property owned by a married person to a statutory trust in favor of the spouse of such person and several variations of the family maintenance legislation current in England and many of the Commonwealth countries. Lundy pointed out that those involved in the probate law revision project currently being prosecuted in Wisconsin had been exploring aspects of some of these proposals, but thus far apparently had not agreed on the suitability of any of them as a substitute for dower and curtesy.

The committee then discussed in some detail the two rough drafts and possible alternatives to the proposed declaration device as a means of recognizing and protecting some kind of inchoate interest in the real property of an owner spouse in favor of the nonowner spouse during the marriage.

a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/61). All members expressed approval of the proposal embodied in the rough draft to change the interest of a decedent's surviving spouse in the real property owned by the decedent, whether taken in the case of the decedent's intestacy or by election against the decedent's will, from a life estate in one-half to a fee estate in one-fourth.

Zollinger referred to subsection (3) of ORS 111.020, as amended by section 1 of the rough draft, and suggested, and Allison and Frohnmayer agreed, that real property should descend to the father and mother of an intestate, if married, as tenants by the entirety, rather than as tenants in common. Dickson suggested that the real property descend to them as joint tenants with the right of survivorship. Zollinger pointed out that joint tenancies had been abolished by statute. [Note: See ORS 93.180.] Dickson responded that the statute abolishing joint tenancies did not preclude another statute creating joint tenancies in certain circumstances.

Lundy raised the general proposition of whether the committee, in considering statute sections amended for purposes of changing dower and curtesy, wished also to consider aspects of those statute sections not necessarily related to the dower and curtesy matter, or to reserve such aspects for consideration in the future. Zollinger expressed the view, with which the committee apparently agreed, that it would be appropriate for the committee at this time to consider such aspects as were recognized as needing revision whether or not they necessarily related to the dower and curtesy matter.

Zollinger referred to the new provision on waiver of the right of election against will added to ORS 113.060 as subsection (2) thereof by section 3 of the rough draft, and commented on the difficulty of determining whether there had been "a fair consideration under all the circumstances" given to the person waiving the right. Lundy pointed out that the wording of the waiver provision was based upon the wording of section 39 of the Model Probate Code. Zollinger suggested, and Dickson agreed, that the words "after full disclosure of the nature and extent of the right and if the thing or promise given to the person waiving the right is a fair consideration under all the circumstances" should be deleted from the waiver provision. Allison pointed out that the waiver provision would apply to the right of election against will as to personal property as well as to real property, and expressed the view that the waiver provision might become a source of controversy. He commented that the waiver provision was not essential to the central theme of the rough draft (i.e., changing dower and curtesy), and suggested, and the committee agreed, that all of subsection (2) be deleted.

Lundy pointed out that in the Comment under section 3 of the rough draft he had raised some questions with respect to the statutory provisions relating to election against will; that is, (1) whether the manner of service of an election on the executor or his attorney should be specified, (2) whether some provision should be made for election against will on behalf of an incompetent surviving spouse for whom there was no guardian of the estate, (3) whether some provision should be made with respect to the nature of the right to make an election (e.g., personal, not transferable and not exercisable after the death of the surviving spouse), (4) whether some provision should be made with respect to whether an election once made was binding and with respect to the effect of failure to exercise the right to elect and (5) whether some provision should be made for barring, denying or reducing an election under such circumstances as where other adequate provision had been made for a surviving spouse, or a decedent and surviving spouse were living apart at the time of the decedent's death, or a surviving spouse had abandoned a decedent. Frohnmayer commented that these questions might involve controversial matters and might require a considerable amount of time to resolve, that the committee had adopted the view that changing dower and curtesy was a matter it wished to present to the 1965 legislature and that if these questions were considered and an attempt made to resolve them the proposed legislation relating to dower and curtesy might not be completed in time for submission to the 1965 legislature. The committee apparently agreed that these questions should not be considered at this time.

Allison pointed out that section 5 of the rough draft would repeal 41 existing statute sections that related wholly to dower and curtesy, but that ORS 113.090, imposing a 10-year statute of limitations on actions or suits by surviving spouses to recover or reduce to possession dower or curtesy, was not included in the list of statute sections to be repealed. He suggested that ORS 113.090 be retained, noting that Lundy had pointed out in the Comment under section 5 of the rough draft that this statute section would become obsolete 10 years after the effective date of the proposed legislation.

Lundy noted that in the Comment under section 5 of the rough draft he had pointed out that amendments of statute sections that appeared to relate partially to dower and curtesy for the purpose of deleting pertinent portions thereof were not included in the rough draft because of the substantial bulk they would have added thereto at this time, and that he had listed in the Comment a number of statute sections that probably should be amended in the proposed legislation in its final form. He reported that he had discovered, since preparation of the rough draft, a few additional statute sections not listed in the comment that related partially to dower and curtesy and that probably should be amended (i.e., ORS 91.020, 91.030,

94.330, 94.445 and 105.220).

Zollinger indicated that he had some relatively minor suggestions with respect to the wording of certain portions of the rough draft. At Dickson's suggestion, Zollinger agreed to send these suggestions to Allison and Lundy.

b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 8/4/64). Jaureguy asked about the nature of the declaration device embodied in the rough draft and whether a nonowner spouse would have a protected inchoate right if a declaration was not recorded. Allison pointed out that there would be no inchoate right unless a declaration was recorded, and, in response to a question by Jaureguy, affirmed that recording a declaration would have the effect of creating an inchoate right.

Gooding commented, and Jaureguy agreed, that there might be considerable reluctance on the part of a nonowner spouse to have a copy of the declaration served personally on the owner spouse for fear of causing marital discord. Allison expressed the views that personal service on the owner spouse was not essential to the creation of the inchoate right by the recording of the declaration, and that he would not object to elimination of the personal service. Carson, Dickson and Zollinger agreed that the personal service should be eliminated. Frohnmayer remarked that, although personal service might not be essential to the creation of the inchoate right, if a nonowner spouse recorded a declaration without informing the owner spouse and the owner spouse later found out about the recording, as much marital discord might result as if there had been personal service at the time of the recording. Dickson and Jaureguy suggested that the declaration device might most often be used in those cases in which marital discord already existed. Carson noted that the requirement of personal service injected into the procedure the possibly bothersome matter of determining whether the service was valid. Lundy pointed out that personal service on the owner spouse was tied in with the right of the owner spouse to maintain an action to challenge the validity and sufficiency of the declaration within 10 years after the recording. Zollinger commented that if personal service was not required there would be no occasion for challenging the declaration and no reason for a statute of limitations on such a challenge; that the primary basis for challenge would be whether or not there had been personal service or its validity. Lundy suggested that there might be other grounds for challenging the recorded declaration, such as whether the owner spouse in fact owned the real property in his sole right, whether the alleged spouses were in fact married and whether the property was accurately described.

In answer to a question by Butler, Riddlesbarger pointed out that the rough draft required the declaration to describe the particular real property to which it was applicable, rather than the declaration being made applicable generally to property owned by the owner spouse in his sole right. Butler commented that in view of this circumstance it would be possible for one spouse to acquire property without knowledge on the part of the other spouse, who would have to check the records of deeds in order to learn about such property before undertaking to record a declaration to protect the inchoate right as to such property. Allison noted that in the early drafting stages consideration was given to making the declaration applicable to all property owned in sole right by the owner spouse in the county in which the declaration was recorded, but that some members at the last meeting had expressed a preference for the specifically described property approach. He commented that he contemplated a frequent use of the declaration device with respect to the homestead only. Butler asked about the possible situation in which one spouse acquired property and did not record the transaction, and whether in such a situation there should be a legal presumption that the other spouse had recorded a declaration applicable to such property. Frohnmayer commented that the situation of an unrecorded deed was very rare, and expressed the view that it was not necessary to be concerned about such a situation. Allison suggested that the declaration should be made applicable to all property in the county in which the declaration was recorded. Zollinger suggested, and Frohnmayer agreed, that the nonowner spouse recording the declaration should be permitted to designate either all property located in the county or particular described property so located.

Jaureguy commented that the principal unresolved questions appeared to be whether there should be a protected inchoate right in favor of the potential surviving spouse and, if so, whether the declaration device was the best means of protecting such an inchoate right. He remarked that the committee appeared to be concerned primarily with the situation in which one spouse did not wish to make suitable provision for the other spouse who survived him. He suggested that there might be cases in which a surviving spouse would prefer that all of the decedent's real property go to the children.

Zollinger questioned the policy of a protected inchoate right as to real property in favor of a potential surviving spouse, and whether there should be any more restriction on the inter vivos transfer of real property than on such transfer of personal property. He indicated that he favored no inchoate right as to real property. He commented that members had previously expressed a desire for protection afforded by an inchoate right, particularly with respect to the home in which the spouses lived and at least if the home was acquired

during the marriage; that the Alaska approach, requiring the joinder of both spouses in a conveyance of the family home or homestead, had been considered but abandoned because experience in that state had revealed the difficulty in determining what was the home; and that the committee had then turned to the declaration device applicable to any real property owned in sole right by one spouse. Zollinger expressed his willingness to accept the declaration device as less drastic than complete elimination of the inchoate right, which he nevertheless preferred.

Dickson expressed the view that there should be some way whereby a nonowner spouse was protected against the other spouse disposing of his real property inter vivos so as to adversely affect provision for the nonowner spouse at the owner spouse's death, and that the declaration device appeared to him to be the best way to do this; that it appeared to be a fair and just compromise of the differing views expressed by the members. He commented that the declaration device afforded a means of protecting the nonowner spouse in the extraordinary situations, and that it need only be used in such situations.

At Dickson's request the members were polled on the questions of adopting the declaration device and of completely eliminating an inchoate right. Zollinger indicated that he was willing to accept either the declaration device or complete elimination of the inchoate right. Carson expressed agreement with Zollinger's position. Jaureguy indicated that he was opposed to the declaration device and, although somewhat uncertain on the matter of complete elimination of the inchoate right, was inclined to favor such elimination. Butler expressed opposition to the declaration device and support for complete elimination of the inchoate right. Gooding commented that he was undecided on both matters. Allison indicated that he favored the declaration device for the practical reason that it would make it easier to secure approval by the legislature of the proposal for abolishment of dower and curtesy. Frohnmayer expressed agreement with Allison's position, and commented that, although he was opposed to the declaration device, the problem of securing legislative approval had to be considered, that some provision should be made for protecting the nonowner spouse in the difficult and unusual situations and that the declaration device might be adequate for such purpose. Riddlesbarger indicated that he opposed the declaration device and that he did not believe the legislature would approve it. Dickson commented that he favored the declaration device, but that he also so strongly favored elimination of inchoate dower and curtesy that he would be willing to support such elimination without the declaration device.

c. Alternatives to declaration device. Riddlesbarger indicated that he opposed the declaration device, and expressed the view that a nonowner spouse should not have to take such affirmative action in order to protect an inchoate right as to the real property owned by the other spouse. He suggested that inchoate dower and curtesy be retained and that waiver thereof be provided for by means of a declaration filed by the nonowner spouse. Zollinger and Allison disagreed with Riddlesbarger's suggestion. Allison commented that one of the principal practical problems arising out of the present dower and curtesy occurred where it was difficult or impossible to obtain joinder of a nonowner spouse in a conveyance of the property, and that Riddlesbarger's suggestion would not resolve that problem. Riddlesbarger then suggested the possibility of abandoning an inchoate right altogether and adopting an expanded and more flexible surviving spouse's allowance device, to be used when necessary and determined in an adversary proceeding as in the case of a divorce.

Indicating that he also opposed the declaration device, Frohnmayer commented that probably in most cases both spouses contributed to and were responsible for the acquisition of real property during the marriage, and suggested that an approach might be taken whereby if one spouse owned property and the other spouse refused to join in a conveyance thereof, the owner spouse could institute a proceeding to determine the extent of the interest of the nonowner spouse in the property, proceed to sell and convey the property and have a portion of the proceeds of such sale allocated to the nonowner spouse based upon the determined interest of the nonowner spouse. Zollinger remarked that Frohnmayer's suggestion appeared to involve an aspect of the community property concept.

Zollinger suggested that the application of the declaration device might be limited to the real property constituting the homestead. Frohnmayer expressed disapproval of requiring a nonowner spouse to record such a declaration, and suggested that the joinder of a nonowner spouse be required in a conveyance of the homestead and that to secure compliance with such requirement the owner spouse state in a conveyance without the joinder of the nonowner spouse that the property conveyed was not the homestead. Zollinger suggested that an owner spouse should make such a statement in his acknowledgment of the conveyance or in the form of an oath before a notary. In answer to a question by Riddlesbarger, Frohnmayer indicated that the homestead might be that as presently defined by statute. Riddlesbarger and Zollinger remarked that they did not favor the present statutory definition of a homestead. Zollinger suggested that the owner spouse's statement be that the property conveyed was not the place of residence of both spouses or either of them. Frohnmayer commented that

violation of the owner spouse's statement under oath would bring into play both criminal and civil sanctions. Zollinger commented that the probable practical effect of requiring such a statement by the owner spouse would be that a grantee would insist upon joinder of both spouses in the conveyance in all cases where it was at all evident that one or both spouses resided on the property.

Riddlesbarger suggested, and Dickson agreed, that members should make an effort to obtain the reaction of attorneys and others of their acquaintance to the declaration device and the owner spouse's statement device and report such reaction at the next meeting. Dickson suggested that this matter be publicized in the Oregon State Bar Bulletin for the purpose of soliciting the views of members of the Bar to be received before the next meeting. Lundy pointed out that the deadline for submission of material to be published in the August issue of the Bar Bulletin had already passed.

Dickson suggested, and the committee agreed, that the matter of the declaration device, the owner spouse's statement device and other possible devices for protecting an inchoate right should be considered again at the next meeting. Allison indicated that he and Lundy would endeavor to prepare, in time for consideration at the next meeting, a rough draft of proposed legislation embodying the concept of an owner spouse's statement to protect the right of the other spouse in the home of either or both spouses, and perhaps a revised rough draft embodying the declaration device, with personal service of the declaration on the owner spouse eliminated and application of the declaration extended to all property in the county in which the declaration was recorded.

4. Guardianship and Conservatorship. The committee continued its consideration, begun at the last meeting, of the amendment of ORS 126.336 (relating to accounting by guardians) by section 2 of the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964).

a. Intermediate accounts. Lundy pointed out that at the last meeting the committee had arrived at some tentative conclusions concerning the content of subsection (4) of ORS 126.336 (relating to the dispcsition of accounts other than final accounts of a guardian of the estate), and that he had been requested to prepare a revised draft of subsection (4) embodying, in so far as possible, the revisions apparently agreed upon by the committee. He distributed to the members copies of such a revised draft he had prepared. [Note: This revised draft is reproduced as Appendix B to these minutes.]

Frohnmayer indicated that he had read that portion of the minutes of the last meeting pertaining to the disposition of intermediate accounts, and expressed the view that copies of the accounts need not be furnished by the guardian to as many persons as contemplated by the revised draft of subsection (4). He remarked that interested persons could obtain copies of the accounts from the clerk of the probate court with whom they were filed.

Lundy referred to the present wording of subsection (4) (i.e., "The guardian of the estate shall give a copy of each account to the person or institution having the care, custody or control of the ward"), and noted that it was somewhat similar to that relating to service of citation in a proceeding for the appointment of a guardian. [Note: See ORS 126.131.] He also referred to the proposed code of probate procedure prepared by the 1942 Bar Committee on Probate Law and Procedure, and pointed out that section 206 of that proposed code provided for a hearing on the annual account of a guardian, with notice thereof to the ward's spouse, next of kin and creditors.

Riddlesbarger moved, seconded by Zollinger, that the revised draft of subsection (4) be approved. Motion carried, with Frohnmayer voting no.

Frohnmayer expressed the view that in most cases it was almost as much of a burden on a guardian to furnish notices of the filing of an account as copies of the account itself, and questioned the desirability of the provisions of the revised draft of subsection (4) relating to such notices. Riddlesbarger suggested that copies of the account should be sent to everyone entitled to receive notices if the account was not too voluminous. Zollinger suggested, and the committee apparently agreed, that, in terms of compliance with the notice requirements of the revised draft, sending a copy of the account should be considered the equivalent of sending a notice.

Allison indicated that in his opinion the provisions of the revised draft relating to notices should be deleted. He suggested that paragraph (a) (A) of the revised draft be revised by deleting the words "or a notice to the superintendent of the institution who has not so presented such a request," and that paragraph (a) (D) be revised by providing that if the ward was a minor or an incompetent, a copy of the account would be furnished to the ward's spouse who was not under legal disability "and to any other member of the ward's family or relative who has requested a copy of the account." Zollinger asked whether "member of the ward's family or relative" should be defined. Lundy suggested, and Allison agreed, that "any child, parent, brother or sister of the ward" be substituted for "any other member of the ward's family or relative."

Frohnmayer commented that the negative phrasing of paragraph (a) (C) of the revised draft was somewhat confusing and suggested that the paragraph might be phrased affirmatively; that is, "if the ward is a minor 14 years of age or older* * *." Zollinger suggested, and the committee apparently agreed that paragraph (a) (C) should be revised to read: "If the ward is a minor 14 years of age or older or a spendthrift, a copy of the account to the ward."

Allison moved, seconded by Frohnmayer, that Lundy be requested to prepare and submit to the committee at the next meeting a draft of subsection (4) based upon Allison's suggestions for revision of the present revised draft by eliminating the notice provisions thereof, so that the committee might have an alternative to the present revised draft to consider at that time. Motion carried unanimously.

At Riddlesbarger's request the members were polled on the question of whether the notice provisions of the revised draft of subsection (4) should be eliminated. It appeared that all members were favorably disposed toward elimination of the notice provisions.

Zollinger asked whether the proposed legislation should provide for the making of some kind of record of requests for copies of an account received by a guardian and some kind of record of compliance by the guardian with such requests. Allison commented that procedures to document compliance by a guardian in many other instances in which the guardian had duties had not been established by specific statutory provisions, and expressed the view that such procedures were not necessary with respect to the requirement that a guardian make a particular distribution of copies of his intermediate accounts. Riddlesbarger indicated that he saw no reason to require an affidavit of compliance of a guardian with respect to distribution of copies of intermediate accounts since settlement of such accounts was not binding on persons entitled to receive such copies, but that he might favor some such requirement with respect to final accounts if final accounts were binding.

Lundy asked whether the requirement of the revised draft of subsection (4) that a guardian distribute copies of an account to the persons entitled thereto before filing the account in the guardianship proceeding should be retained, noting that this requirement tied in with the affidavit of compliance requirement in paragraph (c) of the revised draft. Frohnmayer suggested that requests for copies of accounts should be filed with both the guardian and the court, so that the court would have a basis for verifying that the guardian had complied with such requests. Dickson expressed the view, with which Zollinger and Riddlesbarger agreed, that requests

for copies of an account which a guardian was required to distribute should be received by the guardian before he filed the account in the guardianship proceeding, and that the guardian should file an affidavit of compliance with such requests at the same time that he filed the account.

Dickson remarked that if a guardian received a request for a copy of an account after the account was filed in the guardianship proceeding, the furnishing of such a copy would involve an additional expense someone would have to bear. Riddlesbarger commented that perhaps the guardianship estate should bear the expense of furnishing copies of accounts requested after the accounts were filed. Zollinger and Butler expressed the view that a person requesting a copy of an account after the filing of the account, rather than the guardianship estate, should bear the expense of furnishing such copy. Lundy pointed out that the revised draft did not specifically prohibit a guardian from sending a copy of an account to a person who requested it after the account was filed, if the guardian wished to do so, but also that there was no specific authorization for a guardian to do so and no specific provision as to who would bear the expense of furnishing such a copy.

b. Final accounts. Noting that at the last meeting he had agreed to undertake some research on the effect of settlement of a guardian's final account and discharge of the guardian, the liability of the guardian thereafter and related matters, Riddlesbarger pointed out that ORS 126.540 threw some light on these matters by providing that upon settlement of a guardian's final account the court would discharge him and exonerate the sureties on his bond, but that this discharge and exoneration did "not relieve the guardian or the sureties on his bond from liability for previous acts or omissions of the guardian." Riddlesbarger commented that he concluded from this that the responsibility of a guardian was not terminated by settlement of his final account, and that therefore the settlement of the final account need not be in the nature of an adversary proceeding requiring personal service on interested persons. Zollinger expressed the view that settlement of the final account should terminate the responsibility of a guardian with respect to matters disclosed in the final account, although perhaps not as to fraudulent misconduct on the part of the guardian or matters not disclosed in the final account.

Riddlesbarger referred to the statutory provision relating to the consequences of settlement of the final account of an executor or administrator [Note: See ORS 117.630], and indicated that under this provision the court decree settling the final account was "primary evidence of the correctness of the account as thereby allowed and settled" in "any other action, suit or proceeding between the parties interested and their representatives." He remarked that Zollinger appeared to

favor a similar approach with respect to the effect of settlement of the final account of a guardian. Jaureguy indicated his willingness to accept Zollinger's approach with respect to the finality of the final account of a guardian if the one-year statute of limitations were applicable in all cases of such a final account [Note: See ORS 18.160]. Frohnmayer expressed doubt that ORS 18.160 applied to the settlement of the final account of an executor, administrator or guardian, and commented that if it did so apply, it perhaps should not do so.

Riddlesbarger noted that section 682 of the 1963 Iowa Probate Code provided for discharge of a guardian of the estate and exoneration of the surety on his bond upon settlement of his final account, and that section 479 of that Code provided that the court order approving the final account of the personal representative of a decedent constituted waiver of any omission from the final account of any of the specific recitals required to be made therein by section 477. Lundy pointed out that section 233 of the Model Probate Code provided for notice of hearing of every accounting to the same persons and in the same manner as required for notice of petition for the appointment of a guardian, and further provided that settlement of any account, subject to appeal and the power of the court to vacate, was binding on all persons except the ward or, if he died before settlement, his personal representative, who might question any item of the settlement within two years after the date of discharge of the guardian, but not thereafter.

After further discussion, the committee agreed to postpone until the next meeting further consideration of the matters of a guardian's final account, its finality, the persons who should receive copies thereof and the manner of furnishing copies thereof to such persons.

5. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Friday, September 11, at 7 p.m., and continuing Saturday, September 12, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Lundy asked whether the committee wished to consider the legislation relating to a guardian's access to the ward's safe deposit box proposed by the Bar Committee on Probate Law and Procedure [Note: See Minutes, Probate Advisory Committee Meeting, 7/18/64, page 3], with a view to including it in the advisory committee's proposed legislation on guardianship and conservatorship. The committee agreed that consideration of this and other Bar committee proposals should be postponed until after the Bar had acted thereon at its annual meeting in October.

The meeting was adjuourned at 1:15 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, August 22, 1964)

REPORT
August 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: R. Thomas Gooding

Subject: Opposition to proposed legislation changing dower and curtesy, and proposed legislation protecting property right during marriage, submitted August 4, 1964

The proponents desire to change the choate right (dower and curtesy) to a fixed one-quarter interest in the nonowner survivor, provide for the antenuptial and postnuptial waiver and release of the survivor's right of election to the choate interest, propose to abolish all forms of dower and curtesy, and would establish an "inchoate marital right" by the filing of a declaration.

Dower and curtesy have received glowing, esteemed and vigilant support from the earliest of times. The books indicate that procedural and administrative changes have been effected but the basic substantive rights and concepts have remained. Of course, age alone is not sufficient to justify any concept, but the primary objection to the proposed legislation lies in its attempt to abolish the little protection now existing in favor of the nonowner spouse.

A change is unnecessary.

The owner spouse has no affirmative duty to create an estate to which these rights will presently attach. Personal property is exempt and conveyancing will defeat a nonowner spouse. The committee is of the opinion that our greatest wealth presently resides in personal property.

Real property may be exempted through corporate ownership. Land ownership is increasingly assuming a corporate form. The rights do not attach to partnership real property.

The rights may be prevented by an antenuptial contract, not an uncommon agreement between older people.

Most real property is held by the entireties. Moreover, almost all spouses' testamentary schemes, without exception, will all to the survivor or make suitable trust provisions for the survivor. In these instances, the rights are of no consequence.

Some of the committee favor abolition of dower and curtesy as useless impediments against conveyancing. In view of the fact that we are dealing with a limited, unusual situation, and a matter which, at its inception, may be avoided by a corporate ownership, an increasing trend, this argument appears to be somewhat exaggerated. At least, this argument cannot preponderate over the reasons and the purposes of dower and curtesy, the protection of the nonowner spouse. The nonowner spouse should not be put to seek the charity of the State or those who have received the fruits of the decedent's conveyancing shortly before death. The change is wholly unnecessary and it is rather unwise.

The choate interest of one-fourth.

This choate right of one-quarter is wholly ineffective if it is not preceded by the inchoate right, as it can be precluded by conveyancing. As mentioned later, the proposed declaration is regarded as unsatisfactory.

However, aside from the proposed abolition of the inchoate rights, the proposal to fix the interest at one-quarter in fee is more certain and manageable than the present life estate.

There has been some suggestion against a fixed interest and in favor of leaving the quantity in an uncertain amount to be ascertained by the court as in divorce cases and according to the survivor's needs, contribution, age, length of marriage and possibly other provisions made by the decedent for the survivor's benefit. This suggestion could be drafted by granting an alternate election with notice to interested people and a court determination. It is commendable in that a court could provide a more realistic quantity. However, it would serve to increase costs, expenses, and might tend to increase interfamily litigation. No favorable recommendation is given to this alternative.

Declaration of "inchoate marital right."

In discussing the "inchoate marital right," the proponents on page 4 of the rough draft state that "the protection afforded thereby resembles somewhat that afforded by inchoate dower and curtesy." At first glance, this procedure appears to completely reinstate the inchoate rights. This is logically inconsistent with the proponent's above abolition of the inchoate rights. If the arguments against the inchoate rights, ease of conveyancing and financing, are valid, then why should we create any loophole which reinstates these rights? Or is the proposed reinstatement of the inchoate rights a recognition of the good reasons for retaining these rights as they presently exist?

A wholesale use of this procedure would nullify the attempts to abolish dower and curtesy as they presently exist. It is doubtful whether these declarations would be widely used, but this is a matter of pure speculation.

It is surmised that a declaration would be seldom used. Witness the lack of the use of the homestead declaration. Its procedure involves the nonowner spouse obtaining knowledge of the owner's separate property, obtaining a lawyer, securing the correct description of all or the chosen parcel of separate property, the signing of the declaration and the onerous personal service of the declaration on the owner spouse. In this situation, it is suggested that personal service can only be safely obtained by the use of the sheriff's services.

Because of the unusual burdens placed upon the nonowner spouse, it is questionable whether the declaration would receive much use. If the reasons for the "inchoate marital right" are valid, the right should not be so encumbered with these burdens. Moreover, the exercise of this right would not be conducive to domestic harmony.

Thus, this procedure would seldom be used. In practical effect, it would not be a reinstatement of the present dower and curtesy and appears to be a useless act. It is not recommended.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, August 22, 1964)

REPORT
August 22, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Disposition of intermediate accounts of guardian of estate

At the last meeting of the Advisory Committee, I was requested to prepare a revised draft of subsection (4) of ORS 126.336, embodying, in so far as possible, the revisions apparently agreed upon by the committee at that meeting. See Minutes, Probate Advisory Committee Meeting, 7/18/64, page 1½. Following is such a revised draft of subsection (4), which relates to the disposition of accounts other than final accounts of a guardian of the estate.

126.336. * * *

* * *

(4) (a) [The] Before filing any account other than his final account, a guardian of the estate shall [give a copy of each account to the person or institution having the care, custody or control of the ward.] cause to be mailed or delivered:

(A) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, a copy of the account to the Secretary of the Oregon State Board of Control, and a copy of the account to the superintendent of the institution who has presented a request for a copy to the guardian before the filing of the account or a notice to the superintendent of the institution who has not so presented such a request.

(B) If there is a guardian of the person for the ward other than the guardian of the estate, a copy of the account to the guardian of the person.

(C) If the ward is not a minor under 14 years of age or an incompetent, a copy of the account to the ward.

(D) If the ward is a minor or an incompetent, a copy of the account to the ward's spouse who is not under legal disability; or, if there is no such spouse, a copy of the account to each of the ward's children who is not under legal disability and has presented a request for a copy to the guardian before the filing of the account and a notice to each of the ward's children who is not under legal disability and has not so presented such a request; or, if there are no such spouse and no such children, a copy of the account to each of the ward's parents who is not under legal disability; or, if there are no such spouse, no such children and no such parents, a copy of the account or a notice to each of the ward's brothers and sisters who is not under legal disability and has presented a request for a copy or a notice to the guardian before the filing of the account.

(b) The notice referred to in paragraph (a) of this subsection (4) shall include the following information:

(A) The names, residence and postoffice addresses of the ward and the guardian of the estate.

(B) The reason for the filing of the account, as provided in subsection (1) of this section.

(C) The place and date of the filing of the account.

(D) A statement that the recipient of the notice may obtain a copy of the account filed or of any account filed thereafter by the guardian by presenting a request therefor to the guardian.

(c) The guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account or notices have been mailed or delivered as provided in paragraph (a) of this subsection (4), showing the names of the persons to whom, and the addresses to or at which, the copies or notices were mailed or delivered. If the guardian, by the exercise of reasonable diligence, is unable to determine the name and address of any person to whom a copy of the account or a notice is to be mailed or delivered as provided in paragraph (a) of this subsection (4), the affidavit or other proof shall so state, and, with respect to such person, this is a sufficient compliance with paragraph (a) of this subsection (4).

(d) The guardian of the estate shall cause to be mailed or delivered a copy of any account other than his final account to any person who presents a request therefor to the guardian after the filing of the account and to whom a notice was mailed or delivered as provided in paragraph (a) of this subsection (4).

* * *

Comment: The revision of subsection (4) of ORS 126.336 by the above draft is based upon Minutes, Probate Advisory Committee Meeting, 7/18/64, pages 8 to 12; and section 2, Guardianship and Conservatorship Bill, Rough Draft, 7/18/64, pages 4 and 5. See also Minutes, Probate Advisory Committee Meeting, 6/13/64, pages 11 to 12, and Appendix C; Minutes, Probate Advisory Committee Meeting, 5/16/64, pages 10 and 11, and Appendix B, page 8.

ADVISORY COMMITTEE
Probate Law Revision

Sixth Meeting

Dates and Times) 7 p.m., Friday, September 11, 1964
and
9 a.m., Saturday, September 12, 1964
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of August 22 meeting of advisory committee.

2. Report on miscellaneous matters (Lundy)

3. Dower and curtesy.

Consideration, among other matters, of (1) changes in and additions to proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64), (2) revision of proposed legislation on protecting property right during marriage by recorded declaration, (3) proposed legislation on statement by grantor in deed of real property not joined in by grantor's spouse that property not place of residence of grantor or spouse, and (4) reports by members on reaction by attorneys and other acquaintances on proposal to abolish inchoate dower and curtesy and on possible substitutes therefor (including recorded declaration device and grantor's deed statement device).

4. Guardianship and conservatorship.

Consideration, among other matters, of proposed legislation (Rough Draft, 7/18/64), starting with section 2 thereof (accounts of guardian of estate). Pending matters on section 2 are: Revised rough draft of subsection (4) (intermediate accounts), revision of subsection (5) (final accounts), and effect of settlement of final accounts and discharge of guardian.

Note: The secretary will not be available to take minutes at that part of the meeting scheduled for Friday evening, September 11. Therefore, it is suggested that the proceedings of that part of the meeting be limited, in so far as possible, to preliminary discussion of matters under suggested agenda items 3 and 4, and that other matters and decision making be postponed until that part of the meeting scheduled for Saturday morning, September 12.

ADVISORY COMMITTEE
Probate Law Revision

Sixth Meeting, September 12, 1964

Minutes

The sixth meeting of the advisory committee was convened at 9:05 a.m., Saturday, September 12, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Frohnmayer, were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Dickson reported that a quorum had not been present at that part of the sixth meeting scheduled for Friday evening, September 11, and that that part of the meeting had been adjourned soon after convening, with no substantial discussion of the matters scheduled for consideration.

Lundy distributed to the members present a second loose-leaf notebook (brown) in which materials received by members might be filed, and suggested that certain materials filed in the blue notebook previously supplied to each member be transferred to the brown notebook.

1. Minutes of Last Meeting. Gooding moved, seconded by Butler, that reading of the minutes of the last meeting (August 22, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting had not been prepared, since the last meeting had been held after the deadline for submission of material to be published in the August issue of the Oregon State Bar Bulletin. He commented that the news releases on this meeting would include a reference to the last meeting. He indicated that the news release on the July 18 meeting had been published in the August issue of the Bar Bulletin.

Lundy distributed to the members present two new comments and suggestions on problem areas in Oregon's probate and related law reproduced for insertion in the "Comments & Suggestions Received" section of their notebooks. He noted that one of these (i.e., a letter from Raymond J. Salisbury, attorney, Grants Pass) and a recent letter from William F. Schulte, attorney, Portland (not yet reproduced for insertion in the "Comments & Suggestions Received" section of the notebooks), concerned matters involved in the handling of small estates of decedents, and that he had sent a copy of each to Denny Z. Zikes, who was engaged in research for the committee in the area of summary proceedings for administration of small estates. He indicated that he had also sent Zikes a paper

entitled "A Proposal for a Simplified Probate Procedure," written by Thompson Snyder, attorney, Corvallis. [Note: See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 1 and 2.]

Lundy reported that the National Conference of Commissioners on Uniform State Laws, at its annual conference in August, had approved a final draft of a Model Special Power of Attorney for Small Property Interests Act. [Note: Tentative drafts of this Model Act are filed in the committee notebook after the divider tabbed "Model Special Power of Attorney Act."] He noted that Frohnmayer had indicated interest in this Model Act, and that copies of the approved final draft would be obtained for members.

Dickson suggested that the legislation proposed by the Bar Committee on Probate Law and Procedure, to the extent approved by the Bar at its annual meeting in October, be scheduled for consideration by the advisory committee at a meeting to be held in November 1964. [Note: See Minutes, Probate Advisory Committee Meeting, 7/18/64, pages 2 to 4.] Carson moved, seconded by Butler, that the committee adopt Dickson's suggestion. Motion carried. Lundy indicated that he would be unable to attend a meeting held in November.

3. Dower and Curtesy. The committee considered in detail (1) the rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated August 4, 1964), prepared by Allison and Lundy and distributed to members before the last meeting, and (2) a rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report dated September 11, 1964), prepared by Allison and Lundy and distributed to members before the present meeting.

a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64).

(1) Section 1. Allison referred to subsection (1) of ORS 111.020, as amended by section 1 of the rough draft entitled "Changing Dower and Curtesy" (dated August 4, 1964), and noted that Zollinger had suggested deletion of "other" in the tenth line of subsection (1), deletion of "and" in the eleventh line and substitution of "and" for "or" in the thirteenth line. Allison expressed agreement with Zollinger's suggestions, but indicated his preference for deletion of "or" in the thirteenth line of subsection (1) over substitution of "and" therefor. Butler suggested deletion of the semicolon and "and" in the eleventh line of subsection (1), insertion of a period, making the balance of the sentence a separate sentence and substitution of a semicolon for the comma in the thirteenth line. After further discussion, Gooding moved, seconded by Butler, that "other" in the tenth line of subsection (1) be deleted, that "; and if" in the eleventh line be

deleted and ". If" be inserted in lieu thereof, and that ", or" in the thirteenth line be deleted and a semicolon inserted in lieu thereof. Motion carried.

At Jaureguy's suggestion, the committee discussed briefly the policy of that part of subsection (1) of ORS 111.020, as amended by section 1 of the rough draft, providing for descent of real property per capita to lineal descendants in the same degree of kindred to the intestate and per stirpes to lineal descendants not in the same degree of kindred. The committee agreed that no change in that policy should be proposed, at least at this time.

Allison moved, seconded by Butler, that subsection (2) of ORS 111.020, as amended by section 1 of the rough draft, be approved. Motion carried.

Allison referred to subsection (3) of ORS 111.020, as amended by section 1 of the rough draft, and noted that at the last meeting Zollinger had suggested that real property should descend to the father and mother of an intestate, if married to each other, as tenants by the entirety, rather than as tenants in common. [Note: See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 5.] In answer to a question by Lundy, Zollinger commented that "tenants by the entirety" appeared to be the proper terminology to use, and that he did not intend a father and mother to take as tenants by the entirety if they were not married to each other or to create a right of survivorship in that circumstance. Allison suggested that the first sentence of subsection (3) be amended to read: "If the intestate leaves no lineal descendants or surviving spouse, such real property shall descend to the father and mother of the intestate as tenants by the entirety if then married to each other." Lundy suggested the need of some provision to cover the circumstance of a father and mother not married. Carson suggested a provision that a father and mother not married take as tenants in common. Allison suggested that the real property descend to the father and mother of the intestate "to take as tenants by the entirety if then married to each other; otherwise as tenants in common." Gooding and Butler questioned the necessity of "to take." Zollinger commented that if a verb was necessary, it should be "hold" instead of "take." Gooding suggested that subsection (3) might be shortened by elimination of the last two sentences and incorporation of the intent thereof in the first sentence by reference to the father and mother of the intestate "or the survivor thereof." Zollinger indicated that, for purposes of clarity, he favored the separate sentences applicable to the circumstances of only a mother and only a father. Allison moved, seconded by Butler, that the wording of the first sentence of subsection (3) be that the real property "descend to the father and mother of the intestate as tenants by the

entirety if then married to each other; otherwise as tenants in common." Motion carried.

Carson suggested that the singular rather than the plural form of "descendant" be used in subsection (3) of ORS 111.020, as amended by section 1 of the rough draft. Lundy noted that the plural form also was used in other subsections, and asked whether the committee wished to change all plural forms used after "no", including "children" in subsection (6) to the singular. Allison moved, seconded by Zollinger, that the plural forms used after "no" in subsections (2) to (7) be changed to the singular. Motion carried.

Allison referred to subsection (5) of ORS 111.020, as amended by section 1 of the rough draft, and noted that Zollinger had suggested deletion of "shall be preferred" in the seventh line of subsection (5) and insertion of "such real property shall descend to" before "those" in the sixth line. Butler moved, seconded by Carson, that the changes suggested by Zollinger be made. Motion carried.

The committee discussed the policy of subsection (6) of ORS 111.020, as amended by section 1 of the rough draft. Butler noted that subsection (6) applied only to real property which descended to a child from an ancestor, and asked whether it should apply also to real property which descended to a child from a brother or sister. In answer to a question by Riddlesbarger, Butler commented that "person" or "relative" might be substituted for "ancestor." Zollinger indicated that he did not favor broadening the application of subsection (6) to real property other than that which descended from an ancestor. Dickson questioned whether real property descending under subsection (6) was subject to claims of creditors of the child. Allison commented that he construed subsection (6) as prescribing descent not from the child but from the ancestor, and that under this theory the creditors of the child would have no claim against the real property. Butler, Carson and Zollinger expressed the view that real property descending under subsection (6) was subject to claims of creditors of the child, pointing out that all subsections of ORS 111.020 were prefaced by a statement that descent was subject to debts of the intestate and that subsection (6) merely provided, in a particular circumstance, a different line of descent than provided in the preceding subsections. Carson suggested that "whom" be substituted for "which" in the fourth line of subsection (6) and that "though" be substituted for "if" in the fifth line. Zollinger moved, seconded by Carson, that the changes suggested by Carson be made. Motion carried. The committee apparently agreed that no other changes should be made in subsection (6), at least at this time.

Zollinger moved, seconded by Riddlesbarger, that subsection (7) of ORS 111.020, as amended by section 1 of the rough draft, be approved. Motion carried.

(2) Section 2. Allison referred to ORS 113.050, as amended by section 2 of the rough draft, and briefly explained the changes proposed by the amendment, including deletion of "domiciled in this state at the time of death" in the second line of subsection (1). Dickson referred to that part of subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, providing that the interest taken under the election against will was in addition to, and not in lieu of, homestead, and suggested that the interest be taken in addition to "any other statutory right," thus including such things as the rights of the surviving spouse and minor children to exempt property and support, as well as the right of homestead. The committee agreed with Dickson's suggestion.

Butler questioned the combination of election against will as to both real and personal property in subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, pointing out that title to real property passed immediately upon the death of a decedent, while title to personal property did not pass until distribution after administration of the estate of a decedent, and suggesting separate provisions for election against will as to real and personal property. Zollinger expressed agreement with Butler's suggestion, and commented that perhaps there should be a right to elect as to either or both real and personal property. Allison and Butler expressed the view, and the committee agreed, that there should be no right to elect separately as to real and personal property; that there should be one election applicable to both real and personal property, although election as to real and personal property should be stated separately for other reasons.

Zollinger suggested that "domiciled in this state at the time of death" be retained as applicable to election as to personal property under subsection (1) of ORS 113.050, as amended by section 2 of the rough draft. Carson proposed that the election be whether to take under the will of a decedent "or to have and take by descent as to real property and, if the decedent was domiciled in this state at the time of death, upon distribution as to personal property." Allison expressed agreement with Carson's proposal. The committee discussed briefly the conflict of laws problems under the election against will provisions of subsection (1).

Lundy asked whether the committee was willing to adopt in principle the changes in subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, it had apparently agreed upon, and to allow him to work out the specific wording thereof. Carson moved, seconded by Zollinger, that the committee adopt in principle the propositions that subsection (1) should provide for one election applicable to both real and personal property, but stated separately; for retention

of "domiciled in this state at the time of death" applicable to election as to personal property; and for the interest taken against will to be in addition to "any other statutory right," leaving to Lundy the task of working out the specific wording thereof. Motion carried.

(3) Section 3. Lundy referred to ORS 113.060, as amended by section 3 of the rough draft, and pointed out that subsection (2) thereof (a new provision on waiver of the right of election against will) was discussed at the last meeting and that the committee had agreed at that time that subsection (2) should be deleted. [Note: See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 5.] He commented that the other changes in ORS 113.060 proposed by the amendment were minor improvements in wording, which were probably not essential to the primary purpose of the rough draft. Zollinger moved, seconded by Allison, that section 3 be removed from the rough draft. Motion carried.

Riddlesbarger left the meeting at this point (11:10 a.m.).

(4) Section 4. Allison referred to and explained section 4 of the rough draft, which expressly abolished dower and curtesy and expressly saved dower and curtesy interests that had become vested. Lundy explained that the vested interest might be either an unassigned right (i.e., dower or curtesy consummate) or an assigned right (i.e., admeasured; an estate). In response to a question by Carson, Allison indicated that the effect of section 4 would be to abolish any inchoate right of dower or curtesy on the effective date of the proposed legislation. Jaureguy suggested, and Allison agreed, that the vested interests saved by section 4 be those vested "by reason of the death of the spouse." Lundy pointed out that the estate of dower or curtesy did not vest by reason of the death of the spouse, but rather by reason of subsequent assignment or admeasurement proceedings. Butler suggested that the vested interests saved be those "which became vested upon or subsequent to the death of the spouse and before the effective date of this Act." Zollinger proposed that the order of the two sentences of section 4 be reversed; that the section should read: "Rights to and estates of dower or curtesy in the surviving spouse of a deceased owner of real property in existence on the effective date of this Act are preserved and shall be governed by the law in effect immediately before the effective date of this Act. Dower and curtesy, including inchoate dower and curtesy, are otherwise abolished." Allison expressed the view that the abolishment provision should come before the saving provision. Zollinger commented that if the abolishment provision came first it should at least be prefaced by "except as provided in this section." He also remarked, and Carson and Jaureguy agreed, that it appeared to be a clearer statement of the intent to specify that the interests being preserved were those in real property

of a person who died prior to the effective date of the proposed legislation. Zollinger moved, seconded by Carson, that section 4 should read: "Dower and curtesy, including inchoate dower and curtesy, are abolished, except that any right to or estate of dower or curtesy in the spouse of any person who died before the effective date of this Act shall be governed by the law in effect immediately before that date." Motion carried.

(5) Section 5. Allison referred to section 5 of the rough draft, which repealed a number of existing statute sections relating wholly to dower and curtesy, and noted that, pursuant to his suggestion, ORS 113.090 (imposing a 10-year statute of limitations on actions or suits by surviving spouses to recover or reduce to possession dower or curtesy) was not included in the list of statute sections to be repealed. Zollinger moved, seconded by Carson, that section 5 be approved. Motion carried.

Lundy called attention to the fact that the rough draft did not include amendments of statute sections relating partially to dower and curtesy for the purpose of deleting pertinent portions thereof. He indicated that he had discovered some 15 statute sections that appeared to require such amendment, and that he would include amendments of these statute sections in the next version of the rough draft entitled "Changing Dower and Curtesy" submitted to the committee.

b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 9/11/64). Allison referred to and explained briefly the rough draft entitled "Protecting Property Right During Marriage" (embodied in a report dated September 11, 1964), which was a revision of the previous rough draft with the same title dated August 4, 1964. [Note: The report dated September 11, 1964, is reproduced as an Appendix to these minutes.] Allison called attention to several differences between the revised rough draft and the original rough draft, including omission of "inchoate" from references to the marital right to be protected by a recorded declaration; deletion of the requirement that a declaration include a description of the real property; deletion of the requirement that a copy of a declaration be served on the spouse owning the real property; insertion of a provision for release of the marital right by means of a separate conveyance by a declarant, in addition to joinder by the declarant in a conveyance; and rearrangement of the order in which certain of the provisions appeared.

(1) Section 1. Gooding referred to section 1 of the rough draft, noted that the marital right and the declaration claiming such right were described in some detail several times in section 1 and suggested that a single definition or description of the right and the declaration would be sufficient, as

well as reduce the length of section 1. Allison commented that a definition of the declaration should not incorporate the matter of the recording of the declaration.

Gooding questioned the necessity of including in the declaration form set forth in subsection (1) of section 1 of the rough draft a lengthy description of the effect of the recording of the declaration, and suggested deletion of this description. Lundy pointed out that if the description was deleted from the declaration form, the second sentence of subsection (1), which required such description, also should be deleted. In answer to a question by Lundy, Butler and Gooding expressed the view, in which Zollinger concurred, that the declaration form should not contain a reference to section 1. The committee apparently agreed that the requirement of a description in the declaration form of the effect of the recording of the declaration should be deleted, and that the declaration form should not be required to include a reference to the statute upon which it was based.

In response to a question by Jaureguy concerning the effect, as provided in subsection (3) of section 1 of the rough draft, of the recording of the declaration, Allison pointed out that the marital right claimed by the declaration would not be affected if the owner spouse conveyed the real property to which the declaration was applicable without joinder of the nonowner spouse in the conveyance, even though the proceeds derived from the conveyance were made available to the nonowner spouse on the death of the owner spouse. Allison and Zollinger commented that a similar result under the same circumstances would occur under present dower and curtesy.

Zollinger referred to subsection (3) of section 1 of the rough draft, and questioned the wording pertaining to release and subordination of the marital right. He commented that "to release" and "to subordinate" appeared to be purpose wording, and suggested, and the committee apparently agreed, that "thereby releasing" and "thereby subordinating" should be used.

Carson noted that subsection (3) of section 1 of the rough draft referred to mortgages, and asked whether a reference to trust deeds should be added. Allison pointed out that the trust deed statutes contained a provision that a trust deed was deemed to be a mortgage on real property and was subject to all laws relating to mortgages on real property except where inconsistent with the trust deed statutes themselves [Note: See ORS 86.715], but indicated that he had no objection to adding a reference to trust deeds to subsection (3). Gooding suggested the use of "encumbrance" instead of a reference to mortgages and trust deeds. Zollinger noted that the use of "mortgage" in the fourth line of subsection (3) was

as a verb, and commented that addition of a reference to trust deeds in the fourth line would not be appropriate. However, he pointed out that the use of "mortgage" in the eighth line of subsection (3) was in the sense of an instrument, and suggested, and the committee apparently agreed, that "or trust deed" be inserted after "mortgage" in the eighth line.

Zollinger referred to paragraph (a) of subsection (4) of section 1 of the rough draft, relating to the recording of a revocation of a recorded declaration, and suggested that a revocation applicable to either all or part of the real property covered by the declaration should be permitted. He indicated that he contemplated a situation in which a nonowner spouse had recorded a declaration but wished to preserve the marital right only as to the homestead, and commented that the nonowner spouse in such a situation should be able to revoke the declaration except as to the homestead. In response to a question by Lundy, Zollinger and Butler indicated that they favored application of both a declaration and a revocation thereof either to all or part of the real property in the county of recording. The committee apparently agreed that a declaration and a revocation thereof should be authorized as to all or part of such real property.

Allison suggested, and the committee apparently agreed, that, in view of the decision that a declaration be authorized as to all or part of the real property in the county of recording, two alternative declaration forms be set forth in subsection (1) of section 1 of the rough draft. Dickson suggested,and the committee apparently agreed, that the titles of the two declaration forms should reflect their different applications, such as "Declaration Claiming Marital Right" and "Partial Declaration Claiming Marital Right."

Gooding referred to paragraph (b) of subsection (4) of section 1 of the rough draft, relating to revocation of a recorded declaration by an annulment or divorce decree, and suggested that some provision be made for revocation of a recorded declaration in a decree of separate maintenance. The committee apparently agreed that some provision as suggested by Gooding should be made.

Gooding asked whether "or suit" should be inserted after "action" in the fifth line of subsection (5) of section 1 of the rough draft. Lundy expressed the view that "action" would be construed to include a suit.

(2) Section 3. Zollinger referred to section 3 of the rough draft, relating to the authority of a guardian of the estate to record a declaration or a revocation thereof for the ward, and commented on the difficulty that would face a guardian in determining whether to record a declaration. He expressed the view, with which Dickson agreed, that a guardian,

who had the duty to protect the estate of the ward, probably could not justify a conclusion that he should not record a declaration. Zollinger suggested that the guardian should be authorized, with prior approval of the court, to revoke a declaration, but not to record a declaration. In response to a question by Lundy, Zollinger indicated that the guardian should be authorized to release (by joinder in a conveyance or by a separate conveyance) or subordinate (by mortgage) the marital right for the ward, as well as record a revocation of a declaration.

Butler asked whether, with respect to guardianships in existence on the effective date of the proposed legislation, a declaration should be presumed to have been recorded for the ward. Zollinger and Dickson expressed approval of such a presumption. In response to a question by Allison, Dickson and Zollinger commented that the guardian should not be required to record a declaration; that the guardian would find it difficult to discover the location of real property owned by the ward's spouse in sole right and might have to record a declaration in every county in the state in order to be on the safe side. Zollinger stated that without a presumption of the recording of a declaration, a nonowner spouse who was a ward on the effective date of the proposed legislation would be precluded from claiming the marital right during the pendency of the guardianship. Dickson noted that a nonowner spouse who became a ward after the effective date of the proposed legislation would similarly be precluded if a declaration was not recorded before the guardianship came into existence. Lundy asked about the notice problem with respect to a legal presumption that a declaration had been recorded in every county in the state for a nonowner spouse who was a ward on the effective date of the proposed legislation. Zollinger remarked that a bona fide purchaser might have to be exempted from the effect of the presumption in the absence of a record of the existence of the guardianship in a county in which the real property was located. After further discussion, the committee agreed that the presumption should not be made, in view of the complications involved and of the fact that the existing guardianship situation represented only a relatively minor aspect of the matter of a declaration claiming a marital right in lieu of abolished inchoate dower and curtesy.

Zollinger moved, seconded by Butler, that section 3 of the rough draft be amended to delete the authority of the guardian to record a declaration for the ward, and to add authority of the guardian to release (by joinder in a conveyance or by a separate conveyance) or subordinate (by mortgage) the marital right for the ward, in addition to the recording of a revocation of a declaration. Motion carried.

4. Next Meeting of Advisory Committee. Gooding suggested that the next meeting of the advisory committee be scheduled at some time during the annual meeting of the Oregon State Bar in Salem, October 7-10. The next meeting was scheduled for Thursday, October 8, in Salem, with members dining together at around 6 p.m. and the meeting to follow. Lundy was requested to make arrangements for a place to dine and a place to meet thereafter.

Lundy and Allison asked whether the committee wished to make any kind of report to the Bar at the annual meeting on the activities of the committee and the proposed legislation under consideration by it. Zollinger expressed the view, with which the committee agreed, that such a report should not be made, since the committee had made no final decisions on the proposed legislation under consideration and since the committee's function was that of an advisor to the Law Improvement Committee, which would probably wish to review the proposals of the advisory committee before they were released for consideration by others.

Lundy asked about the matters to be scheduled for consideration at the next meeting, pointing out that Denny Z. Zikes' report on his research for the committee in the area of summary proceedings for administration of small estates of decedents had been tentatively scheduled for consideration at a meeting to be held in October. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, pages 2 and 3.] The committee agreed that Zikes' report would be considered at the next meeting if the report was available then; otherwise, the committee would continue its consideration of the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964), and, if available then, would consider a revision of the rough draft entitled "Protecting Property Right During Marriage."

Lundy explained that the amount of his time officially allocated to the probate law revision project for this year had been exhausted, and that, except for attendance at meetings and preparation of minutes thereof, his time available for assisting the committee during the remainder of the year would have to be the very limited amount he could devote outside regular office hours.

The meeting was adjourned at 1:45 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, September 12, 1964)

REPORT
September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison and Robert W. Lundy

Subject: Revised rough draft on "Protecting Property Right During Marriage."

Prior to the last meeting of the Advisory Committee, we submitted a rough draft of proposed legislation entitled "Protecting Property Right During Marriage," dated August 4, 1964. The aim of that rough draft was to provide protection, by means of a recorded declaration, of a right of a surviving spouse to receive, upon the death of the other spouse, a fee estate in an undivided one-fourth interest in real property owned during the marriage by the other spouse in his sole right against an attempt by the owner spouse to convey or mortgage such real property without the joinder of the nonowner spouse in the conveyance or mortgage, and thus to defeat or diminish the right of the surviving spouse to receive such an interest in the real property by intestate succession or election against will under the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964.

The rough draft entitled "Protecting Property Right During Marriage," dated August 4, 1964, was considered at length at the last meeting of the committee, and a number of objections thereto were raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 3,4 and 7 to 9, and Appendix A. At that meeting Mr. Allison indicated that we would endeavor to prepare and submit a revised rough draft embodying the declaration device to protect a property right during marriage, which would meet some of the objections raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 11. Following is such a revised rough draft.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county in which real property owned by the spouse of the declarant in his sole right is situated a

written, signed and acknowledged declaration claiming a marital right in and to an undivided one-fourth interest in the real property so owned in the county by the spouse of the declarant. The declaration shall include a statement of the effect of the recording of the declaration as provided in subsection (3) of this section. The declaration may be in the following form:

DECLARATION CLAIMING MARITAL RIGHT

_____, declarant, is now married to

_____, the owner of
(name of husband or wife owning real property)

real property in _____ County, State of Oregon, in sole right, and declarant hereby claims a marital right in and to an undivided one-fourth interest in and to all real property now or hereafter owned during the marriage by _____
(name of husband

_____, the spouse of the declarant, in
or wife owning real property)

sole right, in the above named county.

The effect of the recording of this declaration, as provided in section 1, chapter , Oregon Laws 1965 (Enrolled Bill), is that the above named spouse of the declarant may not, during the marriage and while this declaration remains unrevoked, convey or mortgage real property owned in sole right by such spouse in the county in which this declaration is recorded free of the marital right of declarant

in and to an undivided one-fourth interest in such real property unless declarant either joins in the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(Acknowledgment)

_____
Declarant

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(2) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, upon the death of the spouse of the declarant an undivided one-fourth interest in and to all real property owned during the marriage by the spouse of the declarant in sole right in the county in which the declaration is recorded shall become vested in the declarant, unless the marital right has been released either by the joinder by the declarant in a conveyance or the execution of a separate conveyance, or the declaration has been revoked as provided in subsection (4) of this section.

(3) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, the spouse of the declarant may not, during the marriage and while the declaration remains unrevoked, convey or mortgage real property owned in sole right by such spouse in the county in which the declaration is recorded free of the marital right of the declarant in and to an undivided one-fourth interest in such real property unless the declarant either joins in

the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(4) A declaration recorded as provided in subsection (1) of this section is revoked by:

(a) A written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration was recorded.

(b) A decree declaring the marriage void or dissolved.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (5) of this section.

(5) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a declaration recorded as provided in subsection (1) of this section is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the revocation of the declaration.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward, the right of the ward to cause a declaration claiming a marital right of the ward or a revocation thereof to be recorded as provided in section 1 of this 1965 Act.

ADVISORY COMMITTEE
Probate Law Revision

Seventh Meeting

Date: Thursday, October 8, 1964
Time: 7 p.m.
Place: Coral Room, First Floor
Marion Motor Hotel
Salem

Note: Pursuant to the wishes of the committee expressed at the last meeting, arrangements have been made for members of the committee to dine together in the main dining area of the Marion Motor Hotel and thereafter to meet in the Coral Room on the first floor of the hotel. A table in the main dining area of the hotel has been reserved, in the name of R. W. Lundy, for 6 p.m. The Marion Motor Hotel is the site of the annual meeting of the Oregon State Bar, October 7-10.

Suggested Agenda

1. Approval of minutes of September 12 meeting of advisory committee.

2. Report on miscellaneous matters (Lundy).

3. Small estates.

The report of Denny Z. Zikes on his research for the committee in the area of summary proceedings for administration of small estates previously was tentatively scheduled for consideration at the October meeting. Copies of the report of Herbert E. Butler, entitled "Streamlining the Administration of Small Estates," previously were distributed to members of the committee. If Mr. Zikes' report is not available for consideration at this meeting, the matter of small estates will be postponed until a future meeting.

4. Dower and curtesy.

Consideration, among other matters, of (1) revision of proposed legislation on protecting property right during marriage by recorded declaration, and (2) proposed legislation on statement by grantor in deed of real property not joined in by grantor's spouse that property not place of residence of grantor or spouse.

5. Guardianship and conservatorship.

Consideration of proposed legislation (Rough Draft, 7/13/64), starting with section 2 thereof (accounts of guardian of estate). Pending matters on section 2 are: Revised rough draft of subsection (4) (intermediate accounts), revision of subsection (5) (final accounts), and effect of settlement of final accounts and discharge of guardian.

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Seventh Meeting, October 8, 1964

Minutes

The seventh meeting of the advisory committee was convened at 8:05 p.m., Thursday, October 8, 1964, in the Coral Room, Marion Motor Hotel, Salem. All members, except Butler and Riddlesbarger, were present. Also present were Senator Donald R. Husband, a member of the Legislative Counsel Committee and the Law Improvement Committee; J. J. Ferder, Inheritance Tax Supervisor, State Treasurer's Office; Paul Griebenow, Fiduciary and Estate Supervisor, Audit Section, Income Division, State Tax Commission; Patricia Anne Lisbakken; William C. Martin; Denny Z. Zikes; and Robert W. Lundy, Chief Deputy Legislative Counsel.

Lundy distributed to the members present copies of (1) a rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964); (2) a revised rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report by Allison, dated October 8, 1964); (3) a revised rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report by Lundy, dated October 1, 1964); and (4) a Model Special Power of Attorney for Small Property Interests Act, approved by the National Conference of Commissioners on Uniform State Laws at its annual conference in August 1964.

1. Minutes of Last Meeting. Zollinger moved, seconded by Jaureguy, that reading of the minutes of the last meeting (September 12, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting, including references to the previous meeting (August 22), had been prepared and copies thereof distributed according to the established pattern. He noted that he had received no comments and suggestions on problem areas in Oregon's probate and related law since the last meeting.

Lundy indicated that the Law Improvement Committee had met the previous day (October 7), and that he had reported to the Law Improvement Committee on the activities of the advisory committee, the status of the advisory committee's immediate program and the costs incurred in the prosecution of the probate law revision project thus far ($7,600, including salaries representing almost six months of professional staff time and almost two months of clerical staff time). Lundy stated that he had expressed his opinion to the Law Improvement Committee that proposed legislation arising out of the advisory committee's immediate program would not be ready for submission to and review by the Law

Improvement Committee before the convening of the 1965 legislature, but that at least some of that proposed legislation would probably be ready for such submission and review at some time during the 1965 legislative session. He noted that the Law Improvement Committee planned to prepare and submit to the 1965 legislature a general report on the law improvement program, which would refer to the probate law revision project and the advisory committee, but not contain any specific proposals for revision of the probate and related law. Lundy suggested that the advisory committee should realistically determine, as soon as possible, what proposed legislation arising out of the immediate program would be ready for consideration by the Law Improvement Committee and then by the 1965 legislature, so that the Law Improvement Committee might know approximately when it would receive such proposed legislation and might make plans on how to handle such proposed legislation on receipt thereof. He stated that the Law Improvement Committee had discussed these matters, but had decided to postpone action thereon until it had received more definite information from the advisory committee.

Lundy noted that, anticipating approval by the Oregon State Bar at its annual meeting in Salem, October 7-10, of at least some of the legislation proposed by the Bar Committee on Probate Law and Procedure, he had brought to the attention of the Law Improvement Committee the fact that such approved proposed legislation would be referred to it. He reported that the Law Improvement Committee had approved referral to the advisory committee of those legislative proposals of the Bar Committee that were approved by the Bar and thereby referred to the Law Improvement Committee. Allison stated that the Bar had approved that morning all of the legislative proposals of the Bar Committee except the one relating to attendance by a representative of the State Treasurer's office at the first opening by a guardian of the estate or conservator of the safe deposit box of the ward and filing an inventory of the contents of the safe deposit box with the county clerk. [Note: The advisory committee previously decided to schedule for consideration at a meeting to be held in November 1964 those legislative proposals of the Bar committee that were approved by the Bar. See Minutes, Probate Advisory Committee Meeting, 9/12/64, page 2.]

Lundy indicated that he had received no word from Campbell Richardson on the progress being made by Richardson on his research for the committee in the area of probate courts and their jurisdiction and on whether Richardson contemplated the submission of any proposed legislation in this area to the 1965 legislature. Dickson reported that Richardson was considering the matters of vesting all original probate jurisdiction in the circuit court and of clarifying the jurisdiction of probate courts, but that he did not know whether Richardson

planned to have any proposed legislation ready in time for submission to the 1965 legislature. Dickson stated that he would discuss the matter with Richardson, and mentioned the possibility of some report from Richardson for consideration by the committee at a meeting to be held in December 1964.

3. Small Estates. Dickson introduced Denny Z. Zikes, who had been engaged in research for the committee in the area of summary proceedings for administration of small estates of decedents, and Patricia Anne Lisbakken, attorney, Portland, and William C. Martin, attorney, Portland, who had been assisting Zikes. Dickson commented that he had met previously with Zikes, Lisbakken and Martin on the small estates project, and that tax matters in connection therewith had been discussed with reporesentatives of the State Treasurer's office (J. J. Ferder) and the State Tax Commission (Paul Griebenow), whom he had invited to attend this meeting. Zikes distributed to the members and others present copies of a rough draft of proposed legislation entitled "The Small Estates Act" (dated October 7, 1964), and proceeded to comment on the background and summarize and explain some of the salient features of the proposed legislation. He noted that his research team had the benefit of materials on the subject of small estates provided by Lundy and a paper on the subject written by Thompson Snyder, attorney, Corvallis.

Zikes indicated that his research team had been faced with the decision as to which of several possible approaches to the matter of summary proceedings for administration of small estates of decedents should be adopted. He noted that two principal approaches were a summary procedure under court supervision and a summary procedure involving the use of affidavits and no court supervision. He referred to a New York statute, enacted in 1963 and effective in 1964, which had adopted the second principal approach (i.e., the use of affidavits and no court supervision), but which was limited to intestate estates consisting of personal property. He pointed out that the rough draft prepared by his research team embodied the affidavits and no court supervision approach, but was applicable to testate as well as intestate estates and to real as well as personal property. He called attention to the underlying purpose and policy of the proposed legislation set forth in section 2 of the rough draft (i.e., "to eliminate delay and unnecessary expense by creating a summary procedure forthe settlement of small estates of decedents who die testate or intestate leaving real or personal property within this state").

Zikes commented that the central figure in the summary procedure under the rough draft for administration of estates

of a value of not more than $5,000, exclusive of liens and encumbrances, was a so-called "voluntary administrator", who would file two affidavits with the clerk of the probate court: An initial affidavit including a list of the devisees, legatees and heirs, a description of the property of the decedent and a list of the debts and liabilities of the decedent; and a subsequent affidavit constituting a report and account upon the conclusion of the administration of the small estate. He pointed out that the forms for these affidavits were set forth at length in the rough draft. He noted that the voluntary administrator would be liable to heirs and creditors if his administration of the small estate was contrary to the provisions of the proposed legislation. He referred to problems with respect to inheritance tax clearances and income tax releases under the summary procedure, but expressed the opinion that such problems could be resolved with the cooperation of the State Treasurer's office and the State Tax Commission. He suggested that these agencies might consider the formulation of special forms to assist voluntary administrators in handling the tax aspects of the summary procedure. He pointed out that the initial affidavit filed by a voluntary administrator would include a description of property jointly owned by the decedent with a right of survivorship, and indicated that this information should be of value for inheritance tax purposes.

Zikes commented that the rights of creditors under the summary procedure embodied in the rough draft were limited, but that such limitation was necessary in order to achieve administration of small estates within a short period of time. He pointed out, however, that the limitation on the rights of creditors was merely such as would require them to be prompt and diligent in seeking payment of their claims. He noted that only creditors whose claims were denied would be entitled to overthrow the summary procedure by timely action to initiate regular probate proceedings.

Martin outlined some of the features of the proposed legislation that in his opinion might be the most controversial. He pointed out that the proposed legislation would be applicable only to estates of decedents of a value of not more than $5,000, exclusive of liens and encumbrances, and recognized that this application would conceivably encompass, for example, an estate of a value of $100,000 with liens and encumbrances of $95,000. He remarked, however, that the research team contemplated primary use of the summary procedure in the case of small gross estates. He noted that while the voluntary administrator had most of the obligations of an executor or administrator in regular probate proceedings, he was entitled to no compensation for acting as such. He commented that the short period of time allowed for the presentation of claims by creditors (i.e., within 15 days after

notice published by the clerk of the probate court) would probably be a controversial feature, and indicated that the notice published by the clerk would probably be a simple one (for example, a list of names of decedents under a heading "the following small estates have been filed"). He pointed out that the voluntary administrator would be required to file his report and account within three months after the filing of the initial affidavit, unless the clerk of the probate court granted an extension of this time, and that the voluntary administrator could be held in contempt of court for failure to comply with this requirement. He called attention to the fact that the use of the summary procedure was optional and not mandatory, and that the rough draft included provision for overthrow of the summary procedure by timely initiation of regular probate proceedings at the instance of devisees, legatees, heirs or creditors.

a. Estates subject to summary procedure. Zikes referred to the description of small estates to which the summary procedure would be applicable as set forth in section 3 of the rough draft (i.e., "the estate of a decedent who dies testate or intestate leaving real or personal property in this state of a value, exclusive of liens and encumbrances, of $5,000.00 or less"). In response to a question by Frohnmayer, Martin indicated that none of the statutes in 15 other states that provided for settlement of small estates without the formality of court supervision and that contained provisions similar to some of those of the rough draft defined a small estate in terms of a maximum value as high as $5,000. Zikes commented that his research team initially had considered a maximum value of $10,000, but finally had settled on the $5,000 figure. He noted that the highest maximum value among those fixed in the statutes of the other states as $3,000, but pointed out that the maximum values so fixed by some of those statutes had been increased in the past and that there was evidence of continuing efforts to accomplish further increases. Zikes remarked that some of those statutes provided for the deduction of the value of property exempt from execution in determining whether a particular estate had a value less than the maximum value fixed thereby.

In response to questions by Allison and Jaureguy, Zikes noted that the value of a homestead set apart for a surviving spouse or minor children of a decedent would be included in the value of the estate for the purpose of determining whether it would be subject to the summary procedure under the rough draft, and that only liens and encumbrances would be deducted for this prupose; for example, if a decedent died leaving a homestead of a value of $6,000, on which there were no liens or encumbrances, the summary procedure

could not be used. Zikes pointed out, however, that one of the duties of a voluntary administrator under the proposed legislation was to set apart property exempt from execution for the persons entitled thereto, so that such property would not be subject to the claims of creditors.

Frohnmayer and Gooding suggested that the maximum value of an estate subject to the summary procedure under the rough draft should be a gross value; that is, without the deduction of liens and encumbrances. Frohnmayer expressed the view that the matter of the validity of liens and encumbrances could present a complicated legal problem beyond the scope of competency of the voluntary administrator and the clerk of the probate court. Zikes commented that the maximum value of $5,000, exclusive of liens and encumbrances, had the advantage of achieving a uniformity in the values of estates subject to the summary procedure (that is, the summary procedure would apply to estates of approximately the same value), whereas with gross value as the yardstick there would be a considerable disparity with respect to the values of estates subject thereto by reason of differences in amounts of liens and encumbrances. He expressed the view, with which Zollinger agreed, that the deduction of liens and encumbrances in determining the value of an estate constituted a better yardstick for determining whether the estate was subject to the summary procedure than the gross value of the estate.

Dickson presented some statistics on the values of estates of decedents in his court for the period January 1, 1964, to September 30, 1964, based upon the inventories filed in those estates. He reported that 1,381 inventories had been filed during the nine-month period, of which 306 (22.15 percent) indicated an estate value of $5,000 or less, 595 (43.1 percent) indicated an estate value of $10,000 or less, and 786 (56.9 percent) indicated an estate value of more than $10,000. He pointed out that the estate values set forth in those inventories were gross values, and that if liens and encumbrances were deducted, the number of estates with values of $5,000 or less and $10,000 or less would be greater. He commented that he did not know whether those statistics reflected accurately the values of estates in other probate courts in Oregon, but that perhaps they gave some idea of the number of estates that might be expected to be subject to the summary procedure under the proposed legislation.

Ferder noted that he had been asked whether he could supply any statistics on the values of estates of decedents handled by the State Treasurer's office. for inheritance tax purposes. He stated that the State Treasurer's office did not make a systematic effort to compile statistics on that subject, but that he had prepared some statistics based upon the estates

handled in September 1964. He reported that 725 estates had been handled during that month (which he indicated he understood to be an unusually small number), of which there were 414 involving no inheritance tax and 311 on which inheritance tax was paid. Of the 414 estates involving no inheritance tax, he noted, 292 were not probated and 122 were probated, and of the 122 probated, 72 were of a value of $5,000 or less and 50 were of a value of more than $5,000. Of the 311 estates on which inheritance tax was paid, he indicated, 120 were not probated and 291 were probated, and of the 291 probated, 12 were of a value of $5,000 or less and 179 were of a value of more than $5,000.

Ferder suggested that the committee might wish to consider the possibility of including in the proposed legislation some provision for summary procedure with respect to estates of decedents that would escheat to the state. He expressed the view that it would probably be difficult to find a voluntary administrator to handle such estates. He offered to furnish advice and assistance if the committee wished to consider this matter.

b. Voluntary administrators. Martin indicated that the various persons eligible to act as a voluntary administrator under the summary procedure were listed in section 4 of the rough draft. He noted that the list included the executor and any devisee or legatee named in the will of the decedent, close relatives of the decedent and, if all those persons were not qualified to act, a qualified nominee of any of those persons. Zikes pointed out that section 4 of the rough draft established a definite order of preference with respect to the persons eligible to act as a voluntary administrator, and that persons of lesser preference were not entitled to act unless persons of higher preference renounced their rights in writing. He stated that the order of preference also was applicable to nominations. In response to a question by Jaureguy, Zikes indicated that an executor named in the will of a decedent had a first preference right to act as voluntary administrator.

In response to a question by Allison, Martin expressed the view that the fee for filing the initial affidavit by a voluntary administrator probably would have to be substantial, and that such fee might be comparable to the fee for filing initial papers in regular probate proceedings.

In response to a question by Zollinger, Zikes indicated that the authority of a voluntary administrator to collect the assets of the decedent would be evidenced by a certified copy of the initial affidavit, and referred to section 9 of the rough draft. In answer to a question by Jaureguy, Martin stated that a voluntary administrator would not be issued

letters of administration, and that a certified copy of the initial affidavit would constitute evidence of his authority to act.

Zikes expressed the view that there would be no problem with respect to the validity of the title of real property conveyed by a voluntary administrator acting in compliance with the proposed legislation. Martin referred to the authority of a voluntary administrator to sell property of the decedent set forth in paragraph (c) of subsection (1) of section 10 of the rough draft.

Allison noted that a voluntary administrator would not be required to furnish a bond [Note: See subsection (2) of section 5 of the rough draft], and asked about the liability of a voluntary administrator. Zikes responded that a voluntary administrator would be subject to both civil and criminal liability, and referred to section 12 of the rough draft.

c. Claims against estates. Zikes outlined the procedure for presentation and payment of claims by creditors against a small estate under the proposed legislation, and referred to section 8 of the rough draft. He pointed out that the clerk of the probate court was required to publish a notice within 15 days after the filing of the initial affidavit, that creditors were required to present their claims to the voluntary administrator within 15 days after publication of the notice and that the voluntary administrator was allowed a period of 10 days after a claim was filed to allow or deny it. He noted that if the voluntary administrator failed to act on a claim within the 10-day period, the claim would be considered denied. Zollinger commented that the notice published by the clerk of the probate court should include the name of the voluntary administrator so that creditors would know to whom they should present their claims against the small estate.

In response to questions by Jaureguy and Carson, Martin and Zikes pointed out that a creditor whose claim was denied might overthrow the summary procedure by initiating regular probate proceedings within 30 days after the notice was published by the clerk of the probate court, but noted that a creditor whose claim was allowed would not be permitted to overthrow the summary procedure in this manner. Carson suggested that a creditor whose claim could not be paid in full because of insufficient estate assets, as well as a creditor whose claim was denied, might be permitted to overthrow the summary procedure by initiating regular probate proceedings, perhaps on the theory that a lien or encumbrance on estate property might be found to be invalid and in that circumstance the estate assets might be sufficient to pay the claim in full.

Martin noted that under the summary procedure creditors with claims against the small estate were not afforded the same degree of protection as under regular probate proceedings, and that the research team was fully aware of this fact in their preparation of the rough draft. He suggested that the advantages of the summary procedure for small estates outweighed the disadvantages of reduced protection afforded creditors.

d. Taxes. Griebenow pointed out that a voluntary administrator under the summary procedure was required to obtain a tax clearance from the State Treasurer (inheritance tax) and a release from the State Tax Commission (income tax) [Note: See subsection (3) of section 11 of the rough draft], and that if he was unable to obtain the clearance and release, he was required to initiate regular probate proceedings [Note: See subsection (6) of section 11 of the rough draft].

In response to a question by Husband,Zikes commented that the priority of payment of inheritance and income tax under the summary procedure would be the same as in regular probate proceedings, and referred to the use of "in the order provided by law" in subsection (3) of section 11 of the rough draft. Griebenow noted that in subsection (3) of section 11 of the rough draft the requirement that a voluntary administrator obtain a tax clearance and release preceded the requirement that he pay administration and funeral expenses, and suggested that the requirement that inheritance and income tax be paid and a tax clearance and release be obtained probably should follow the requirement that administration and funeral expenses be paid. Allison suggested that subsection (3) of section 11 of the rough draft might be changed to read: "(3) * * * and, after the period of forty-five days has elapsed from the date of filing his affidavit, to pay so far as possible out of the assets of the decedent the necessary expenses of administration, the reasonable funeral expenses, the taxes and the debts of the decedent, in the order provided by law; and he shall then obtain a tax clearance from the State Treasurer and a release from the State Tax Commission; and he shall then distribute * * *." He noted that if this change was made, a similar change should be made in the form of the initial affidavit filed by a voluntary administrator set forth in subsection (1) of section 6 of the rough draft [Note: See page 12 of the rough draft]. In response to a question by Ferder, Martin expressed the view that it made no significant difference whether a tax clearance and release was obtained before or after payment of claims against the small estate.

Zollinger noted that the proposed legislation contained no provision for judicial determination of inheritance tax under the summary procedure, and questioned whether the State Treasurer would consider the absence of such a provision objectionable.

e. Regular probate superseding summary procedure. It was pointed out that the proposed legislation made provision for the overthrow of the summary procedure by initiation of regular probate proceedings in a number of circumstances: (1) Initiation of regular probate proceedings by a creditor whose claim against the small estate was denied [Note: See subsection (3) of section 8 of the rough draft]; (2) initiation of regular probate proceedings by the voluntary administrator if the assets of the decedent were found to exceed a value of $5,000, or if the voluntary administrator was unable to obtain a tax clearance and release [Note: See subsection (6) of section 11 of the rough draft]; and (3) initiation of regular probate proceedings by a devisee, legatee, spouse or heir at law of the decedent [Note: See section 13 of the rough draft]. Zikes noted that the summary procedure under the proposed legislation was optional and not mandatory, and commented that if regular probate proceedings were initiated before a voluntary administrator had filed his initial affidavit the summary procedure apparently could not be used. He pointed out that if an executor or administrator under regular probate proceedings was appointed and qualified, the authority of a voluntary administrator would cease [Note: See subsection(3) of section 10 of the rough draft, and the similar provision in the form of the initial affidavit filed by a voluntary administrator set forth in subsection (1) of section 6 of the rough draft, at page 14 thereof].

Zikes suggested that perhaps there should be added to the proposed legislation a provision permitting overthrow of the summary procedure by initiation of regular probate proceedings by any interested person on the ground that the value of the estate exceeded $5,000. Zollinger expressed the view that such a provision might be desirable. Zikes noted that some of the statutes in other states that provided a summary procedure for small estates similar to that provided in the rough draft specified that a person who wrongfully overthrew the summary procedure by initiating regular probate proceedings was liable for the costs of the regular probate proceedings.

Zollinger asked if it might not be desirable to permit any person interested, without restriction, to initiate regular probate proceedings, and thereby overthrow the summary procedure, at any time after commencement and before completion of the summary procedure. Martin expressed the view that it would not be desirable to overthrow the summary procedure where, for example, some of the claims against the estate had been paid by the voluntary administrator and others had not been so paid. Zollinger indicated that he saw no objection to overthrow of the summary procedure in such a circumstance, since the payment of claims could continue under the regular probate proceedings. Zikes commented that it should not be made too easy to overthrow the summary procedure by initiation of regular probate

proceedings, since such overthrow would result in greatly increased administration costs and negate the purpose of the proposed legislation, and that confusion would likely result if the summary procedure was overthrown without good reason during the course of administration by the voluntary administrator.

f. Clerk of probate court. Zikes noted that the proposed legislation would impose a considerable responsibility on the clerk of the probate court, including responsibility for determining whether the initial affidavit filed by a voluntary administrator was properly completed and whether the person filing the initial affidavit was eligible and qualified to act as a voluntary administrator. He referred to the description of the clerk in subsection (3) of section 3 of the rough draft.

Zikes and Dickson commented that if the proposed legislation was enacted some uniform instructions for the guidance of clerks of probate courts might be prepared by someone. Zikes suggested that if a clerk encountered problems with respect to the summary procedure he would probably consult with and seek advice and assistance from the judge of the probate court, although the aim of the summary procedure embodied in the rough draft was to avoid involvement of the judge of the probate court and, to as great an extent as possible, to leave primary responsibility for administration of a small estate to the voluntary administrator and the clerk.

In answer to a question by Frohnmayer, Dickson expressed the view that there would probably have to be a trained and experienced clerk of the probate court in each county to properly handle the functions of the clerk under the summary procedure for small estates, although the clerk need not be an attorney. Frohnmayer commented that the need for a clerk with such competence appeared to be one drawback to the proposed legislation. Martin suggested that a clerk might obtain some assistance from an attorney with respect to matters beyond the competence of the clerk, and that such assistance might be paid for as an expense of administering the small estate. Zikes expressed the view that there would be few really complicated problems with respect to small estates under the proposed legislation. Martin commented that the research team did not contemplate any significant burden on the clerk with respect to most small estates handled under the summary procedure, that the principal responsibility of the clerk probably would be to assist voluntary administrators to complete the initial affidavits and that if a voluntary administrator was faced with some really difficult problem the clerk could advise him to consult an attorney.

g. Attorney participation in summary procedure. Frohnmayer

commented that use of the summary procedure under the proposed legislation would likely tend to reduce participation by attorneys in the handling of small estates, and expressed some doubt that this would be desirable from the standpoint of securing proper administration thereof. Zikes noted that one aim of the proposed legislation was to reduce the expense of administering small estates, and that reducing the necessity of participation of attorneys was one way of reducing administration expense. Zikes and Martin pointed out that a voluntary administrator would be authorized to incur reasonable and necessary administration expenses and to charge such expenses against the estate [Note: See paragraph (e) of subsection (1) of section 10 of the rough draft]. Zikes expressed the view that payment for the necessary services of an attorney would be an administration expense chargeable against the estate, but that such services probably would not be necessary in the administration of most small estates. Martin indicated that the research team did not view the summary procedure as one designed to remove attorneys from participation in the administration of small estates, but rather as a device to permit accomplishment of relatively simple administrations in a simple manner.

In response to a question by Frohnmayer, Ferder commented that many of the estate filings with the State Treasurer's office for inheritance tax purposes were by lay persons, with apparently no participation by attorneys.

Husband noted that the suggestion had been made that the clerk of the probate court might advise a voluntary administrator to consult an attorney in the event a difficult problem arose under the summary procedure, and questioned whether this would not make the task of the attorney more difficult than if he had participated in the summary procedure from its inception. Frohnmayer commented that the reputation of an attorney was at stake when he participated in the administration of an estate, whereas the clerk of the probate court might not have as strong an incentive to see that the administration was done properly.

Carson and Dickson expressed the opinion that presently there was a certain amount of estate administration being handled by lay persons without the assistance of attorneys and, contrary to law, without regular probate proceedings. Frohnmayer agreed that this practice probably was going on, but suggested that such administration probably was faulty in certain respects and that some loss of inheritance tax to the state probably resulted from such practice. He expressed the view that administration of estates should be done properly, and that in many instances, even in the case of small estates, this required some assistance on the part of attorneys. Frohnmayer and Husband commented that presently many attorneys

probably assisted in the administration of small estates for very small fees out of a genuine desire to see that such estates were handled properly and to help persons involved in such estates. Carson suggested that the existence of the summary procedure contemplated by the proposed legislation might encourage the use of more formal and proper procedures in instances where regular probate proceedings were not presently being used in the administration of small estates.

In response to a question by Frohnmayer, Martin and Zikes pointed out that an attorney could not act as a voluntary administrator under the summary procedure unless he happened to be one of the persons made eligible by the proposed legislation, and that if he was eligible and did so act he would not be entitled to compensation as such. Frohnmayer expressed the view that an attorney should be permitted to act as a voluntary administrator in appropriate circumstances. Martin suggested that a provision might be added to the proposed legislation specifically authorizing attorney fees as a charge against a small estate. Frohnmayer commented that there might be added to the provision of the proposed legislation relating to the purpose thereof a statement to the effect that the services of an attorney were encouraged where such services were necessary to the proper administration of a small estate and that a voluntary administrator assumed a burden of risk in failing to use such services where necessary. Martin suggested that the form set forth in the proposed legislation for the initial affidavit filed by a voluntary administrator might contain a statement to the effect that if problems arose in the course of the summary procedure, it would be advisable for the voluntary administrator to seek the advice of an attorney and that the voluntary administrator would be liable for his errors committed in the course of the administration of the small estate. Allison suggested the possibility of a requirement that the initial affidavit filed by a voluntary administrator be signed by the attorney for the voluntary administrator. Zikes expressed the opinion that a voluntary administrator who did not require the services of an attorney to adequately perform his functions should not be compelled to engage such services, but that encouragement of a voluntary administrator to seek legal advice and assistance where necessary would be proper.

h. In general. Dickson expressed the opinion that the research team had done a fine job for the committee in the preparation of the proposed legislation, and commented that the committee was sincerely appreciative of the efforts of Lisbakken, Martin and Zikes. He noted that attorneys often inquired of him whether there was not some way to simplify probate proceedings and shorten the time presently involved therein. He noted, however, that the summary procedure contemplated by the proposed legislation, or any other summary

procedure devised by the committee, probably would be quite controversial, although perhaps no more so than the proposal of the committee to abolish dower and curtesy. Jaureguy commented that in his opinion a summary procedure for the administration of small estates was needed.

Dickson suggested that copies of the proposed legislation might be distributed to appropriate committees of the Oregon State Bar and to the Law Improvement Committee, and the comments and suggestions with respect thereto by members of those committees solicited. Allison pointed out that Bar committees were presently in a stage of transition, that new members would be appointed to those committees before the end of the year and that the newly constituted committees might not be able to meet and take any action for several months. Zollinger suggested, and Dickson agreed, that instead of attempting to obtain reaction to the rough draft in its present form, the committee should work out proposed legislation it could substantially agree upon, have a bill introduced in the legislature and the invited comments and suggestions on that bill.

Dickson suggested that at its next meeting the committee should undertake to consider the proposed legislation in more detail, and that in the meantime members should give some thought to the matter so as to be ready to present their views at the next meeting.

Zikes expressed his thanks to Dickson for the latter's attendance at the meetings of the research team and to Ferder and Griebenow for their advice and assistance.

At this point all except members of the committee and Lundy left the meeting.

4. Dower and Curtesy. Allison referred to and explained briefly the rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in his report dated October 8, 1964), which was a revision of previous rough drafts with the same title. [Note: Copies of this report were distributed to members present. This report is reproduced as an Appendix to these minutes.] Allison noted that, in preparing the rough draft he had drawn upon some of the ideas and wording contained in Gooding's letter to Lundy, dated September 14, 1964 [Note: A copy of this letter was mailed to each member]; Jaureguy's letter to Gooding, dated September 21, 1964; Allison's letter to Lundy, dated October 1, 1964 [Note: A copy of this letter was mailed to each member]; and the rough draft entitled "Protecting Property Right During Marriage" (embodied in a report by Lundy, dated October 1, 1964), copies of which had been distributed to members present.

a. Section 1. Allison referred to subsection (1) of

section 1 of the rough draft and pointed out that by use of "then or thereafter owned" he intended to make clear that a declaration claiming a marital right in all real property situated in the county was applicable not only to such real property owned at the time of the recording of the declaration but also to such real property owned thereafter and while the marital right claimed by the declaration was in effect. He also indicated that "now or hereafter owned" was used in the declaration form set forth in subsection (2) to clarify this matter.

Frohnmayer referred to subsection (4) of section 1 of the rough draft and suggested that "in the declarant" should follow "shall become vested," rather than following "upon the death of the spouse of the declarant.". Carson questioned the use of "during the marriage" in subsection (4) and elsewhere in section 1, and suggested substitution of "within the period of the existence of the marriage" therefor.

Allison referred to subsection (7) of section 1 of the rough draft, pointed out that comparable provisions of previous rough drafts had been phrased in terms of revocation of the recorded declaration and noted that subsection (7) was phrased in terms of termination of the marital right, which he considered a more accurate way of describing the effect of divorce decrees and the other occurrences listed in subsection (7). Lundy questioned whether phrasing subsection (7) in terms of termination of the marital right was accurate with respect to the court order referred to in paragraph (d) of subsection (7) and in subsection (8). He pointed out that under subsection (8) a court would determine the validity and sufficiency of a recorded declaration and asked whether a court order terminating the marital right would be consistent with the nature of the inquiry by the court into the validity and sufficiency of the recorded declaration. Allison noted that the existence of the marital right was dependent upon there being a valid and sufficient recorded declaration. Lundy remarked that the recorded declaration might be found to be invalid or insufficient, but that such a finding should not necessarily prevent the subsequent recording of a proper declaration; that a court order terminating the marital right might be construed to preclude such a subsequent recording. Gooding agreed that a finding that a recorded declaration was invalid or insufficient should not preclude a subsequent recording of a proper declaration. Zollinger suggested that the last sentence of subsection (8) might be deleted. Lundy expressed the view that subsection (8) and the reference to it in paragraph (d) of subsection (7) would be incomplete without the last sentence of subsection (8) or some similar provision. Allison suggested that paragraph (d) of subsection (7) might be deleted and the last sentence of subsection (8) phrased in terms of revocation of the recorded declaration,

rather than in terms of termination of the marital right.

Allison referred to subsection (9) of section 1 of the rough draft and pointed out that its purpose was to make clear that a surviving spouse would be entitled to real property owned by a decedent at the time of his death by reason of intestate succession or election against will, whether or not a declaration claiming a marital right had been recorded.

Jaureguy commented that, contrary to views he had expressed previously, he was inclined not to favor the declaration device or any other means of creating and maintaining any kind of inchoate right in real property owned in sole right by one spouse in favor of the other spouse, and that the rights of a surviving spouse to real property owned by a decedent at the time of his death by reason of intestate succession or election against will were sufficient.

b. Section 3. Allison referred to section 3 of the rough draft and, in response to a question by Carson, pointed out that at the last meeting the committee had agreed that a guardian of the estate should not have authority to record a declaration claiming a marital right for and on behalf of the ward, on the theory that the general duty of the guardian to protect the estate of the ward would require the guardian to make maximum use of the declaration device if he were authorized to employ it, and that this would impose an undue burden on the guardian. Frohnmayer expressed the view that perhaps a guardian of the estate should be authorized to record a declaration in appropriate circumstances.

5. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, November 14, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. Lundy indicated that he would be unable to attend the next meeting.

Dickson requested Lundy to prepare an agenda for the next meeting that would include pending matters in the areas of dower and curtesy, guardianship and conservatorship and small estates and those legislative proposals of the Bar Committee on Probate Law and Procedure that had been approved by the Bar.

The meeting was adjourned at 11:15 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, October 8, 1964)

REPORT
October 8, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison

Subject: Revised rough draft on "Protecting Property Right During Marriage."

I have prepared, and hereby submit for consideration by the Advisory Committee, the following revised rough draft of the proposed legislation entitled "Protecting Property Right During Marriage." Incorporated in this revised rough draft are some of the ideas embodied in Mr. Gooding's letter, dated September 14, 1964; my letter, dated October 1, 1964; and Mr. Lundy's report, dated October 1, 1964.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county a written, signed and acknowledged declaration claiming a marital right to an undivided one-fourth interest in specifically described real property or in all real property then or thereafter owned during the marriage in sole right by the spouse of the declarant and situated in the county.

(2) A declaration applicable to all real property may be in the following form:

GENERAL DECLARATION CLAIMING MARITAL RIGHT

_____, the _____ of _____
(name of declarant) (wife or husband) (name of

_____, claims a marital right
husband or wife owning real property)

to an undivided one-fourth interest in all real property now or hereafter owned during the marriage in sole right by _____
(name

_____ and situated in
of husband or wife owning real property)

_____ County, State of Oregon.

(Acknowledgment)

_____
Declarant

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(3) A declaration applicable to specifically described real property may be in the following form:

SPECIFIC DECLARATION CLAIMING MARITAL RIGHT

_____, the _____ of _____
(name of declarant) (wife or husband) (name of

_____, claims a marital right
husband or wife owning real property)

to an undivided one-fourth interest in the following described real property owned in sole right by _____
(name of husband or wife

_____ and situated in _____ County, State
owning real property)

of Oregon, to wit:

(Description of real property)

(Acknowledgment)

_____
Declarant

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(4) An undivided one-fourth interest in real property to which a recorded declaration is applicable, owned during the marriage in sole right by the spouse of the declarant and situated in the county in which the declaration is recorded, shall become vested upon the death of the spouse of the declarant in the declarant as a marital right, unless the marital right has been released or terminated or the declaration has been revoked as provided in this section.

(5) The spouse of the declarant may not convey or mortgage real property to which a recorded declaration is applicable free of the marital right of the declarant unless the declaration has been revoked, the marital right has been terminated or the marital right is released by the declarant joining in the conveyance or executing a separate conveyance or is subordinated by the declarant joining in the mortgage or trust deed.

(6) A recorded declaration may be revoked as to all or part of the real property to which it is applicable by a written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration is recorded.

(7) A marital right is terminated by:

(a) A decree declaring the marriage void or dissolved.

(b) A decree of permanent or unlimited separation from bed and board specifically terminating the marital right.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (8) of this section.

(8) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a recorded declaration is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the marital right terminated.

(9) Nothing in this section shall affect the inheritance rights of a declarant to real property of which the spouse of the declarant died seised as provided in ORS 111.020.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval

of the court by order, may exercise for and on behalf of the ward the right of the ward under section 1 of this 1965 Act to cause a revocation of a recorded declaration claiming a marital right of the ward to be recorded or to release or subordinate the marital right.

ADVISORY COMMITTEE
Probate Law Revision

Eighth Meeting

Date: Saturday, November 14, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of October 8 meeting of advisory committee.

2. Disposition of 1964 proposals of Bar Committee on Probate Law and Procedure that were approved by Bar.

3. Small estates.

   Proposed legislation entitled "The Small Estates Act" (dated October 7, 1964).

4. Dower and curtesy.

   a. Protecting property right during marriage.

      (1) Report by Allison (dated October 8, 1964), containing revised rough draft on "Protecting Property Right During Marriage."

      (2) Report by Lundy (dated October 1, 1964), containing revised rough draft on "Protecting Property Right During Marriage."

      (3) Report by Allison and Lundy (dated September 11, 1964), containing rough draft on owner spouse's statement in conveyance or mortgage that property conveyed or mortgaged not residence of either spouse.

   b. Changing dower and curtesy.

      Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 10/9/64).

5. Guardianship and conservatorship.

   Consideration of proposed legislation (Rough Draft, 7/18/64), starting with section 2 thereof (accounts of guardian of estate). Pending matters on section 2 are: Revised rough draft of subsection (4) (intermediate accounts); revision of subsection (5) (final accounts); and effect of settlement of final accounts and discharge of guardian.

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Eighth Meeting, November 14, 1964

Minutes

The eighth meeting of the advisory committee was convened at 9:05 a.m., Saturday, November 14, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Frohnmayer, were present. Also present was William E. Love, a member of the Law Improvement Committee.

1. Minutes of Last Meeting. No objection being raised, Dickson ordered that reading of the minutes of the last meeting (October 8, 1964) be dispensed with and that they be approved as submitted.

2. 1964 Proposals of Bar Committee on Probate Law and Procedure. Allison referred to the proposed annual report of the Oregon State Bar Committee on Probate Law and Procedure, and to the proposed legislation contained as exhibits therein. [Note: A copy of these exhibits constitutes Appendix A to these minutes.] He noted that this report was submitted to the Oregon State Bar at its annual meeting in Salem, October 7-10, 1964, and that the Bar, at that meeting, had approved the general recommendation of the Bar committee that legislation proposed thereby, and approved by the Bar, should be referred to the Law Improvement Committee and the advisory committee for study and consideration in the course of the probate law revision project. He pointed out that the Bar had approved all the Bar committee recommendations of specific proposed legislation except the one relating to attendance of a representative of the State Treasurer's office at the first opening of a ward's safe deposit box by the guardian of the estate or conservator (Exhibit C). Proposals approved by the Bar were those relating to: (a) Objections by interested persons to the confirmation of sales of real property by executors or administrators (Exhibit A); (b) revocation of wills by the subsequent marriage, divorce or annulment of the marriage of testators (Exhibit B); (c) waiver in certain circumstances by probate courts of the appointment of appraisers of estates of decedents (Exhibit D); (d) clarification of the procedure when power of sale is given under the terms of wills (Exhibit E); (e) obligation of executors and administrators to pay mortgages or other liens or encumbrances on property of decedents (Exhibit F); and (f) appointment of administrators to reopen estates of decedents under certain circumstances (Exhibit G).

Dickson suggested, and Allison agreed, that the advisory committee should proceed to consider the legislation proposed by the Bar committee and approved by the Bar, and to determine which of these proposals, with whatever changes the advisory committee considered necessary or desirable, should be recommended to the Law Improvement Committee.

a. Objection to confirmation of sale of real property by personal representative (Exhibit A). Allison explained the Bar committee's proposed legislation amending ORS 116.805 to permit any interested person to file objection to confirmation of the sale of real property by an executor or administrator. He pointed out that at present only persons who were cited to appear on the application for the order of sale were entitled to file objections (i.e., devisees

and heirs; see ORS 116.745), and suggested that other persons (such as legatees, creditors and spouses of interested persons, including the wife of the decedent) should also be entitled to file objections.

Zollinger suggested that another person who should be entitled to file objection might be a potential purchaser in the event the court vacated the sale of the real property and directed resale. He questioned the qualification that a person entitled to file objection be "interested," commented that there might be some difficulty in determining who was an "interested" person and expressed the view, with which Allison, Dickson and Jaureguy agreed, that any "person," rather than any "interested person," should be entitled to file objection. In answer to a question by Butler, Zollinger noted that "any person" was the terminology used in the comparable provision of the guardianship statutes. [Note: See ORS 126.451.]

Allison moved, seconded by Zollinger, that Exhibit A, as amended by deletion of "interested" before "person," be approved. Motion carried unanimously.

Butler commented that he would like to see the provision of the probate statutes relating to confirmation of the sale of real property (i.e., ORS 116.810) conformed to the comparable provision of the guardianship statutes (i.e., ORS 126.456).

b. Revocation of will by subsequent marriage, divorce or annulment of marriage of testator (Exhibit B). Allison explained the Bar committee's proposed legislation relating to revocation of the will of a testator by his subsequent marriage, divorce or annulment of his marriage. He pointed out that the present statute (i.e., ORS 114.130), which would be repealed by the proposed legislation, operated as an absolute revocation of the will of a testator in the event of his subsequent marriage, referring to the statement by the Oregon Supreme Court in Booth's Will, (1901) 40 Or. 154, that "the statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate eo instanti as a revocation." He noted that the proposed legislation would provide three exceptions to revocation of the will of a testator by his subsequent marriage: First, no revocation unless his spouse survived the testator; second, no revocation if provision for the spouse had been made by written antenuptial agreement or marriage settlement; and third, no revocation if the will provided for the spouse or mentioned the spouse in such a manner as to show an intention not to make such provision. Allison expressed the view that in many instances the effect of the present statute was unreasonably harsh; for example, where a will was made in contemplation of marriage and other provision was made for the testator's prospective spouse, where a will devised or bequeathed much of the testator's property to persons other than his spouse and he had not contemplated the effect of his possible subsequent divorce or where the testator and his spouse were divorced but the spouse predeceased the testator. He noted that, under the proposed legislation, a subsequent divorce would only revoke those provisions in a will in favor of the former spouse of the testator.

Zollinger suggested that section 2 of Exhibit B be amended by inserting, after "annulled," the words "unless his will shall otherwise provide." He commented that a will might be made in contemplation of divorce and might contain some provision for the spouse to be divorced, and that under such circumstances the

divorce should not be considered to revoke the will. In answer to a question by Carson, Zollinger expressed the view that the provision in the will should not be qualified by the word "expressly" or "explicitly," that the intention of the testator should control and that the court should be relatively free to determine what the testator's intention was. Allison expressed agreement with Zollinger's suggested amendment.

Allison moved, seconded by Carson, that Exhibit B, as amended by insertion of the words suggested by Zollinger, be approved. Motion carried unanimously.

c. Guardian's access to ward's safe deposit box (Exhibit C). Allison noted that the Bar committee's proposed legislation to require the presence of a representative of the State Treasurer's office at the time of the first opening of a ward's safe deposit box by the guardian had been disapproved by the Bar. Dickson suggested, and the committee agreed, that Exhibit C was not properly before the committee for study and consideration and that, therefore, it should not be considered.

d. Waiver of appraisal of estates of decedents (Exhibit D). Allison explained the Bar committee's proposed legislation amending ORS 116.420 to permit the court to waive the appointment of appraisers to appraise property of a decedent in certain specified circumstances. He commented that there were probably many estates of decedents that consisted wholly or largely of cash or other property the value of which was readily ascertainable, and suggested that in such cases the appointment of an appraiser or appraisers was not necessary. He noted that although the present statute requires the appointment of at least one appraiser in all cases, he was aware that some courts have more or less disregarded the statute and waived the appointment of appraisers in cases involving cash or other property with readily ascertainable value.

Zollinger questioned the necessity of the reference to the inheritance tax statutes (i.e., ORS 118.005 to 118.840) in subsection (3) of ORS 116.420, as amended by Exhibit D, and suggested that the reference be deleted. In response to a suggestion that the appraisal provision of the inheritance tax statutes (i.e., ORS 118.630) might also be amended to permit waiver of appraisal, Zollinger noted that the provision authorized the court, on its own motion or that of an interested party, to appoint one or more appraisers if no previous inventory or appraisal had been made or if a previous inventory or appraisal was considered insufficient or inadequate, and expressed the view that no change in this provision need be made.

Dickson expressed disapproval of the proposal in Exhibit D that the court, in its discretion, be authorized to waive the appointment of any appraisers under certain circumstances. He commented that the court would probably be flooded with requests for waiver, and that this would impose a considerable burden on the court to determine the propriety of waiver in each case. Zollinger expressed agreement with the view advanced by Dickson.

Dickson suggested that the present maximum of $10,000 on the value of estates for appraisal of which a court was authorized to appoint a single appraiser be increased, perhaps at least to $15,000, thus reducing the cost of appraisal in a larger number of estates, but not leaving the matter within

the discretion of the court. In answer to a question by Allison, Dickson commented that he would not object to a maximum value of $25,000.

Love commented that he had observed, in some estates administered in eastern Oregon, that appraisal was often handled by the attorney for an estate, with the appraisers merely confirming valuations determined by the attorney, and that the appraisers were only called upon to do the actual work of appraisal where real property or contracts or other property sometimes difficult to value were involved. He suggested that this might be the usual pattern of appraisal, as a practical matter, outside of Multnomah County. Riddlesbarger noted that Love's observation was probably accurate. He commented that, in his experience, security dealers seldom charged a fee for appraising securities of an estate. Gooding indicated that he had similar experience with respect to security dealers and that the reason for not charging a fee in such cases probably was that the security dealers had, or hoped to obtain, the business of handling the securities.

Allison suggested that waiver by the court of the appointment of any appraisers might be limited to estates consisting solely of cash. Dickson responded that courts probably waived appraisal in such cases now, even though the statutes did not expressly authorize this, because no one objected to such waiver.

Zollinger expressed the view that most personal representatives themselves were sufficiently capable to appraise cash and securities listed by any national security exchange and that appraisers should not be required for property of this kind. Dickson suggested that some consideration might be given to an approach, somewhat similar to that adopted by the provision in the inheritance tax statutes, involving no appointment of appraisers unless requested by some interested person. Zollinger commented that if that approach was adopted there might be few requests for the appointment of appraisers, but Butler and Riddlesbarger disagreed with Zollinger on this point. Dickson stated that he understood that the various tax agencies usually relied upon their own appraisers, and suggested that personal representatives might select their own appraisers, without requesting the court to appoint them, and use the reports of those appraisers for tax purposes, which the tax agencies would probably accept.

Allison suggested, and the committee agreed, that further consideration of Exhibit D be postponed pending preparation by himself and perhaps others of a revised draft of proposed legislation on the subject.

e. Sale of property of decedent under power in will (Exhibit E). Allison explained the Bar committee's proposed legislation relating to sale or other disposition of property of a decedent under a provision made in the will of the decedent, noting that the purpose of Exhibit E was to clarify the ambiguity, or at least uncertainty, of the procedures under the present statute (i.e., ORS 116.825).

Zollinger questioned the need for court confirmation of a sale of real property under a power granted in a will. Allison suggested that one argument for confirmation might be the circumstance that the court order confirming the sale would be entered in the probate journal as a record of the transaction. He expressed the view that if a power of sale was granted in a will to the executor, the executor should be permitted to proceed under the power and make a return

of the sale, but not obtain court confirmation. He indicated, however, that he was not in favor of dispensing with court confirmation if the sale was made by an administrator with the will annexed. Zollinger commented that, in his opinion, if the power of sale was to be exercised only by the executor, court confirmation was not essential, but stated that he would not object to court confirmation if the authority to exercise a power of sale was in an administrator with the will annexed as well as an executor. Carson suggested, and Butler and Gooding agreed, that the best solution would be to permit either an executor or an administrator with the will annexed to exercise the power of sale and to require court confirmation in both cases.

Carson noted that he had previously suggested deletion of the words "from a well drilled" from ORS 116.825 [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, Appendix B.], and suggested that, since Exhibit E amended ORS 116.825, Exhibit E be amended to delete the words in question.

Dickson asked if there was any sentiment in favor of reducing the time limits for return and court confirmation after a sale of property (i.e., return of sale of personal property within 15 days after sale, under ORS 116.715; return of sale of real property within 10 days after sale, under ORS 116.805; objections to sale of real property within 15 days after filing of return, under ORS 116.810), whether in connection with a power of sale granted in a will or generally. The matter of these time limits was discussed at some length. Dickson suggested that a 10-day time limit was sufficient for both a return and objections, and whether the property involved was real or personal. He expressed the view that, in the case of personal property, requiring a return of sale served little purpose if court confirmation was not also required.

Allison suggested that Exhibit E be amended to delete the words "from a well drilled" as suggested by Carson, and to authorize sale or other disposition under a power granted in a will of any property by an executor or administrator with the will annexed, with the only exception being that in the case of the sale of real property a return be required within 10 days after the sale and court confirmation be required. Butler suggested that a period of time also be allowed for the filing of objections.

Allison moved, seconded by Butler, that Exhibit E be redrafted in accordance with the views expressed by members of the committee, and that the redraft then be considered by the committee. Motion carried unanimously.

f. Payment of mortgages or other encumbrances on property of decedent (Exhibit F). Allison explained the Bar committee's proposed legislation relating to the obligation of a personal representative to pay mortgages or other encumbrances on property of a decedent. He pointed out that under the present statute (i.e., ORS 116.140), which would be repealed by Exhibit F, an heir, creditor or other person interested could force the executor or administrator to sell personal property of the estate and use the proceeds to redeem property under encumbrance, and expressed the view that this would impose hardship in some cases. Jaureguy noted the inconsistency of ORS 116.155, which appeared to deny the authority of an executor or administrator to redeem when a mortgage had been foreclosed or when proceedings had been commenced for foreclosure, and

ORS 116.165, which appeared to authorize such redemption. He expressed the view that a testator whose will devised real property subject to a mortgage prior to execution of the will probably intended that the devisee take the property subject to the mortgage and be responsible for discharging the obligation secured by the mortgage, but recognized that a reasonable argument might be made for a contrary intent on the part of the testator. He noted that similar opposing arguments might be made as to the intent of the testator when devised real property was subjected to a mortgage after the execution of the will devising it. Jaureguy commented that there should be some definite rule on the subject.

Zollinger questioned the meaning of "other lien or encumbrance" in section 1 of Exhibit F. He referred to the exception as to judgment liens, and suggested that tax liens fell into the same category as judgment liens. He commented that perhaps the application of the section should be limited to mortgages and trust deeds, noting that these were voluntary encumbrances. Carson suggested that mechanics' liens might be included. Riddlesbarger asked whether security agreements covering personal property should not be included. Dickson expressed the view that the section should apply to either real or personal property and to encumbrances thereon voluntarily assumed.

Gooding expressed some concern about that part of section 1 that would require an executor or administrator to apply rents or profits to the payment of instalments of principal or interest falling due upon a lien or encumbrance, indicating that he did not favor this use of rents or profits in some circumstances. Carson suggested, and the committee agreed, that the words "any installments of" be deleted and that "or legatee" be inserted after "devisee."

Riddlesbarger suggested, and the committee agreed, that "specific" should be substituted for "express" in that part of section 1 relating to directions in a will for payment of a lien or encumbrance.

It was suggested, and the committee agreed, that section 1 should be amended to apply to a "mortgage, trust deed or security agreement," rather than a "mortgage or other lien or encumbrance." It was also agreed that "lien or" should be deleted from the phrase "lien or encumbrance."

Allison suggested, and the committee agreed, that "administrator with the will annexed" be substituted for "administrator" in section 1.

It was moved and seconded that Exhibit F, as amended in accordance with suggestions agreed upon by the committee, be approved. Motion carried unanimously.

g. Reopening of estate of decedent for further administration (Exhibit G). Allison explained the Bar committee's proposed legislation relating to reopening the estate of a decedent for further administation after it had been closed. In response to a question by Jaureguy, Allison noted that Exhibit G would provide statutory authorization for a practice that was presently being permitted in some cases, such as where other property of the estate was discovered after closure of the estate.

Riddlesbarger suggested for committee consideration the section of the 1963

Iowa Probate Code on the subject of reopening administration, which reads as follows:

> "§ 489. Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court. It may reappoint the personal representative, or appoint another personal representative, to administer any additional property or to perform other such acts as may be deemed necessary. The provisions of law as to original administration shall apply, insofar as applicable, to accomplish the purpose for which the estate is reopened, but a claim which is already barred can, in no event, be asserted in the reopened administration."

The matter of when claims against estates were barred under Oregon law was discussed briefly. Carson asked whether a creditor barred under original administration should be allowed to reassert his claim against property of the estate discovered after closure of the original administration, and commented that perhaps at least a creditor who received only partial payment of his claim under original administration because of inadequacy of the estate to pay in full should be allowed to seek payment of the balance of his claim unpaid from after-discovered property. Dickson expressed the view that in the case of partial payment because of estate inadequacy the creditor probably would not be barred from seeking such payment from after-discovered property.

Butler asked about the application of the Iowa statute to the situation of an insolvent estate reopened because of after-discovered property, and whether in this situation creditors would be barred from asserting their claims for payment from the after-discovered property. Riddlesbarger responded that the Iowa statute did not appear to cover this situation.

Love commented that in some situations creditors, after noting the inadequacy of the estate to pay their claims, might not bother to file such claims, and in such situations they would be barred if additional property was discovered after closure of the estate. Dickson remarked that this was a matter which should be given more consideration in the course of the probate law revision project.

Zollinger moved, seconded by Riddlesbarger, that Exhibit G be amended by substitution of the substance of section 489 of the 1963 Iowa Probate Code for the substance of section 1 of Exhibit G, and that Exhibit G, as so amended, be approved. Motion carried unanimously.

3. Small Estates. Dickson suggested, and the committee agreed, that consideration of the proposed legislation relating to small estates be postponed until a future meeting, and that the committee proceed with consideration of the proposed legislation relating to dower and curtesy in an effort to complete action thereon at this meeting.

4. Dower and Curtesy.

a. Protecting property right during marriage. Allison referred to the rough draft of proposed legislation entitled "Protecting Property Right During

Marriage" (embodied in his report dated October 8, 1964), which was a revision of previous rough drafts with the same title. He noted that the draft had been considered briefly at the last meeting of the committee on October 8, and was reproduced as an Appendix to the minutes of that meeting. He pointed out that several changes in the wording of section 1 of the draft had been suggested at the last meeting, as follows: (a) In subsection (1), line 6, substitution of "within the period of the existence of" for "during"; (b) in subsection (4), line 2, substitution of "within the period of the existence of" for "during"; (c) in subsection (4), line 5, insertion of "in the declarant as a marital right" after "vested" and, in line 6, deletion of "in the declarant as a marital right"; (d) deletion of paragraph (d) of subsection (7); and (e) in subsection (8), line 9, substitution of "recorded declaration revoked" for "marital right terminated."

In response to a question, Carson indicated that "within the period of the existence of the marriage" was preferable to "during the marriage," since the principal meaning of "during" was "throughout," and "throughout the marriage" was not what was intended. Allison suggested that "during the marriage" be retained in the form of a general declaration set forth in subsection (2) of section 1. The committee agreed that the wording in the form should be "at any time during the marriage." The committee also agreed that, in subsection (1), line 5, "either" should be inserted after "interest," and that the suggestions for changes in wording made at the last meeting, as pointed out by Allison, should be approved.

The proposition of whether the declaration to protect a property right during marriage, as embodied in the rough draft, should be approved was discussed at some length. Jaureguy indicated that, after much thought on the matter, he was opposed to the declaration device as it applied to all real property, although he might be in favor of the device if it was applicable only to the homestead. He also indicated that he would be inclined to favor some general requirement that the homestead might not be sold without the signatures of both spouses. Allison pointed out that the declaration device, as embodied in the rough draft, represented an effort to fill, to some extent, the gap that would be left by abolition of inchoate dower and curtesy by other legislation to be proposed by the committee. He expressed the view that there would be a few hardship cases arising out of the abolition of inchoate dower and curtesy, and that the declaration device would constitute a protection available for use in such cases. He also suggested that the declaration device would make it somewhat easier to convince the legislature that dower and curtesy should be abolished. Butler indicated that he did not favor the declaration device on its merits, but that, like Allison, he believed it would be necessary to support abolition of dower and curtesy before the legislature.

Zollinger commented that limiting the application of the declaration device to the homestead, as mentioned by Jaureguy, would require either a precise identification of what was a homestead or an assumption that any property being conveyed was a homestead. Jaureguy suggested that the statutes relating to exemption of homestead from execution, under which a homestead owner may file a declaration of homestead, might be followed. [Note: See ORS 23.240 to 23.270, particularly subsection (2) of ORS 23.270.] Allison agreed that the major problem area probably was the homestead, but expressed the view that the practical

problem of sufficiently identifying what was a homestead, for purposes of conveying or encumbering, was an extremely difficult one and that the end result would likely be a requirement, as it was now, that both spouses join in every conveyance or encumbrance. Zollinger stated that he saw no need for and did not favor protection of a spouse by means of the declaration device, even in the case of the homestead. He noted that no such protection presently existed with respect to personal property, and asked why it should exist with respect to real property.

Jaureguy remarked that another basis for his objection to the declaration device was that, under it, a spouse would acquire both a right in the real property and a share in the proceeds of the sale thereof, either immediately or upon the death of the other spouse. Zollinger noted that in the case of a gift of the property there would be no proceeds. Alison commented that if a spouse who filed a declaration did not join in a conveyance, he would be unlikely to share in the proceeds of a sale, and that if he did share in the proceeds, he would likely join in the conveyance, thus releasing the marital right established by the declaration. Love expressed the view that the situation described by Jaureguy would almost never arise, since as a practical matter the property subject to the filed declaration probably would not be conveyed unless the spouse who filed the declaration joined in the conveyance.

Allison moved, seconded by Gooding, that the rough draft embodying the declaration device, as amended in accordance with suggestions agreed upon by the committee, be approved. Motion carried, with Jaureguy and Zollinger voting no.

b. Changing dower and curtesy. Allison referred to the latest rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964). He moved, seconded by Zollinger, that section 1 (amending ORS 111.020) of the draft be approved. Motion carried unanimously.

Allison explained the change in ORS 113.050 proposed by section 2 of the draft. Zollinger noted that section 2 referred to real property of which the decedent died "possessed," and asked whether, with respect to real property, "seised" should not be used instead of "possessed." Allison pointed out that "seised" was used in ORS 111.020, which dealt with descent of real property. Riddlesbarger suggested, and the committee agreed, that, with respect to real property, "seised" should be used instead of "possessed."

Carson questioned the use of "possessed" in section 2 with respect to personal property, and suggested that "owned" be substituted therefor. He commented, and Butler agreed, that a person might possess personal property without owning it. Allison suggested that the wording "owned by the decedent at the time of death" might be used. Riddlesbarger asked whether bonds payable to another person on the death of a decedent constituted personal property "owned" by the decedent at the time of death and thus subject to the election against will, and expressed the view that such bonds should not be so considered. He recalled a situation in which a court had ruled that such bonds were not a part of a decedent's estate. Butler suggested use of "owned by the decedent's estate" instead of "owned by the decedent." Zollinger suggested, and the committee agreed, that the wording should be "personal property of the estate of the

decedent owned by the decedent at the time of death."

Jaureguy asked whether some provision should be made for an offset against the one-fourth interest taken by a surviving spouse under election against will in the event the surviving spouse also received real property held by the entirety with the decedent, who furnished the purchase price therefor; life insurance proceeds; or bonds payable to the surviving spouse on the death of the decedent. Butler expressed disapproval of such an offset, and commented that the matter was one subject to the control of the decedent during his life and that an attempt to regulate it after his death should not be made by statute. Zollinger pointed out that election against will was a statutory right, and expressed the view that if a surviving spouse received property of a decedent on his death that was not part of his estate, it was not unreasonable to limit the right of election against will. Allison noted that information concerning amounts received by a surviving spouse as life insurance beneficiary or real property received by a surviving spouse as surviving tenant by the entirety ordinarily did not appear in estate proceedings, and commented on the difficulty of obtaining accurate information of this nature as a drawback to the suggested offset against or limitation on election against will. Butler remarked that the question of who furnished the purchase price for jointly owned property also would constitute a difficult problem in connection with the offset or limitation. Carson suggested that a proposal to limit election against will submitted to the legislature at the same time as the proposal to abolish dower and curtesy and substitute a substantial equivalent might tend to reduce chances of legislative approval of the latter proposal. Dickson expressed the view that a proposal to limit election against will, if favored by the committee, should be embodied in separate proposed legislation rather than in that relating to changing dower and curtesy.

Allison moved, seconded by Gooding, that sections 2 and 3 of the draft be approved. Motion carried unanimously.

Allison noted that the balance of the sections of the draft primarily dealt with deletion of references to dower and curtesy in a number of existing statutes. He suggested postponement of consideration of those sections until all members had an opportunity to review them. Dickson suggested, and the committee agreed, that consideration of those sections be made a special order of business for the next meeting of the committee.

Riddlesbarger left the meeting at this point.

5. Guardianship and Conservatorship. Zollinger pointed out that the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964) was still under consideration, and that the committee had not taken action on the amendment of ORS 126.336 (relating to accounting by guardians) by section 2 of the draft. He noted that the latest revision of that part of ORS 126.336 relating to disposition of accounts other than final accounts of a guardian of the estate was embodied in a report dated September 11, 1964, which members had previously received. [Note: This report is reproduced as Appendix B to these minutes.] Jaureguy suggested, and the committee agreed, that the wording of paragraph (a) (D) of the September 11 revised draft be adjusted to make clear that copies of accounts were to be mailed or delivered to all persons listed who requested them, as follows: "* * * to [any] those of the ward's

children, parents, brothers or sisters who [is] are not under legal disability and [has] have presented a request * * *."

The committee then turned to consideration of subsection (5) of ORS 126.336, as amended by section 2 of the July 18 draft, relating to disposition of final accounts. Carson commented that the committee had previously discussed limiting personal service of a final account to a ward not under legal disability and providing for mail or delivery of copies thereof to the other persons listed in subsection (5). Dickson suggested deletion of the word "personally." After further discussion, it was suggested that subsection (5) be amended to read as follows: "The guardian of the estate shall cause a copy of his final account to be mailed or delivered to [served personally on a ward not under legal disability, the person or institution having the care, custody or control of a ward under legal disability,] each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (4) of this section, the executor or administrator of a deceased [ward] ward's estate and a successor guardian. Within 10 days after the date of such mailing or delivery [the service], any such person [or institution so required to be served] may make and file in the guardianship proceeding written objections to the final account." Zollinger expressed the view that 10 days might not be sufficient in some circumstances. Dickson responded that additional time might be allowed by order of the court or by stipulation. Zollinger moved, seconded by Carson, that subsection (5), as amended pursuant to the previous suggestion, be approved. Motion carried.

The effect of settlement of final accounts and discharge of the guardian was discussed briefly. Zollinger suggested, and the committee agreed, that consideration of this matter should be deferred until a future time, and perhaps be considered in conjunction with similar matters as to decedents' estates.

Zollinger referred to and explained the amendment of ORS 126.346 by section 3 of the July 18 draft. Gooding moved, seconded by Butler, that section 3 be approved. Motion carried unanimously.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, December 12, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The meeting was adjourned at 1:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, November 14, 1964)

The following are the Exhibits (i.e., proposed legislation) contained in the proposed annual report of the Oregon State Bar Committee on Probate Law and Procedure for the year 1963-1964. The Oregon State Bar, at its annual meeting in Salem, October 7-10, 1964, approved Exhibits A, B, D, E, F and G, and disapproved Exhibit C.

EXHIBIT A

A BILL

FOR AN ACT

Relating to return of sale and objections thereto; amending ORS 116.805.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 116.805 is amended to read:

116.805. Within 10 days after the sale of real property, the executor or administrator shall make a return of his proceedings concerning the sale, and file the same with the clerk of the probate court. At any time within 15 days from the filing of such return [any person cited to appear on the application for the order of sale,] any interested person may file his objection to the confirmation of such sale.

EXHIBIT B

A BILL

FOR AN ACT

Relating to revocation of wills by subsequent marriage or divorce of testator; creating new provisions; and repealing ORS 114.130.

Be It Enacted by the People of the State of Oregon:

Section 1. If, after making any will, the testator shall marry, and the wife or husband of testator shall be living at the time of his death, such will shall be deemed revoked, unless provision shall have been made for such survivor by a written antenuptial agreement or marriage settlement or unless such

survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received.

Section 2. If, after making any will, a testator shall be divorced, or his marriage shall be annulled, such divorce or annulment shall revoke all provisions in the will in favor of the former spouse, including any provision appointing such spouse as the executor or executrix of the will.

Section 3. ORS 114.130 is repealed.

EXHIBIT C

A BILL

FOR AN ACT

Relating to the power of a Guardian or Conservator to gain access to the safe deposit box of his ward; requiring the presence of a representative from the State Treasurer's Office at the time of first access; and the filing of an inventory of the contents thereof.

Be It Enacted by the People of the State of Oregon:

Section 1. No person, safe deposit company, trust company, corporation, bank or other institution engaged in the business of renting safe deposit boxes or other receptacles of similar character, shall permit the guardian or conservator of the estate of the owner or tenant thereof to gain access thereto unless the State Treasurer, personally or by representative, shall be present at the first opening of such safe deposit box by such guardian or conservator.

Section 2. The State Treasurer, or his representative, shall, within ten days after being present at the opening of the safe deposit box of a ward by the guardian or conservator of his estate, file with the Clerk of the county wherein the guardianship or conservatorship of such ward is pending an inventory

of the contents of said safe deposit box.

EXHIBIT D

A BILL

FOR AN ACT

Relating to appraisement, appointment of appraisers and waiver of appraisal; creating new provisions; and amending ORS 116.420.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 116.420 is amended to read:

116.420. (1) Before the inventory is filed, the property therein described shall be appraised at its true cash value by three disinterested and competent persons, who shall be appointed by the court; provided, that the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed $10,000, exclusive of cash and securities of the United States Government, and provided, further, that the court, in its discretion, may waive the appointment of any appraisers if, in its judgment, the value of the property may be definitely ascertained and entered in the inventory by the personal representative and if no useful purpose will be served by the appraisal.

(2) If any part of the property is in a county other than that wherein the administration is granted, the appraiser or appraisers thereof may be appointed by such court, or the court of the county in which the property is located. In the latter case, a certified copy of the order of appointment shall be filed with the inventory.

(3) Nothing contained herein shall limit the power of the court to require the filing of an inventory and the making of an appraisal as provided in ORS 118.005 to ORS 118.840.

EXHIBIT E

A BILL

FOR AN ACT

Relating to the disposition of property under power in will; creating new provisions; and amending ORS 116.825.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 116.825 is amended to read as follows:

116.825. When a testator makes provision in his will for the sale, lease, including, without limitation, a lease granting the right to explore or prospect for and remove and dispose of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, which may be produced from a well drilled pursuant to such lease, or other disposition of all or any particular portion of his estate, the same may be sold, leased or otherwise disposed of as directed, by the executor [or administrator with the will annexed, without an order of the court therefor, but any sale conducted under such power shall be made and a return filed thereon in all respects as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he is governed by such direction in such respects] without regard to any statutory requirements or procedure except that in the case of the sale of personal property the executor shall file a return of sale within 15 days after the completion of the sale, but such sale need not be confirmed, and in the case of the sale of real property the executor shall file a return of sale and obtain a confirmation of the sale by the court in the manner required by ORS 116.805 and 116.810.

EXHIBIT F

A BILL

FOR AN ACT

Relating to the obligation of executors to make payments upon encumbered property; creating new provisions; and repealing ORS 116.140.

Be It Enacted by the People of the State of Oregon:

Section 1. When any real or personal property subject to a mortgage or other lien or encumbrance, except the lien of a judgment against the decedent, is specifically bequeathed or devised, the legatee or devisee thereof shall take such property subject to such mortgage or other lien or encumbrance and there shall be no obligation upon the executor or administrator to make any payments of principal or interest thereon unless (1) there are express directions in the will that said lien or encumbrance be so paid, or (2) the executor or administrator obtains rents or profits from said property, in which case the same, if requested by the devisee, shall first be applied to the payment of any installments of principal or interest falling due upon any such lien or encumbrance, or (3) any beneficiary of the estate consents that such payments be made and charged against his interest.

Section 2. ORS 116.140 is repealed.

EXHIBIT G

A BILL

FOR AN ACT

Relating to appointment of an administrator when after discovered property is found in an estate or when it becomes necessary or proper that letters should again be issued.

Be It Enacted by the People of the State of Oregon:

Section 1. The final settlement of an estate shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes

Relating to the obligation of executors to make payments upon encumbered property; creating new provisions; and repealing ORS 116.140.

Be It Enacted by the People of the State of Oregon:

Section 1. When any real or personal property subject to a mortgage or other lien or encumbrance, except the lien of a judgment against the decedent, is specifically bequeathed or devised, the legatee or devisee thereof shall take such property subject to such mortgage or other lien or encumbrance and there shall be no obligation upon the executor or administrator to make any payments of principal or interest thereon unless (1) there are express directions in the will that said lien or encumbrance be so paid, or (2) the executor or administrator obtains rents or profits from said property, in which case the same, if requested by the devisee, shall first be applied to the payment of any installments of principal or interest falling due upon any such lien or encumbrance, or (3) any beneficiary of the estate consents that such payments be made and charged against his interest.

Section 2. ORS 116.140 is repealed.

EXHIBIT G

A BILL

FOR AN ACT

Relating to appointment of an administrator when after discovered property is found in an estate or when it becomes necessary or proper that letters should again be issued.

Be It Enacted by the People of the State of Oregon:

Section 1. The final settlement of an estate shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes

necessary or proper for any cause that letters should be again issued.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, November 14, 1964)

REPORT
September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Disposition of intermediate accounts of guardian of estate.

At the last meeting of the Advisory Committee, I submitted a revised draft of subsection (4) of ORS 126.336 (relating to the disposition of accounts other than final accounts of a guardian of the estate), embodying, in so far as possible, the revisions apparently agreed upon by the committee at the July 18 meeting. At the last meeting the committee considered that revised draft, directed or suggested certain revisions thereof and requested that I prepare and submit a new revised draft. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 13. Following is such a new revised draft of subsection (4).

126.336. * * *

* * *

(4) (a) [The] Before filing any account other than his final account, a guardian of the estate shall [give a copy of each account to the person or institution having the care, custody or control of the ward.] cause a copy of the account to be mailed or delivered:

(A) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, to the Secretary of the Oregon State Board of Control and to the superintendent of the institution who has presented a request for a copy to the guardian before the filing of the account.

(B) If there is a guardian of the person for the ward other than the guardian of the estate, to the guardian of the person.

(C) If the ward is a minor 14 years of age or older or a spendthrift, to the ward.

(D) If the ward is a minor or an incompetent, to the ward's spouse who is not under legal disability and to any of the ward's children, parents, brothers or sisters who is not under legal disability and has presented a request for a copy to the guardian before the filing of the account.

(b) The guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account have been mailed or delivered as provided in paragraph (a) of this subsection, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

* * *

Comment: The revision of subsection (4) of ORS 126.336 by the above draft is based upon Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 11 to 14, and Appendix B.

See also: Minutes, 7/18/64, pages 8 to 12.
Section 2, Guardianship and Conservatorship Bill, Rough Draft, 7/18/64, pages 4 and 5.
Minutes, 6/13/64, pages 11 to 13, and Appendix C.
Minutes, 5/16/64, pages 10 and 11, and Appendix B, page 8.

ADVISORY COMMITTEE
Probate Law Revision

Ninth Meeting

Date: Saturday, December 12, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

[Note: The rough minutes of the November 14 meeting have not yet been edited. Lundy will endeavor to do so and distribute copies later this month.]

1. Activities of advisory committee from now through 1965 legislative session.

[Note: Lundy will not be available to assist the committee during this period. Mrs. Carpenter will not be available to take minutes of meetings of the committee during this period.

The committee probably will wish to consider the nature of its activities during this period and the necessity and availability of staff-type services to assist it in carrying on those activities. For example, if the committee plans to hold meetings during this period and wishes minutes of such meetings prepared and distributed as in the past, it will be necessary to make provision for taking the minutes and editing and distributing them.]

2. Dower and curtesy.

Pending for committee consideration are sections 4 through 20 of the rough draft on "Changing Dower and Curtesy" (dated October 9, 1964).

The rough minutes of the November 14 meeting indicate that the committee approved, with some changes, the revised rough draft on "Protecting Property Right During Marriage" (report by Allison, dated October 8, 1964), and the first three sections of the rough draft on "Changing Dower and Curtesy" (dated October 9, 1964).

3. Guardianship and conservatorship.

Pending for committee consideration are sections 4 through 12 of the rough draft on "Guardianship and Conservatorship" (dated July 18, 1964).

The rough minutes of the November 14 meeting indicate that the committee concluded with approval of section 3 of the rough draft.

4. Small estates.

5. 1964 proposals of Bar Committee on Probate Law and Procedure.

The rough minutes of the November 14 meeting indicate that the committee approved, with some changes, the 1st, 2nd, 6th and 7th legislative proposals of the Bar Committee. Postponed, and apparently pending, are the 4th and 5th proposals (i.e., (a) waiver by probate court of appointment of appraisers of estates of decedents, and (b) clarification of procedure when power of sale given under terms of wills).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Ninth Meeting, December 12, 1964

Minutes

The ninth meeting of the advisory committee was convened at 9:05 a.m., Saturday, December 12, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Gooding, were present.

Dickson noted that the minutes of the last meeting (November 14, 1964) had not yet been prepared for distribution, but that Lundy (Robert W. Lundy, Chief Deputy Legislative Counsel) had indicated he would do so as soon as possible. Dickson indicated that he would ask Lundy also to prepare for distribution the minutes of this December meeting.

The committee was informed that the Legislative Counsel's office would be unable to furnish professional or secretarial assistance to the committee during the 1965 legislative session, and that other arrangements for secretarial assistance with respect to committee meetings and the minutes thereof during that period would have to be made.

Butler indicated that the Oregon State Bar Committee on Probate Law and Procedure was meeting that morning in Portland. He noted that legislation proposed by the Bar committee and approved by the Oregon State Bar at its annual meeting in October had been considered by the advisory committee at its last meeting. He commented that the Bar committee was concerned with the matter of its responsibility with respect to that proposed legislation, particularly the presentation thereof to the Law Improvement Committee.

Dickson informed the members that a meeting of the Law Improvement Committee was scheduled for Friday, January 8, 1964, in Salem. He commented that representatives of the advisory committee, at least Allison and, if possible, other members, should attend the meeting of the Law Improvement Committee and present the report of the advisory committee. Dickson indicated that he would ask Lundy to send notices of the time and place of the Law Improvement Committee meeting to members of the advisory committee. He requested that Allison, in the latter's liaison capacity, contact the Bar committee and invite members thereof to attend the meeting of the Law Improvement Committee. Allison referred to the procedure approved by the Bar for handling the legislation proposed by the Bar committee (i.e., referral to the Law Improvement Committee and the advisory committee for study and consideration in the course of the probate law revision project, rather than direct presentation to the legislature).

Later in the meeting Allison contacted Duncan L. McKay, Chairman of the Bar committee, and reported on his conversation with McKay. He stated that McKay had expressed some uncertainty as to the role of the Bar committee in the probate law revision project, but had indicated that he (McKay) and perhaps other members of the Bar committee would endeavor to attend the meeting of the Law Improvement Committee on January 8.

1. Dower and Curtesy. Allison referred to the latest rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964).

He pointed out that the committee had considered sections 1 to 3 of the draft at the last meeting and, with certain changes, had approved them. He noted that the balance of the sections of the draft remained to be considered and approved.

Riddlesbarger referred to the amendment of ORS 5.040 by section 4 of the draft, deleting the authority of the probate court to "direct the admeasurement of dower," and questioned the deletion. Allison commented that one of the purposes of section 3 of the draft was to preserve, temporarily as needed, the provisions of law relating to dower and curtesy notwithstanding deletion from the statutes of those provisions, but expressed some doubt that section 3 would fill the gap left by deletion of subsection (8) of ORS 5.040. Zollinger commented, and Carson and Riddlesbarger agreed, that the express authority of the probate court to direct the admeasurement of dower should be retained. Carson moved, seconded by Butler, that subsection (8) of ORS 5.040 be amended to read: "Direct the admeasurement of dower or curtesy of the surviving spouse of any person who died before the effective date of this Act." Motion carried.

Allison referred to the amendment of ORS 68.420 by section 5 of the draft, deleting a reference to dower and curtesy in paragraph (e) of subsection (2) of the ORS section and, noting that the committee previously had approved the proposed legislation entitled "Protecting Property Right During Marriage," suggested that "claim of marital right" be inserted in paragraph (e). He commented that it should be made clear that a partner's right in specific partnership property was not subject to a claim of marital right established by a filed declaration. Zollinger noted that paragraph (e) referred to "allowances" to "heirs, or next of kin," pointed out that Oregon law made no provision for allowances to such persons and suggested, and Allison and Frohnmayer agreed, that "heirs, or next of kin" should be deleted and the reference be to allowances to "widows and minor children." Carson pointed out that "heirs, or next of kin" probably was used in the section of the Uniform Partnership Act from which ORS 68.420 was derived, and suggested that, since paragraph (e) was phrased in negative terms, it would do no harm to retain the reference to dower and curtesy while adding the reference to the claim of marital right. He also suggested that, in the context of the Uniform Act, "allowances" might have a broader meaning than that customarily given to the word under the Oregon probate statutes, perhaps even including inheritance rights. After further discussion, Allison moved, seconded by Butler, that paragraph (e) be amended to read: "A partner's right in specific partnership property is not subject to dower, curtesy, claim of marital right, or allowances to widows [, heirs, or next of kin] and minor children." Motion carried unanimously.

Allison referred to the amendment of ORS 93.240 by section 8 of the draft, deleting the wording relating to dower and curtesy in subsection (2) of the ORS section, and suggested that a reference to a claim of marital right established by a filed declaration should be inserted in subsection (2). He expressed the view that, if it were not for the claim of marital right, subsection (2) might be deleted, since the nonowner spouse, without that claim, would have no interest in the real property. Zollinger indicated disagreement with that view, pointing out that subsection (2) dealt with an interest in or right to the purchase price of the real property. Allison questioned the deletion of "unless a contrary purpose is expressed in the contract." Zollinger suggested that the draftsman probably relied upon the wording "except to the extent specifically prescribed therein," which had been retained, to perform the same function as the deleted

wording. Frohnmayer moved, seconded by Zollinger, that subsection (2) be amended to read: "If immediately preceding the execution of any such contract one or more of the sellers held no right or estate in the real property covered thereby other than [an inchoate estate of or right to dower or curtesy] under a recorded declaration claiming marital right, then, unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the sole purpose of [barring dower or curtesy only and, except to the extent specifically prescribed therein,] releasing the marital right and such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of [said] the real property except to the extent specifically provided in the contract." Motion carried unanimously.

Riddlesbarger referred to subsection (3) of ORS 93.240, and suggested the substitution of "the" for "such" in the seventh line thereof. Zollinger suggested that the first sentence of subsection (4) of ORS 93.240 be deleted, commenting that the Oregon Supreme Court, on one occasion, had expressed disapproval of such a provision stating that a statute was declaratory of existing law and, on another, had held that such a statute did not apply to prior transactions. Riddlesbarger moved, seconded by Zollinger, that his and Zollinger's suggestions be approved and that changes in subsections (3) and (4) of ORS 93.240 be made pursuant thereto. Motion carried unanimously.

Allison referred to the amendment of ORS 94.105 by section 9 of the draft, deleting the authority of the court to bar dower and curtesy rights in a proceeding under the Torrens title registration statutes, and questioned whether the deletion should be made. After a brief discussion of the current use and effect of the Torrens system, Allison moved, seconded by Zollinger, that section 9 be deleted from the draft. Motion carried unanimously.

Allison referred to the amendment of ORS 94.330 by section 10 of the draft, pointing out that the ORS section dealt with the transfer or mortgage of property registered under the Torrens system and that the amendment would delete the reference to dower and right of dower. He suggested that the reference to dower and right of dower be retained and that a reference to the proposed claim of marital right established by a filed declaration be added. Frohnmayer moved, seconded by Allison, that the number of the section be changed from 10 to 9, and that the wording of the pertinent portion of ORS 94.330 be as follows: "* * * and that the dower, right of dower, marital right and estate of homestead, if any, have been * * *." Motion carried.

Allison expressed the view that the amendment of ORS 94.445 (relating to final distribution of property registered under the Torrens system upon the death of the owner) by section 11 of the draft was not necessary, that references to dower in the ORS section should be retained and that, in view of the existing references to "rights" in the ORS section, it was not necessary to add a specific reference to the proposed claim of marital right established by a filed declaration. Allison moved, seconded by Zollinger, that section 11 be deleted from the draft. Motion carried.

Allison questioned the necessity of the amendment of ORS 105.050 by section 12 of the draft to delete that portion of the ORS section relating to proof of ouster in actions for the recovery of dower before admeasurement, commenting that the portion in question should be available with respect to dower vested

before the effective date of the proposed legislation. Zollinger moved, seconded by Allison, that section 12 be deleted from the draft. Motion carried.

For reasons given and discussed with respect to the deletion of sections previously, Allison moved, seconded by Zollinger, that section 13 (amending ORS 105.220, relating to parties defendant in partition suits, to delete a reference to tenants in dower and by the curtesy) be deleted from the draft. Motion carried.

Allison referred to the amendment of ORS 105.330 (relating to the valuation of certain estates for purposes of determining disposition of partition sale proceeds) by section 14 of the draft, and expressed the view that the portion of the ORS section pertaining to estates in dower or curtesy should be retained for use with respect to dower or curtesy vested before the effective date of the proposed legislation. He moved, seconded by Zollinger, that section 14 be deleted from the draft. Motion carried.

Allison commented that the amendment of ORS 105.340 (relating to provision for inchoate or future rights or interests in the case of partition sales) by section 15 of the draft was necessary to delete references to inchoate dower, but suggested that the deletions be limited to the word "inchoate" appearing twice in the ORS section. It was suggested that "married woman" also should be deleted. Allison moved, seconded by Butler, that the number of the section be changed from 15 to 10, and that the wording of the pertinent portion of ORS 105.340 be as follows: "* * * when it appears that <u>there is</u> a [married woman has an inchoate] right of dower in any of the property sold, or that any person * * *." Motion carried.

Allison referred to the amendment of ORS 107.280 (relating to property awards and extinguishment in separation from bed and board cases) by section 16 of the draft, and suggested that, for reasons given and discussed with respect to previous sections of the draft, the reference in the ORS section to dower and curtesy be retained and a reference to the proposed claim of marital right established by a filed declaration be added. Zollinger commented that vested dower or curtesy would not be involved in a separation from bed and board case. Jaureguy pointed out a typing error in the fourth line of section 16, that "an" should be "in." After further discussion, Allison moved, seconded by Butler, that the number of the section be changed from 16 to 11, and that the wording of ORS 107.280 be as follows: "* * * the party at whose prayer [such] <u>the</u> decree was granted shall be awarded in individual right * * * as tenants by the entirety at the time of [such] <u>the</u> decree * * *. The court may, in making [such] <u>the</u> award, decree that [dower and curtesy, as well as] <u>marital rights,</u> homestead rights * * *." Motion carried.

Riddlesbarger referred to ORS 111.130 (relating to the effect of advancements to issue on the part to be given to the widow), as amended by section 17 of the draft, and questioned the meaning of the reference in the ORS section to "part to be given to" the widow. After discussion, it was agreed that "share" should be used instead of "part." Frohnmayer questioned the reference to the "value" of the advancement, and suggested that the reference should be to the "amount" of the advancement. Jaureguy expressed some doubt as to the necessity of the ORS section. Butler noted that the ORS section had been on the books for a long time, and commented that elimination thereof at this time might create confusion. Jaureguy moved, seconded by Butler, that the number of the section

be changed from 17 to 12, and that the ORS section be amended to read as follows: "If the intestate leaves a [widow] surviving spouse and issue, and any of [such] the issue has received an advancement from the intestate in his lifetime, the [value of such] advancement shall not be taken in consideration in computing the [part to be given to the widow, but the widow shall only be entitled to receive one-half of the residue, after deducting the value of the advancement] share to which the surviving spouse is entitled." Motion carried unanimously.

Allison expressed approval of the amendment of ORS 114.020 (relating to who may make a will) by section 18 of the draft. Frohnmayer suggested that the ORS section be revised to simplify the description of who may make a will. After further discussion, Riddlesbarger moved, seconded by Jaureguy, that the number of the section be changed from 18 to 13, and that the ORS section be amended to read as follows: "[Every] Any person [of 21 years of age and upward, or] who has attained the age of majority [as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy] and is of sound mind may make his will." Motion carried. Frohnmayer suggested that at some point the committee should consider reducing the age qualification for making a will, and commented that in some states persons who are 18, 19 or 20 years old are considered competent to make their wills. Zollinger commented that if a married person less than 21 years old [Note: See ORS 109.520.] was considered competent to make his will, it was difficult to argue that an unmarried person of the same age was not so competent.

Frohnmayer suggested, and Allison agreed, that the deletion of the reference to dower and curtesy from subsection (1) of ORS 118.010 (relating to the subjects of inheritance tax) by the amendment of the ORS section by section 19 of the draft was unnecessary. Frohnmayer moved, seconded by Allison, that section 19 be deleted from the draft. Motion carried.

Allison moved, seconded by Carson, that the number of section 20 of the draft be changed to 14, and that the section (repealing a considerable number of ORS sections relating wholly to dower and curtesy) be approved. Motion carried.

Riddlesbarger suggested that someone should review the entire draft, with the changes therein approved by the committee. Dickson asked Allison to undertake this review and the preparation of a revised draft to be distributed to members and considered by them. Allison agreed to undertake the preparation of a revised draft, and indicated that he would consult with Lundy on the project. Dickson offered the facilities of his office to assist Allison.

2. 1964 Proposals of Bar Committee on Probate Law and Procedure. Zollinger suggested, and Dickson agreed, that the committee should turn to a consideration of the two items of legislation proposed by the Bar Committee on Probate Law and Procedure, approved by the Bar and referred to the advisory committee, on which action had not been completed by the advisory committee at its last meeting. [Note: See Exhibits D and E, Minutes, Probate Advisory Committee Meeting, 11/14/64, Appendix A.]

a. Waiver of appraisal of estates of decedents (Exhibit D). Butler suggested

that responsibility for having the estate of a decedent appraised might be imposed upon the executor or administrator, leaving it to him to do the appraisal himself or to employ expert appraisers, subject to approval of the appraisal for inheritance tax purposes by the State Treasurer. Zollinger commented that this approach would require amendment of ORS 118.630 as well as ORS 116.420.

Allison suggested, and Dickson agreed, that it might be desirable to amend ORS 116.420 to permit the court to appoint "one or more" appraisers in the case of any estate and to delete the present requirement of three appraisers and the exception as to one appraiser where the value of the estate did not exceed $10,000. Dickson commented that a maximum limit on the number of appraisers to be appointed by the court might be imposed. Zollinger stated that he saw no reason for such a limit.

Zollinger expressed the view that in the case of an estate consisting solely of cash, the court should have the authority to waive the appointment of all appraisers. He commented that the portion of subsection (1) of ORS 116.420, as amended by Exhibit D, relating to waiver by the court of the appointment of appraisers need not be conditioned as set forth therein. He suggested that the wording might be, simply, that "the court in its discretion may waive the appointment of any appraisers," noting that the court was unlikely to waive the appointment in the event of any uncertainty as to the value of the estate or if the estate was subject to tax.

Jaureguy suggested, and Dickson and Zollinger agreed, that some provision should be made authorizing the court to appoint an appraiser for a specific item of property. Jaureguy noted that it was presently customary for the three appraisers to sign the appraisal and all receive the same compensation for the work of appraising, regardless of whether all participated in the work of appraising all property of the estate. Dickson and Zollinger commented that appraisers should be compensated only on the basis of the work of appraising they actually did, and that there should be a single inventory listing all property of the estate at its appraised value, but with appraisers' certificates limited to the property actually appraised by each appraiser.

Allison expressed the view that subsection (2) of ORS 116.420, as amended by Exhibit D, should be deleted. Zollinger suggested, and Dickson agreed, that there was no need for subsection (3) of ORS 116.420, as amended by Exhibit D.

After further discussion, Zollinger moved, seconded by Carson, that Exhibit D be revised to amend ORS 116.420 and 116.425 to read as follows: "116.420. Before the inventory is filed, the property therein described shall be appraised at its true cash value by [three] one or more disinterested and competent persons, who shall be appointed by the court. [; provided, that the court may * * * certified copy of the order of appointment shall be filed with the inventory.] The court may direct that specific property shall be appraised by a person or persons designated by the court. The court may waive the appointment of any appraisers with respect to any of the property described in the inventory."; and "116.425. (1) [Each appraiser is entitled to receive compensation not in excess of the following rates:] An appraiser designated by order of the court to appraise a property or properties is entitled to receive compensation not in excess of the following rates for the property or properties appraised by him: * * *." Motion carried.

b. Sale of property of decedent under power in will (Exhibit E). Carson suggested that the words "produced from a well drilled" in ORS 116.825, as amended by Exhibit E, be deleted, and that "produced from the premises" or "produced pursuant to the lease" be used instead of the deleted words.

The committee agreed that the reference to an administrator with the will annexed, deleted from ORS 116.825 by the amendment thereof by Exhibit E, should be restored.

Zollinger expressed the view, with which Carson agreed, that there should be court confirmation of the sale of real property under a power granted in a will. Dickson noted that if the reference to ORS 116.805 was deleted, the court could act to confirm such a sale without the waiting period for the filing of objections required by that ORS section. After further discussion, the committee agreed that Exhibit E should be revised to amend ORS 116.825 to read as follows: "When a testator makes provision in his will for * * * which may be produced [from a well drilled] pursuant to [such] the lease, or other disposition * * * as directed, by the executor or administrator with the will annexed, [without an order of the court * * * in which case he is governed by such direction in such respects] without regard to any statutory requirements or procedure except that in the case of the sale of real property a return of sale shall be filed and the sale shall be confirmed by order of the court in the manner required by ORS 116.805 and 116.810."

Allison indicated that he would consult with Lundy on the redrafting of Exhibits D and E with the revisions thereof approved by the committee.

3. Court Confirming Sale of Real Property by Executor or Administrator. Butler again raised the matter of conforming the provision of the probate statutes relating to court confirmation or vacation of the sale of real property by an executor or administrator (i.e., ORS 116.810) with the comparable provision of the guardianship statutes (i.e., ORS 126.456). After brief discussion, Zollinger moved, seconded by Butler, that the committee propose legislation to amend ORS 116.810 to conform its wording to that of ORS 126.456. Motion carried. Allison indicated that he would consult with Lundy on the drafting of this proposed legislation.

4. Next Meeting of Advisory Committee. Frohnmayer suggested, and the committee agreed, that the next meeting of the advisory committee should be scheduled for Friday, January 8, at 2 p.m., in Salem, so that as many members as possible could be in Salem for the meeting of the Law Improvement Committee to be held that day. Dickson indicated that he would ask Lundy to reserve a room in the capitol building for the advisory committee meeting, to have a notice of the meeting and its place posted near the entrance to the capitol building or inform the capitol guide service of the meeting and its place, and to report to Dickson on the room reserved for the meeting so that Dickson could notify the members of the advisory committee and the Bar Committee on Probate Law and Procedure. Allison commented that McKay, Chairman of the Bar committee, with whom he had conferred earlier, had indicated that he (McKay) would try to arrange for the Bar committee to meet with the advisory committee on January 8 in Salem.

Zollinger suggested that the legislation proposed by the Bar committee,

approved by the Bar and referred to the advisory committee should be the first order of business for consideration by the two committees at its joint meeting on January 8. It was pointed out that other items that should be on the agenda for the January 8 meeting were the proposed legislation relating to guardianship and conservatorship and small estates.

Noting that the Legislative Counsel's office would be unable to furnish secretarial assistance for advisory committee meetings during the 1965 legislative session, Dickson commented that he could provide secretarial assistance from his staff for the January 8 meeting, but that other arrangements should be made for subsequent meetings. Zollinger suggested that Lundy be asked whether moneys for the law improvement program were available for the purpose of securing secretarial assistance for the advisory committee. Allison volunteered to ask Lundy about this financing matter.

Riddlesbarger suggested that the committee should give some thought to its future program, and possible participation therein by the Bar committee. Dickson remarked that the Bar committee might be asked whether it was willing to undertake some research work in connection with the probate law revision project. Zollinger commented that the notices to members of the advisory committee on the January 8 meeting should include a reminder to be considering the role the Bar committee might play.

Frohnmayer extended an invitation to the committee to hold one of its regular meetings next summer in Medford. He suggested that members might be accompanied by their wives, and offered the use of his home as the place of the meeting. Dickson, on behalf of the committee, accepted Frohnmayer's invitation.

The meeting was adjourned at 1 p.m.

PROBATE LAW REVISION IN OREGON

An Initial Staff Report to the
Advisory Committee on Probate Law Revision

April 1964

Prepared by
Legislative Counsel's Office
410 State Capitol
Salem, Oregon 97310

Oregon Probate Law Revision
Staff Report No. 1

To the Members of the Advisory Committee on
Probate Law Revision:

You have recently accepted appointment to serve on an advisory committee to assist the Law Improvement Committee in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law. Your first meeting will soon be held.

This is an initial report prepared by your staff and submitted for your information and consideration. It briefly describes some of the recent history of substantive law revision in Oregon and the inauguration of the probate law revision project. It inquires into the meaning of the term "probate law" for purposes of considering the scope of the project, and recounts some past efforts in Oregon to revise all or part of our probate law. It refers to probate revisions enacted or in progress in other states in recent years, and to uniform or model Acts pertaining to probate. Finally, it sets forth some thoughts on procedure that may be employed by the advisory committee in prosecuting the project and on services and facilities available to assist the advisory committee.

The aim of this report is to give you some helpful background and preliminary information pertinent to the probate law revision project and your role in this project. Our hope is that this aim may prove reasonably accurate.

Robert W. Lundy
Chief Deputy Legislative Counsel

Salem, Oregon
April 1964

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I. THE OREGON LAW REVISION PROGRAM AND THE PROBATE PROJECT

By passage of Senate Bill 321[1] the 1963 Regular Session of the Oregon Legislative Assembly has directed the Legislative Counsel Committee to "cause to be conducted a continuous substantive law revision program" and to "establish a law improvement committee to supervise the conduct of the program."[2] The law improvement committee is to consist of the chairman of the Legislative Counsel Committee and eight other members appointed by him with the approval of the Legislative Counsel Committee.[3] Subject to approval by the Legislative Counsel Committee, the Legislative Counsel is to furnish to the law improvement committee the services of personnel and other facilities.[4]

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[1] Senate Bill 321 was approved by the Governor and filed in the office of the Secretary of State on May 15, 1963. It became effective September 2, 1963, as chapter 292, Oregon Laws 1963 (Regular Session), and was compiled as ORS 173.310 to 173.340. In conception Senate Bill 321 was the embodiment of the views and aims of many persons in this state who have shown deep interest in the establishment and maintenance of a continuing substantive law revision program and who have labored on behalf of this cause. However, the principal sponsor of the bill, as a piece of proposed legislation, was the Oregon State Bar Committee on Law Revision, at whose request the Senate Committee on Judiciary introduced the bill. See Oregon State Bar, 1961 Committee Reports 68-71 (1961); Oregon State Bar, 1962 Committee Reports 133-34 (1962); Oregon State Bar, 1963 Committee Reports 48-50 (1963).

[2] ORS 173.310.

[3] ORS 173.310. At least four of the members of the law improvement committee are to be appointed from the membership of the Oregon State Bar committee on law revision, or from a standing bar committee with similar functions in the event there is no committee by that name.

[4] ORS 173.330.

Since its establishment on January 1, 1954,[5] the Legislative Counsel Committee has had, as one of its statutory duties, some responsibility for the conduct of a substantive law revision program.[6] However, with the establishment of a law improvement committee to supervise the program, the role of the Legislative Counsel Committee becomes one that is less directly concerned with the details of the conduct of the program.[7]

Representative C. R. Hoyt, Chairman of the Legislative Counsel Committee, appointed the eight other members of the Law Improvement Committee, and these appointments were

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[5] See ORS 173.110 and section 16, chapter 492, Oregon Laws 1953.

[6] See ORS 173.150 (section 5, chapter 492, Oregon Laws 1953) and 173.155 (section 1, chapter 295, Oregon Laws 1959). ORS 173.155 was repealed by section 1, chapter 292, Oregon Laws 1963 (Regular Session). The substantive law revision duty embodied in ORS 173.150 is not definite, merely requiring the Legislative Counsel Committee to "formulate, supervise and execute plans and methods for . . . the . . . clarification . . . of the Oregon Revised Statutes." ORS 173.155 specifically directed the Legislative Counsel Committee to "exercise its authority under ORS 173.150 to develop and cause to be executed a substantive law revision program." During the 1959-1961 biennium the Legislative Counsel Committee undertook and completed five substantive law revision projects, the results of four of which were embodied in legislation enacted by the 1961 Legislative Assembly, including revisions of laws relating to the legislature and to guardianship and conservatorship.

[7] Of express concern to the Legislative Counsel Committee are: (1) Membership of the law improvement committee (see ORS 173.310); (2) services of personnel and other facilities furnished to the law improvement committee by the Legislative Counsel (see ORS 173.330); and (3) appointment and expenses of advisory committees to assist the law improvement committee (see ORS 173.340). Implicit in the statutes relating to the program (i.e., ORS 173.310 to 173.340), is the exercise by the Legislative Counsel Committee of some measure of budgetary control over the program.

approved by the Legislative Counsel Committee at its meeting on November 13, 1963.[8] At its first meeting on December 20, 1963, the Law Improvement Committee selected Oregon's probate law as the subject of its first substantive law revision project, and authorized its chairman, Mr. Allan G. Carson, to appoint a nine-member advisory committee to assist in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law.[9] On January 20, 1964, Chairman Carson appointed the members of the advisory committee, who are: Judge William L. Dickson, Chairman, Portland; Clifford E. Zollinger, Vice Chairman, Portland; Stanton W. Allison, Portland; Herbert E. Butler, Portland; Wallace P. Carson, Salem; Otto J. Frohnmayer, Medford; R. Thomas Gooding, La Grande; Nicholas Jaureguy, Portland; and William P. Riddlesbarger, Eugene.

Before commencing the main body of this report, which concerns itself with the probate law revision project, it may

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[8] Members of the Law Improvement Committee and their terms, commencing November 13, 1963, are: Senator Harry D. Boivin, Klamath Falls (two years); Allan G. Carson, Chairman, Salem (four years); Gene B. Conklin, Pendleton (two years); Paul E. Geddes, Roseburg (two years); Representative C. R. Hoyt, Corvallis (ex officio member as Chairman of the Legislative Counsel Committee); Senator Donald R. Husband, Eugene (two years); William E. Love, Portland (four years); Norman A. Stoll, Vice Chairman, Portland (four years); and Manley B. Strayer, Portland (four years).

[9] ORS 173.340 authorizes the law improvement committee, subject to approval by the Legislative Counsel Committee, to "appoint such advisory committees as are necessary to assist the law improvement committee in carrying out its functions as provided by law."

be worthwhile at this point to restate, briefly, the nature and objectives of a substantive law revision program.

"Revision" means, simply, change in pre-existing law, and is accomplished by enactment of a finished product by the legislature (as compared with "compilation," which is merely a bringing together of pre-existing statutes under an arrangement designed to facilitate use, with no change in wording).

"Substantive" revision is the process by which the meaning and effect of pre-existing statutes, and in some cases common law principles, are changed so as to accommodate them to changing conditions (as compared with "formal" revision, which deals only with the form and expression of pre-existing statutes, and is carried on for the purpose of producing certainty and conciseness in express and logic in arrangement of pre-existing statutes, so that they may be found readily and, when found, understood easily).

In a sense, much of the legislation enacted from time to time by the Oregon and other state legislatures is in the nature of "substantive revision" as broadly defined. Perhaps what distinguishes a substantive law revision program, as conceived and executed in Oregon and other states with similar programs,[10] is a matter of objectives, as well as emphasis and

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[10] Substantive law revision programs similar in concept to that in Oregon are known to have been established in at least five other states: California, Louisiana, New Jersey, New York and North Carolina. In terms of continuous operation and achievement, as well as inauguration, the New York program, under the New York Law Revision Commission created in 1934, is the pioneer and a recognized leader. See N.Y. Legis. Law §§ 70-72. A more recent arrival on the scene, the California

working procedures. The objectives of the Oregon substantive law revision program appear to be embodied in the statutory recital of some of the duties and powers of the Law Improvement Committee, as follows:

> "(1) To examine the Constitution, statutes and common law of the state for the purpose of discovering defects and anachronisms therein and recommending needed reforms.
>
> "(2) To receive and consider suggestions and proposed changes in the law from interested groups and individuals.
>
> "(3) To recommend from time to time such changes in the law as are considered necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of the state into harmony with modern conditions.

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program, under the California Law Revision Commission created in 1953, shows promise of at least matching the success of the New York program. See Cal. Gov't Code §§ 10300-340. The Louisiana program, under the Louisiana State Law Institute created in 1938, is making a creditable record. See La. Rev. Stat. §§ 24:201-05 (1950). The New Jersey program, under the Law Revision and Legislative Services Commission in existence since 1939, and the North Carolina program, under the General Statutes Commission created in 1945 and assigned substantive law revision functions in 1951, appear to have been less productive than the New York, California and Louisiana programs, or at least less publicized. See N.J. Rev. Stat. §§ 52:11-6 to -31 (Supp. 1954); N.C. Gen. Stat. §§ 164-12 to -19 (1951).

"(4) To report recommendations with respect to changes in the law to the Legislative Assembly and, if considered desirable, to accompany such reports with proposed legislation designed to carry out such recommendations."[11]

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[11] ORS 173.320. Similar duties and powers are assigned to the California Law Revision Commission (Cal. Gov't Code §§ 10330, 10333, 10334); Louisiana State Law Institute (La. Rev. Stat. § 24:204 (1950)); New Jersey Law Revision and Legislative Services Commission (N.J. Rev. Stat. § 52:11-18 (Supp. 1954)); and New York Law Revision Commission (N.Y. Legis. Law §72).

II. THE OREGON PROBATE LAW

The "probate law" has been selected by the Law Improvement Committee as the subject of its first substantive law revision project. Some preliminary inquiry as to the meaning of the term "probate law" is pertinent to a consideration of the scope of the project.[12]

Webster defines "probate law" as the "law regulating the jurisdiction, rights, powers, and functions of a probate court," and "probate court" as "a court that probates wills and attends to the administration of the estates of deceased persons and that often has additional jurisdiction and powers granted to it by particular statutes in these and related matters."[13] Legal authorities appear to agree that "the real meaning of the word 'probate' is proof, and originally it meant relating to proof, although somewhat later it came to signify relating to proof of wills, but in American law it is now a

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[12] The meanings of "probate court," "probate jurisdiction" and similar terms, as used in the Oregon Constitution, statutes and court decisions, are extremely difficult to determine. See 1 Jaureguy & Love, Oregon Probate Law and Practice §§ 501-18 (1958). Problems in connection with that use of those terms will be encountered in the course of the probate law revision project and may require intensive study. Consideration of these problems is both premature and unnecessary for purposes of this report.

[13] Merriam-Webster Third New International Dictionary 1806 (1961).

general term used to include all matters of which probate courts have jurisdiction."[14]

From 1859, when Oregon achieved statehood, until 1919 the only probate court in this state was the county court.[15] In 1919 and since probate jurisdiction has been transferred from the county court to the circuit court[16] or district court[17] in at least one-half of Oregon's 36 counties. A general idea of the scope of "probate law" may be had from a statute first enacted in 1862 and still in effect, that gives probate court jurisdiction to the county court and itemizes

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[14] 72 C.J.S. Probate 970 (1951). See Ballentine, Law Dictionary 1021 (1930); Black, Law Dictionary 1365 (4th ed. 1951); 3 Bouvier, Law Dictionary 2728 (Rawle's 3d rev. ed. 1914); 34 Words and Phrases, "Probate" 95-98 (1957).

[15] The original Oregon Constitution gave the county court "the jurisdiction pertaining to Probate Courts." Section 12, Article VII (Original), Oregon Constitution. Until adoption of the 1910 amendment of Article VII it appears that this jurisdiction given by the Constitution could not be taken away or enlarged by the legislature; but the scope of this jurisdiction was not clear, nor was it completely exclusive so as to encompass matters related to probate but not truly probate in nature, such as escheat of real property and certain equity matters. One effect of the 1910 amendment of Article VII was to permit the legislature to transfer probate jurisdiction from the county court to other courts. See sections 1 and 2, Article VII (Amended), Oregon Constitution. The first transfer occurred in Multnomah County in 1919, when probate jurisdiction was transferred from the county court to the circuit court pursuant to chapter 59, Oregon Laws 1919. For a comprehensive treatment of the development of the probate court and its jurisdiction in Oregon, see 1 Jaureguy & Love, op. cit. supra note 12, §§ 501-18.

[16] ORS 3.130.

[17] ORS 46.092.

a number of matters included within this jurisdiction. This statute reads:

"County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, to:

"(1) Take proof of wills.

"(2) Grant and revoke letters testamentary, of administration, of guardianship and of conservatorship.

"(3) Direct and control the conduct, and settle the accounts of executors and administrators.

"(4) Direct the payment of debts and legacies, and the distribution of the estates of intestates.

"(5) Order the sale and disposal of the property of deceased persons.

"(6) Order the renting, sale or other disposal of the property of minors.

"(7) Appoint and remove guardians and conservators, direct and control their conduct and settle their accounts.

"(8) Direct the admeasurement of dower."[18]

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[18] ORS 5.040. The source of this ORS section is a section of an Act of the Legislative Assembly approved October 11, 1862, which became effective June 1, 1863. Section 869, Code of Civil Procedure, Deady's General Laws of Oregon (1845-1864). Only twice have changes been made in the wording of this source. When Oregon Revised Statutes was enacted in 1953 (see chapter 3, Oregon Laws 1953) the statute was adjusted to specify that it was applicable only to county courts having judicial functions and references to "real and personal property" were shortened to "property." ORS 5.040 was amended in 1961 (see section

With the matters specifically mentioned in the statute set forth above as a guide, and with consideration given other related matters, it is reasonable to conclude that the bulk of Oregon's "probate law" may be found in ORS titles 12 (Estates of Decedents) and 13 (Guardianships, Conservatorships and Trusts), composed of 15 ORS chapters.[19] Some "probate law" and related matters can be expected to be found in a large

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95, chapter 344, Oregon Laws 1961) to adjust portions thereof relating to guardianship and to make portions applicable to guardianship also applicable to conservatorship.

[19] ORS title 12. Estates of Decedents
- Chapter 111. Descent and Distribution (17 sections)
- Chapter 112. Uniform Simultaneous Death Act (8 sections)
- Chapter 113. Dower and Curtesy; Election Against Will (42 sections)
- Chapter 114. Wills (27 sections)
- Chapter 115. Initiation of Probate and Administration (32 sections)
- Chapter 116. Administration of Estates (99 sections)
- Chapter 117. Settlement and Distribution (38 sections)
- Chapter 118. Inheritance Tax (62 sections)
- Chapter 119. Gift Tax (41 sections)
- Chapter 120. Escheat; Estates of Persons Presumed to be Dead (28 sections)
- Chapter 121. Actions and Suits Affecting Decedents' Estates and Administration (27 sections)

ORS title 13. Guardianships, Conservatorships and Trusts
- Chapter 126. Guardianships and Conservatorships; Gifts to Minors (110 sections)
- Chapter 127. Conserving Property of Missing Persons (24 sections)
- Chapter 128. Trusts; Educational Institution Annuity Agreements (55 sections)
- Chapter 129. Uniform Principal and Income Act (14 sections)

There is no intention to represent that all of ORS titles 12 and 13 are "probate law" or even related matters. For example, consideration of ORS chapter 119 (Gift Tax) as a part of or related to the "probate law" may border on the unwarranted.

number of statute sections dispersed throughout the five volumes of Oregon Revised Statutes.

Some mention of the history of Oregon's "probate law" and related statutes may be in order, although a detailed consideration of this subject does not appear to be necessary at this point. The results of more comprehensive research on this subject have been amply recorded elsewhere for reference to by those interested.[20]

Historical evidence supports the proposition that the beginnings of organized government in the Oregon territory received some impetus from the occurrence of a probate law problem. In February 1841, Ewing Young, recognized as perhaps the wealthiest American citizen in the territory, died leaving no known will or heirs.[21] At that time there were no laws on descent and distribution, and no officers to probate

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[20] For a study and comment on the sources of Oregon probate and guardianship statutes, see Clark, "Sources of the Oregon Probate and Guardianship Code," 16 Ore. L. Rev. 271 (1937). This article is limited to a consideration of the sources of Title XI, Oregon Code Annotated (1930), which encompasses much of what is now contained in ORS chapters 115, 116, 117, 120, 126 and 127. For reference to the history of certain areas of probate and related law, see 1 Jaureguy & Love, op. cit. supra note 12, § 61 (dower and curtesy), § 202 (escheats), § 244 (wills) and §§ 501-05 (probate courts); 2 Jaureguy & Love, op. cit. supra note 12, § 571 (administration of estates) and § 901 (guardianship). Two discussions of the early (1864 and before) development of Oregon statute law generally, but which include some reference to probate and related law, are Beardsley, "Code Making In Early Oregon," 23 Ore. L. Rev. 22 (1943), and Harris, "History of the Oregon Code" (pts. 1 & 2), 1 Ore. L. Rev. 129, 184 (1922).

[21] Beardsley, supra note 20, at 24; Clark, supra note 20, at 271; Harris, supra note 20, at 132.

a will had there been one. An English Act of Parliament had extended the colonial jurisdiction and civil laws of Canada over English subjects in the territory, but American settlers had refused to be governed by those laws. As early as 1838 the Methodist missionaries had appointed their own magistrate and constable. Following Young's funeral a number of the men in attendance met together and a discussion of the proper disposition of the estate of the deceased led to the broader question of organizing a civil government. On February 18, 1841, a committee to draft a constitution and code of laws and a judge with probate powers, "to act according to the laws of the state of New York,"[22] were appointed. A provisional government ultimately was established in July 1843. Acts of the legislative body of the provisional government adopted certain of the laws of the Iowa territory, including those relating to wills and administration of decedents' estates, and established and governed probate courts. The provisional government was succeeded in March 1850 by the territorial government pursuant to an Act of Congress passed August 14, 1849. In December 1853, and January and February 1854, the territorial legislature enacted a code of laws prepared by a three-member commission and popularly referred to as the Code of 1853. Oregon attained statehood in 1859, and its first codes of laws were drafted by Judge Matthew P. Deady, who also prepared the first compilation of the general laws of the state. The Deady code of civil procedure, which included a considerable body of

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[22] Harris, supra note 20, at 132.

probate and related law, was enacted in 1862. One authority[23] argues that Deady, in preparing his code of civil procedure, used the Code of 1853, but was influenced by the New York civil procedure laws, and that, contrary to some contemporary thought, the Deady code was not based on Iowa laws. Another authority,[24] whose research was limited to the Oregon probate and guardianship statutes, concludes that the probate statutes, having as their source Deady's 1862 code, were derived from similar California statutes, while the guardianship statutes, having as their source the Code of 1853, came from California and Iowa in about equal measure.

Portions of the Oregon probate and related statutes, of course, have been changed by amendment, repeal and addition since their inception, while other portions have remained virtually unchanged. The guardianship statutes, for example, were substantially revised and rewritten by Acts passed in 1947 and 1961.[25] On the other hand, of the 27 statute sections that presently constitute ORS chapter 114 (Wills), 16 have been unchanged since compilation in Deady's General Laws of Oregon (1845-1864).

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[23] Harris, supra note 20, at 210-15.

[24] Clark, supra note 20, at 277. In arriving at his conclusion Clark compared the California, Iowa and New York probate and guardianship statutes in existence at the time of adoption of the Oregon Code of 1853 with the probate and guardianship portions of that code.

[25] Chapter 524, Oregon Laws 1947; chapter 344, Oregon Laws 1961.

III. PREVIOUS PROBATE REVISION IN OREGON

There have been at least two previous efforts to accomplish a more or less wholesale revision of the Oregon probate statutes, both at the instigation of the organized bar of Oregon and both unsuccessful in the sense that proposed legislation embodying the revisions was not enacted.

In 1919 Judge William McCamant, then President of the Oregon Bar Association,[26] appointed a three-member committee, pursuant to a resolution adopted at the 1918 annual meeting of the association, to prepare and recommend to the legislature a new probate code.[27] The committee prepared a new probate code, consisting of 201 new statute sections replacing then existing statutes equivalent in substance to that of ORS chapters 115, 116, 117, 118, 121 and 126,[28] and embodied it in a report distributed to all members of the association.[29] B. S. Huntington, chairman of the committee, listed the more important modifications of the existing probate code to be made by the revision as follows: (1) Vest probate jurisdiction primarily in the circuit court; (2) make procedure in matters of decedents' estates and guardianship as identical

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[26] The Oregon Bar Association, a voluntary organization, antedated the establishment of the official integrated Oregon State Bar in 1935 pursuant to chapter 28, Oregon Laws 1935.

[27] 1 Ore. L. Rev. 68-69 (1921).

[28] See note 19 supra.

[29] 1 Ore. L. Rev. 69 (1921).

as possible; (3) conform to actual practice the statutes relating to keeping probate court records; (4) adjust the procedure to be followed when the State Treasurer is not satisfied with an appraisal of estate assets; (5) simplify realty sale procedure; (6) simplify inheritance tax determination procedure; (7) repeal statutes making next of kin, legatees and heirs liable for debts of a decedent; and (8) make probate conclusive as to claims against a decedent's estate.[30] The committee's report was discussed at length at the postponed 1921 annual meeting of the association in March 1922. Strong objection arose to the committee's recommendation as to vesting probate jurisdiction almost solely in the circuit court. The committee was directed to redraft the revision to overcome this objection, as well as in other particulars.[31] A redrafted version of the revision was introduced at the 1923 session of the legislature as House Bill 36.[32] The bill was considered in detail by the House Committee on Judiciary, which then invoked the legislative rule that bills amending existing statutes be printed to indicate changes in wording. The bill sponsors were unable to comply with this rule, and the bill was returned to the House, where it was indefinitely postponed. At its 1923 annual meeting the bar association resolved that the proposed revision be adjusted to include legislation enacted in 1923 and that it be

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[30] 1 Ore. L. Rev. 40 (1921).
[31] 1 Ore. L. Rev. 160-61 (1922).
[32] 4 Ore. L. Rev. 87-88 (1924).

resubmitted to the 1925 legislature,[33] but the impetus appears to have been blunted since no further record of this revision has been found.

In 1938 Allan G. Carson, then President of the Oregon State Bar, called to the attention of the Bar the need for a new probate code in Oregon.[34] Apparently in response to this call, the Bar Committee on Probate Law and Procedure undertook to consider the probate code with a view to its revision. The committee reported to the 1940 annual meeting of the Bar that it was considering the revision, had obtained a copy of the proposed revision drafted by the Oregon Bar Association committee in the early 1920's and had examined new probate codes recently enacted in other states, and recommended that a new probate code for Oregon be prepared.[35] The 1940 annual meeting approved this recommendation and directed the committee to proceed.[36] By the time of the 1941 annual meeting the committee was involved in a consideration and refinement of a preliminary draft.[37] The committee's report to the 1942 annual meeting contained a draft of a proposed new probate code and a list of the more important changes intended to be accomplished by the revision.[38] The draft consisted of 220 new statute sections replacing then existing statutes equivalent in substance

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[33] 2 Ore. L. Rev. 265 (1923).

[34] Oregon State Bar, 1940 Committee Reports 20 (1940); Oregon State Bar, 1943 Committee Reports 29 (1943).

[35] Oregon State Bar, 1940 Committee Reports 20-22 (1940).

[36] Oregon State Bar, 1943 Committee Reports 29 (1943).

[37] Oregon State Bar, 1941 Committee Reports 32 (1941).

[38] Oregon State Bar, 1942 Committee Reports 34-91 (1942).

to that of ORS chapters 115, 116, 117, 118, 121 and 126,[39] thus encompassing the same general area of probate law as did the revision proposed by the Oregon Bar Association some 20 years previously. The 1942 annual meeting directed that the question of approval of the committee's draft be submitted to the members of the Bar before any recommendation was made to the legislature.[40] The December 1942 issue of the Oregon State Bar Bulletin contained pro and con arguments on the question and a referendum ballot to be marked and returned.[41] The result of the referendum was 210 negative votes and 157 affirmative.[42] Thus, the second effort on the part of the organized bar to accomplish a revision of the probate code was abandoned.

Despite the failure of the organized bar to gain approval and enactment of an overall revision of a large portion of Oregon's probate law, it appears that many of the reforms proposed by the two revisions described above have been accomplished through separate proposals over the years enacted into law, many of which have been recommended by the Bar Committee on Probate Law and Procedure.[43]

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[39] See note 19 supra.

[40] Ore. S. B. Bull., Oct. 1942, p. 4.

[41] Ore. S. B. Bull., Dec. 1942, pp. 3, 6.

[42] Ore. S. B. Bull., Jan. 1943, p. 1; Oregon State Bar, 1943 Committee Reports 29 (1943).

[43] A comparison of recommendations by the Bar Committee on Probate Law and Procedure in its annual reports in 1940 and since with legislation introduced and enacted during this period lends support to this conclusion.

Two revisions of that portion of the probate law pertaining to guardianship have been favorably accepted and enacted into law. In 1947 the Oregon legislature enacted a guardianship law revision consisting of 41 new statute sections replacing 44 then existing sections.[44] This revision combined existing separate provisions on appointment of guardians for different categories of ward, rewrote other guardianship provisions and added provisions on conservatorship.[45]

The statutes relating to guardianship and conservatorship were again revised by legislation enacted in 1961.[46] This legislation was the end product of a substantive law revision project undertaken by the Legislative Counsel Committee during the 1959-1961 biennium, with the invaluable assistance of an advisory committee composed of members of the bench and bar experienced and knowledgeable in the subject matter.[47]

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[44] Chapter 524, Oregon Laws 1947.

[45] The conservatorship statutes were rewritten in 1951. Chapter 520, Oregon Laws 1951.

[46] Chapter 344, Oregon Laws 1961.

[47] Members of the guardianship and conservatorship advisory committee were: Judge William L. Dickson, Chairman, Portland; Nicholas Jaureguy, Vice Chairman, Portland; Allan G. Carson, Salem; Senator Donald R. Husband, Eugene; Representative George H. Layman, Newberg; Senator (subsequently Judge) Jean L. Lewis, Portland; Judge Robert D. Maclean, Newport; and Clifford E. Zollinger, Portland.

This advisory committee began its deliberations in June 1960 with a section-by-section analysis of the existing Oregon statute law relating to guardianship and conservatorship, considering, in respect to each section, the suggestions by committee members and those received from others, the provisions of the Model Probate Code (prepared by a committee of the American Bar Association in cooperation with the research staff of the University of Michigan Law School), available literature on the subject and pertinent laws of other states. The form and content of each section and its relation to

The revision consisted of 96 new statute sections replacing 68 then existing sections and amendment of 11 then existing sections.[48]

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other provisions of the guardianship and conservatorship law were examined critically, with careful attention to detail, applying to each section the combined practical experience of committee members to test its soundness and value.

Following the section-by-section analysis, a rough draft of a bill incorporating the decisions of the committee was prepared. This draft was hammered into shape for introduction at the 1961 session of the legislature by minute examination of its provisions by the committee and adjustment where considered necessary or desirable.

[48] The advisory committee (see note 47, supra) found the existing Oregon statute law relating to guardianship and conservatorship to contain many ambiguous provisions. In some instances it was silent on important phases of guardianship and conservatorship. It contained some provisions that were inadequate and others that were just poor law. The legislation enacted strove to clarify ambiguities, to fill gaps, to repair inadequacies and to improve poor law. It authorized a guardian, subject to court control, to do things that formerly he either could not do (but should) or his authority to do was uncertain. On the other side of the scale, it attempted in better fashion to fix and clarify a guardian's responsibility to his ward.

IV. RECENT PROBATE REVISION IN OTHER STATES

In the past 20 years there have been revisions of the probate law, or substantial portions thereon, in at least seven other states. Since 1960 probate law revision projects have been undertaken in at least three other states, apparently now abandoned in one of these but currently being prosecuted in the other two. Some reference to these probate law revisions and projects in other states should prove instructive in the process of carrying on probate law revision in Oregon, as sources of ideas both as to the substance of probate law and as to procedures to be used in prosecuting the Oregon project.

A. Iowa.

The most recent revision of probate law in another state was enacted by the Iowa legislature in 1963, and became effective January 1, 1964.[49] The 1963 Iowa Probate Code contains 489 new statute sections in 15 divisions, as follows: (1) Introduction and Definitions, (2) Probate Court, Clerk of Probate Court and Procedure in Probate, (3) General Provisions Relating to Fiduciaries, (4) Intestate Succession, (5) Rights of Surviving Spouse, (6) Wills, (7) Administration of Estates of Decedents, (8) Foreign Wills and Ancillary Administration, (9) Estates of Absentees, (10) Uniform Simultaneous Death Act,

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[49] Iowa Acts 1963, ch. 326.

(11) Felonious Death, (12) Proceedings for Escheat, (13) Opening Guardianships and Conservatorships, (14) Administration of Guardianships and Conservatorships, and (15) Trusts.

The Iowa revision was the product of a project undertaken by a Special Committee on Probate Law of the Iowa State Bar Association.[50] This committee, consisting of 22 members, was appointed in June 1958, and held its first meeting in September of the same year. Upon beginning its work the committee apparently had little thought of entering on so extensive a revision as was embodied in the final product. The committee divided into five subcommittees for a two and one-half year study of the law relating to decedents' estates, then redivided into three subcommittees (i.e., drafting, guardianship and testamentary trusts) for work during the following two years. Early in 1962 a draft was submitted to a committee of the Iowa District Judges Association, which studied the draft and then spent a day with the drafting subcommittee of the bar committee discussing, debating and arriving at an approved draft. West Publishing Company of St. Paul, Minnesota, printed the approved draft in the form of a booklet that was distributed to all judges and lawyers in Iowa. Thereafter, the bar committee devoted a week in April 1962 to a statewide bus tour, holding all-day area meetings with judges, lawyers and court clerks in five cities. These meetings resulted in securing for the revision the study and indorsement of more

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[50] West Publishing Co., 1963 Iowa Probate Code at ix-xiii (1963).

than 1,000 of those persons best qualified to understand and evaluate the work and the need for it. The draft was submitted to two of the leading American authorities on the subject, Professors Lewis M. Simes and Paul E. Basye, who made valuable suggestions and praised the work as a whole.

The Iowa State Bar Association, acting through its Board of Governors, approved the revision and recommended it to the 1963 Iowa legislature for adoption. It appears that the Model Probate Code served as a principal source of ideas for deviation from existing Iowa probate statutes by the revision. Also, some credit is given to the Oregon guardianship and conservatorship revision enacted in this state in 1961[51] as being helpful in the formulation of that part of the Iowa revision pertaining to this subject.

B. Missouri.

In 1955 the Missouri legislature enacted a new probate code for that state.[52] It was drafted under the supervision of a joint legislative committee, consisting of five senators and seven representatives, created in 1953, and with the assistance of an 11-member advisory committee of probate judges and lawyers.[53] After enactment in 1955 the operation of the

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[51] See pp. 18-19 & notes 46-48 supra.

[52] Mo. Laws 1955, at 385; see Mo. Rev. Stat. chs. 472-75 (1959).

[53] Joint Probate Laws Revision Committee, Final Report at vii-viii (1955); City National Bank & Trust Co. of Kansas City, Mo., Probate Code and Forms 3-4 (1958).

new Missouri probate code was studied by a special committee of the St. Louis Bar Association, which consulted with the Missouri Probate Judges' Association, and a considerable number of changes proposed as a result of this study, affecting 50 of the code's 355 sections, were enacted in 1957 by the Missouri legislature. The Missouri revision embraced both substantive and procedural aspects of the laws pertaining to wills, administration, descent and distribution, marital rights in property and guardianship. It was represented as primarily a revision and restatement of existing Missouri statutes and case law, with such changes necessary to correct defects. The Model Probate Code was used as a guide as to arrangement, and to some extent as a source of substantive ideas. Probate laws recently adopted in other states, particularly Arkansas, Florida, Illinois, Indiana, Kansas and Michigan, were referred to, and borrowed from in a few instances.

C. Texas.

A new probate code was enacted by the Texas legislature in 1955.[54] Work on the new code was begun in 1944 by the State Bar Committee on Real Estate, Probate and Trust Law, which had recommended in an annual report that the entire probate law be completely revised.[55] The bar committee's

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[54] Tex. Laws 1955, ch. 55; see Tex. Prob. Code (1956).

[55] Moorhead, Foreward to Probate Code, 17A Tex. Prob. Code Ann. at iii-vii (1956).

work proceeded on an intermittent basis for several years, a first draft being produced in 1947 and a second draft in 1950. The tempo of the project increased in 1952 when the Texas Civil Judicial Council appointed a committee to work with the bar committee and the Trust Section of the Texas Bankers Association. This collaboration, with the assistance of others, produced a third draft in 1952 and a fourth in 1953. The latter draft was embodied in a bill introduced at the 1953 session of the Texas legislature. This bill passed the Senate but died in the House. Additional drafts were produced during the period 1953-1955, and the last draft was introduced and passed at the 1955 legislative session.

The goal of the Texas probate revision was represented to be elimination of conflicts in existing law, filling of gaps, modernization of some language and solution of problem sections. The statement was made that 95 percent of the new code consisted of reenactment of former statutes in identical language, but rearranged in a more logical order. Nevertheless, there is some evidence of resort to the Model Probate Code for ideas in a few instances.

D. North Carolina.

Revisions of portions of the North Carolina probate law were enacted in 1953 (wills)[56] and 1959 (intestate succession).[57]

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[56] N.C. Sess. Laws 1953, ch. 1098; see N.C. Gen. Stat. ch. 31 (Supp. 1961).

[57] N.C. Sess. Laws 1959, ch. 879; see N.C. Gen. Stat. ch. 29 (Supp. 1961).

The revision of intestate succession law was the product of a special drafting committee, consisting of three law school professors, working under the General Statutes Commission.[58] The 1957 legislature appropriated $2,500 to the commission for purposes of studying the subject, and the work was begun late in 1957. Among other aids, the Model Probate Code was drawn upon.

E. Indiana.

In 1953 a new probate code was enacted in Indiana.[59] The code was prepared by the Indiana Probate Code Study Commission, appointed by the Governor pursuant to joint resolutions adopted by the legislature in 1949 and 1951, in concert with the Probate Code Committee of the Indiana State Bar Association. The Model Probate Code was used as an aid in preparation of the Indiana code.

F. Arkansas.

A revised Arkansas probate code was enacted by the legislature of that state in 1949.[60] It was prepared by a committee of the Arkansas State Bar Association, which commenced its work in 1939. The scope of the revision embodied in the 1949 code appears to be limited to procedural and remedial aspects of probate law, with little change in the substantive law of wills and administration, descent and

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[58] McCall, "North Carolina's New Intestate Succession Act," 39 N.C.L. Rev. 1 (1960).

[59] Ind. Acts 1953, ch. 112; see Ind. Ann. Stat. tit. 6-8 (1953).

[60] Ark. Acts 1949, No. 140; see Ark. Stat. Ann. tit. 57, 60-63 (Supp. 1961).

distribution and dower. No evidence of resort to the Model Probate Code in the course of the revision has been found.

G. Pennsylvania.

A revision of Pennsylvania's probate law was accomplished in 1947 and 1949 through several enactments by the state legislature. Acts relating to intestate succession, wills, estates and principal and income were adopted in 1947, and Acts on fiduciaries and investment by fiduciaries in 1949.[61] The revision work was directed and supervised by the Joint State Government Commission pursuant to a resolution adopted by the 1945 legislature. A special committee was appointed in July 1945 to concentrate on the project, and this committee was assisted by a 32-member advisory group consisting of judges, lawyers and trust company executives. The Model Probate Code was used as one of several sources of aid.

H. Alaska.

A probate law revision project undertaken recently in Alaska failed to result in an enactment by the legislature. In 1960 the Alaska legislature directed the Legislative Council to prepare a revised probate code and submit it at the 1961 session.[62] The council proceeded in accordance with this

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[61] Pa. Laws 1947, No. 37 (intestate succession); Pa. Laws 1947, No. 38 (wills); Pa. Laws 1947, No. 39 (estates); Pa. Laws 1947, No. 516 (principal and income); Pa. Laws 1949, No. 121 (fiduciaries); Pa. Laws 1949, No. 544 (investment by fiduciaries); see Pa. Stat. Ann. tit. 20 (1950).

[62] Preface to Alaska Legislative Council, Study on the Proposed Alaska Probate Code (1961).

directive, and in May 1960 a committee of the Alaska Bar Association, previously appointed to study the subject, was reconstituted to work with the council staff. Initial drafts were prepared and distributed to the Bar committee, judges and lawyers. A final version of the revision was completed in late 1960 and embodied in a bill introduced at the 1961 legislative session.[63] The revision encompassed wills, descent and distribution, administration of estates and guardianship. The Model Probate Code was used to a considerable extent. However, the bill failed to pass.

I. New York.

In New York a Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates was created in 1961[64] and its existence extended in 1963,[65] for the purpose of making a comprehensive study of relevant provisions of real and personal property law, decedent estate law, surrogates court law and other statutes in order to correct defects in laws relating to estates and their administration, descent and distribution of property, practice and procedure relating thereto, and to modernize, simplify and improve such law and practice. The commission consists of 14 members appointed by the presiding officers of the two

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[63] Senate Bill 4, 2d Alaska Legislature, 2d Sess. (1961).
[64] N.Y. Sess. Laws 1961, ch. 731.
[65] N.Y. Sess. Laws 1963, ch. 78.

houses of the New York legislature and the Governor, and seven ex officio members who are legislators.[66]

Faced first with a consideration of whether to engage in a bulk revision to be incorporated in a single package of proposed legislation or to proceed area by area and submit separate revision proposals for each area, the New York commission chose the latter course. An extensive program to ascertain problem areas was initiated in 1961. This program included:

(1) Establishment of an advisory committee in each of New York's 11 judicial districts. Members of the advisory committees, in number ranging from 17 to 69, include surrogates, legislators, representatives of national, state and local bar associations chosen from their trust and estate law committees, outstanding lawyers, tax and estate planners, trust company officials, law school professors, life insurance attorneys and title company representatives. Also, a 25-member advisory committee was appointed by the New York State Bar Association.

(2) Informal hearings with representatives of interested groups and public hearings were held by the commission.

(3) Bills introduced in the New York legislature in the preceding five years were examined.

(4) State legislators were contacted and their suggestions solicited.

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[66] N.Y. Temporary State Comm'n on the Modernization, Revision and Simplification of the Law of Estates, First Report (1962); N.Y. Temporary State Comm'n on the Modernization, Revision and Simplification of the Law of Estates, Second Report (1963).

(5) Liaison with legislative committees and state agencies with estates law responsibilities was established for purposes of cooperation, as was liaison with the Surrogates' Association of the State of New York.

(6) Material relating to estates law produced by the New York Law Revision Commission was obtained.

(7) All bar associations, the deans of law schools and many statewide professional associations in New York were contacted and their cooperation requested.

(8) Appearances by commission members and its counsel before various conventions and associations to explain commission purposes and request suggestions were made.

(9) Text for radio announcements requesting suggestions from the general public was prepared and circulated among various broadcasting stations.

As a result of the program outlined above the commission in late 1961 evolved seven general subject areas for current study: Family rights, small estates, probate practice, jurisdiction of parties, estate administration, trust administration and accounting proceedings. Research work on these subject areas was commenced, which included reference to court decisions, statutes, uniform laws, restatements, law reviews, legal studies and periodicals, New York Law Revision Commission studies, textbooks, legal encyclopedias, proposed legislation, New York Legislative Reference Library material, laws and practice in other states and countries and reports and studies of state legislative committees and administrative agencies.

In 1962 the commission continued to hold informal hearings with representatives of interested groups. A research analysis and partial statutory outline were developed. Forty-six staff reports covering a wide variety of subjects in the seven general subject areas were completed or in process. An additional general subject area (i.e., codification of statutes) was designated. Sixteen bills were introduced at the 1963 session of the New York legislature.

Commission procedure appears to follow this pattern: (1) A subject in one of the designated general areas is assigned to particular members of the commission with responsibility in that area; (2) a staff report on the subject is prepared; (3) the staff report is considered by the full committee and circulated among the advisory committees for their comments; (4) the report is revised and a bill is prepared and discussed by the commission; and (5) the commission makes a recommendation to the legislature, accompanied by proposed legislation, a legislative note and the final version of the report.

That the New York revision program is a large-scale operation is evidenced by the number and size of the advisory committees previously referred to, by the commission staff of 16 counsel and four administrative assistants, by 14 research counsel (i.e., law school professors) who assist the commission on a contract basis and by an annual commission budget of a quarter million dollars.

J. Wisconsin.

A Probate Study Committee of the Wisconsin Bar Association commenced work on a revision of that state's probate law in January 1963. The probate project is part of a package undertaken by the bar association; other subjects are estates, trusts and powers, landlord and tenant and conveyancing. Research and drafting services on the package are currently being performed by a Wisconsin University Law School professor. Approximately $25,000, made available by the bar association, was expended in 1963 on the package.

Through August 1963 the probate committee had held seven meetings. Tentative drafts on wills and intestate succession were prepared, as well as studies on the problems of rights of surviving spouse and exemptions from creditor claims. The matter of will substitutes (i.e., joint tenancies, living trusts, insurance, pension plans) was given consideration. The committee appears to have concluded that a thorough overhaul of all Wisconsin probate statutes is needed, but that more time and money will be required to accomplish this.

V. UNIFORM AND MODEL ACTS

Over the years the National Conference of Commissioners on Uniform State Laws has promulgated a considerable number of uniform and model Acts that pertain, in whole or in part, to probate and related matters. In prosecuting a revision of Oregon's probate law it appears reasonable to consider some of these Acts with a view to their adoption or, at least, a source of ideas for adaptation in a new state probate code. Through 1962 some of these Acts, the date of their promulgation by the National Conference and the number of jurisdictions having enacted them are:[67]

Name of Act	Year Promulgated	Number of jurisdictions enacting
Absence as Evidence of Death and Absentees' Property Act	1939	3
Act Governing Secured Creditors Dividends in Liquidation Proceedings	1939	5
Ancillary Administration of Estates Act as Amended	1953	1
Death Tax Credit Act	1961	0
Estate Tax Apportionment Act	1958	2
Execution of Wills Act	1940	1
Fiduciaries Act	1922	25
Gifts to Minors Act	1956	47
Interstate Arbitration of Death Taxes Act	1943	14
Interstate Compromise of Death Taxes Act	1943	17
Joint Obligations Act	1925	5
Partnership Act	1914	40
Powers of Foreign Representatives Act	1944	0

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[67] National Conference of Commissioners on Uniform State Laws, Handbook 341-44 (1962).

Name of Act	Year Promulgated	Number of jurisdictions enacting
Principal and Income Act	1931	24
Amendments	1958	3
Revised	1962	0
Probate of Foreign Wills Act	1950	2
Property Act	1938	1
Reciprocal Transfer Tax Act	1928	21
Simplification of Fiduciary Security Transfers, Act on	1958	35
Simultaneous Death Act	1940	44
As Amended	1953	9
Small Estates Act	1951	2
Testamentary Additions to Trusts Act	1960	10
Trustees' Accounting Act	1937	3
Trusts Act	1937	7
Veterans' Guardianship Act	1942	28
War Service Validation Act	1944	1

Of the Acts listed above, the following have been enacted in Oregon: Gifts to Minors Act,[68] Partnership Act,[69] Principal and Income Act[70] and Simultaneous Death Act.[71] Acts introduced at Oregon legislative sessions in 1941 and since that have failed to pass are: Absence as Evidence of Death and Absentees' Property Act,[72] Ancillary Administration of Estates Act,[73] Probate of Foreign Wills Act[74] and Veterans' Guardianship Act.[75]

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[68] ORS 126.805 to 126.880; enacted, with modifications, in 1959.

[69] ORS chapter 68; enacted in 1939.

[70] ORS chapter 129; enacted, with modifications, in 1931.

[71] ORS chapter 112; enacted in 1947.

[72] House Bill 45, 41st Oregon Legislative Assembly (1941).

[73] Senate Bill 139, 46th Oregon Legislative Assembly (1951).

[74] Senate Bill 135, 46th Oregon Legislative Assembly (1951).

[75] Senate Bill 98, 47th Oregon Legislative Assembly (1953); House Bill 78, 48th Oregon Legislative Assembly (1955); Senate Bill 73, 48th Oregon Legislative Assembly (1955).

The Oregon State Bar Committee on Probate Law and Procedure from time to time has studied and, in some instances, made recommendations concerning some of the Acts listed above. These are: Ancillary Administration of Estates Act,[76] Execution of Wills Act,[77] Gifts to Minors Act,[78] Powers of Foreign Representatives Act,[79] Probate of Foreign Wills Act,[80] Small Estates Act,[81] Simultaneous Death Act,[82] Trustees' Accounting Act[83] and Veterans' Guardianship Act.[84]

Previously in this report a number of references have been made to the Model Probate Code. This code is not one of those Acts that have been promulgated by the National Conference of Commissioners on Uniform State Laws. Rather, it was prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association by the Division's Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan

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[76] Oregon State Bar, 1948 Committee Reports 52-53 (1948); Oregon State Bar, 1954 Committee Reports 25 (1954); Oregon State Bar, 1958 Committee Reports 47 (1958).

[77] Oregon State Bar, 1942 Committee Reports 34, 36, 89-90 (1942); Oregon State Bar, 1943 Committee Reports 34-35 (1943).

[78] Oregon State Bar, 1956 Committee Reports 44 (1956); Oregon State Bar, 1958 Committee Reports 47 (1958).

[79] Oregon State Bar, 1954 Committee Reports 25 (1954).

[80] Ibid.

[81] Oregon State Bar, 1954 Committee Reports 25 (1954); Oregon State Bar, 1955 Committee Reports 40-41 (1955); Oregon State Bar, 1956 Committee Reports 44, 46-47 (1956).

[82] Oregon State Bar, 1942 Committee Reports 34, 36, 91 (1942); Oregon State Bar, 1943 Committee Reports 36 (1943).

[83] Oregon State Bar, 1956 Committee Reports 44 (1956).

[84] Oregon State Bar, 1948 Committee Reports 52 (1948).

Law School. The code, with comments on the provisions thereof and monographs on problems in probate law prepared by two of the principal draftsmen of the code, were published in 1946.[85]

Impetus for the undertaking of the drafting of the Model Probate Code was provided by a series of articles by Professor Thomas E. Atkinson on probate courts and procedure published in the Journal of the American Judicature Society in 1939 and 1940.[86] Also, a movement for probate reform had been in progress for several years, with new probate codes having been adopted in at least eight states,[87] and revision work underway in a number of other states.

At the 1940 meeting of the American Bar Association the Section of Real Property, Probate and Trust Law proposed a Model Probate Code, and a committee was appointed to engage in the project. The initial work of the Section's committee, with the assistance of advisory groups appointed by the state bar associations of many states, was preparation of a list of proposed general headings of matters to be included in a Model Probate Code and an order of classification. This initial work was completed in 1941. Faced with the familiar problem of finding persons able to devote the time necessary

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[85] Simes, Problems In Probate Law (1946).

[86] See Id. at v-x, 5-8.

[87] Cal. Stat. 1931, ch. 281; Fla. Laws 1933, ch. 16103; Ill. Laws 1939, at 4; Kan. Laws 1939, ch. 180; Mich. Pub. Acts 1939, No. 288; Minn. Laws 1935, ch. 72; Nev. Stat. 1941, ch. 107; Ohio Laws 1931, at 320.

to perform research and drafting services, the Section's committee achieved a satisfactory solution by an agreement in 1942 with the University of Michigan Law School, which was carrying on a number of legal research projects. A subcommittee on drafting was established, consisting of R. G. Patton, Chairman of the Section's committee, Professor Lewis M. Simes, Professor Atkinson and Paul E. Basye. The project procedure followed this general plan: Probate statutes of various states were read and classified, memoranda were prepared on more difficult points, monographs on some of the most basic topics were written, preliminary drafts were prepared and distributed, conferences were held at which 10 tentative drafts were criticized and revised and many recognized experts were consulted and furnished advice and assistance.

The stated objective of the Model Probate Code is improvement of probate procedure wherever revision is sought, rather than attainment of uniformity among the several states.[88] It is apparently intended as a reservoir of ideas and of acceptable legislative formulations of those ideas, from which draftsmen and policy-makers may draw in the preparation of new probate codes.

Almost 20 years have elapsed since the Model Probate Code was drafted, and there is considerable evidence that it has served its intended objective. However, with the passage of time it perhaps is inevitable that new ideas not embodied in

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[88] Simes, op. cit. supra note 85, at 10.

the code, as well as modifications of old ideas contained therein, should have been developed and advanced.

At the 1962 mid-year meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, the Subcommittee on Scope and Program reported that it had been contacted by an officer of the Section of Real Property, Probate and Trust Law of the American Bar Association who indicated the interest of the Section in review and revision of the Model Probate Code and inquired as to the views of the National Conference on aiming this review and revision more in the direction of achieving some uniformity among the states with respect to probate law. The Subcommittee further reported that it believed at least some portions of the code were appropriate for adoption in much the same manner as uniform Acts and that the project of review and revision of the code would be worthwhile. The Executive Committee authorized appointment of a special committee to study the matter of undertaking the project and investigate ways and means of obtaining research services necessary therefor.

At its August 1963 meeting the National Conference approved going ahead with preparation of a uniform probate code, and considered a first tentative draft of two portions (i.e., intestate succession and simultaneous death) of such a code. In April 1963, and again during the National Conference meeting in August of that year, the Conference's Special Committee on Uniform Probate Code met jointly with the Special Committee on Revision of Model Probate Code of the ABA

Section of Real Property, Probate and Trust Law and discussed the project of a uniform or revised model probate code. The two special committees agreed on several points in connection with the project, which were: (1) There is a need for the project; (2) the project will be a long-term one extending over a period of 5 to 10 years, quality being more important than speed; (3) probate law revision projects in individual states, such as the one currently underway in New York, should not deter the joint project of the committees; (4) the two committees will coordinate their efforts and cooperate in every phase so as to make the project a true joint venture; (5) ABA members, experienced and knowledgeable in the subject area, should be utilized to evaluate portions of the proposed new code; and (6) during the ensuing year consideration would be given to the financing required for the project, some portions of the proposed new code would be prepared for review in 1964, drafting responsibilities would be assigned, research papers would be exchanged and members of both committees would complete a 246-item questionnaire on the Model Probate Code promulgated in 1946.

VI. THE OREGON PROBATE PROJECT -- THOUGHTS ON PROCEDURE AND STAFF

In authorizing the appointment of an advisory committee to assist in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law, the Law Improvement Committee did not define in detail the role of the advisory committee nor establish any specific guidelines for it to follow, except to indicate that the advisory committee was "to operate in the same manner as the advisory committee had worked in connection with the guardianship law revision program."[89] The work of the guardianship and conservatorship advisory committee in 1960 and early 1961 has been referred to previously.[90] Three members of the current probate advisory committee were members of that guardianship and conservatorship advisory group,[91] and they may recall the manner in which that group proceeded. Those procedures may or may not be appropriate for prosecution of the probate law revision project.

It appears that, unless the Law Improvement Committee undertakes to supply additional instructions, the procedures to be employed by the probate advisory committee are to be

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[89] Law Improvement Committee, Minutes of Meeting, December 20, 1963, at 2.

[90] See p. 18 & note 47 supra.

[91] Judge William L. Dickson, Portland; Nicholas Jaureguy, Portland; and Clifford E. Zollinger, Portland.

within the discretion of that committee. While it is certainly not the intention of this report in any way to attempt to usurp the exercise of this discretion on the part of the advisory committee, your staff believes it is part of its duty to bring to your attention a few thoughts on procedure that might be followed and on the role staff will be able to play in assisting you.

The probate advisory committee will be faced, perhaps initially but at least at some point in the course of its deliberations, with the task of defining the scope of the probate law revision project. Some space in this report has already been devoted to an inquiry into the meaning of the term "probate law,"[92] and reference to Oregon statutes which appear to encompass the bulk of Oregon's "probate law" has been made.[93] One question for consideration may be whether the scope of the project should be limited to the procedural aspects of probate (i.e., matters relating to the administration of estates of decedents and wards), or whether it should encompass related substantive law (e.g., intestate succession and will-making formalities). Another question may be the extent to which the Oregon guardianship and conservatorship statutes should be re-examined in view of the complete

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[92] See pp. 7-9 & notes 12-18 supra.

[93] See p. 10 & note 19 supra.

revision thereof enacted in 1961.[94]

The probate project, even if its scope is limited to some extent, appears to be one of considerable magnitude. To hope to complete the project in time for submission of recommendations and proposed legislation to the Legislative Assembly at its regular session in 1965 no doubt is vain. Indeed, the Law Improvement Committee appears to have recognized that the project is a long-term one to be completed, at best, in time for consideration by the 1967 Oregon legislature. In view of this characteristic of the project the advisory committee may wish to give thought to the question of submitting a proposed revision of the probate law in segments or as a complete package.

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[94] See pp. 18-19 & notes 46-48 supra. In August 1962 the staff of the Legislative Counsel Committee undertook, with the committee's approval, an evaluation of the revised guardianship and conservatorship statutes enacted in 1961 and effective January 1, 1962. This evaluation was in the nature of a follow through, and its purpose was to determine whether the new statutes were having the effect intended; that is, improvement of practice and procedure as to guardianship and conservatorship matters. Such a follow through, by the way, would appear to be an important aspect of a continuous substantive law revision program. As a part of the evaluation project a letter and a reply form were sent to all probate judges in Oregon. Responses were received from 18 of the 46 probate judges thus contacted, and the reaction to the new statutes indicated by these responses was almost unanimously favorable. However, suggestions for improvement of the new statutes were offered by six of the responding probate judges. The evaluation project was reported in the August 1962 issue of the Oregon State Bar Bulletin, together with a request that members of the Bar who had had experience with the new statutes send in their comments and suggestions. Three attorneys answered this request with suggestions for improvement of the new statutes. Unfortunately, because of the press of other business the evaluation project was not completed and, in effect, is still pending.

Despite the form of submission to the legislature, it appears that the work of the advisory committee necessarily may need to be segmented according to defined segments that make up Oregon's probate law. Perhaps the possibility of subcommittees and use of more than one research assistant in order to facilitate work on more than one segment at the same time should be explored. The advisory committee may wish to establish some kind of time schedule for completion of various phases of the project.

Notwithstanding the scope of the probate law revision project and its anticipated length of time in progress before completion, or perhaps because of these factors, it is quite likely that the Law Improvement Committee will expect progress reports from time to time from the advisory committee. It is quite likely also that the Law Improvement Committee will wish to submit at least a progress report on the project to the 1965 Oregon legislature.

Many other questions relating to its procedures will arise for consideration and decision by the advisory committee in the course of performance of its assigned task. For example, should meetings of the committee be scheduled on a regular basis or held on call of the chairman when in his opinion a sufficient agenda is ready for committee action? Should the advisory committee hold informal meetings with invited representatives of interested groups or interested individuals for the purpose of soliciting suggestions or reviewing tentative drafts? Should the committee hold public meetings for the same

purposes? What sort of liaison should be established and consultation engaged in with appropriate committees of the Oregon State Bar, Oregon probate judges, probate court clerks, state and local governmental agencies concerned with probate matters and others? You may wish to consider that kind of services and facilities you will require to assist you in performing your task; that is, what kind of research and bill drafting services, what kind of services of an administrative nature, what basic reference materials and so forth.

Some mention should be made of the capacity of the staff of the Legislative Counsel's office to furnish assistance to the advisory committee. By law the Legislative Counsel, subject to approval by the Legislative Counsel Committee, is to furnish to the Law Improvement Committee, and, inferentially, to advisory committees thereof, the services of personnel and other facilities necessary to enable the Law Improvement Committee to carry out its functions.[95] However, the resources of the Legislative Counsel are not only limited but spread quite thinly over the program of several services which he is required to perform. At the present time one member of the Legislative Counsel's staff (i.e., the writer of this report) is assigned to assist the advisory committee on the probate law revision project. It is likely that the level of assistance furnished by the Legislative Counsel will

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[95] ORS 173.330.

fluctuate from time to time. At times perhaps more than one staff member may be available; at others (during a legislative session, for example), perhaps the Legislative Counsel will be unable to furnish assistance. This circumstance may make it desirable for the advisory committee to look for some kinds of staff assistance from other quarters. Perhaps some attorney or law school faculty member could be induced to volunteer his services to perform some small part of the research or other background work necessary in the prosecution of the project. The word "volunteer" is used in the sense of a willing offer without expectation of remuneration. The current budget for the probate project is limited to whatever the Legislative Counsel Committee is able to make available out of its budget established by the Legislative Assembly for the 1963-1965 biennium, and this, for practical purposes and unless the Legislative Counsel Committee affirmatively directs otherwise, more or less means services and facilities furnished directly by the Legislative Counsel. As a matter of fact, at the present time no moneys have been budgeted for payment of the individual expenses of members of the advisory committee itself.

In addition to preparation of this report, the Legislative Counsel's office has been engaged, since designation of probate law as the subject of a substantive law revision project by the Law Improvement Committee in December 1963, in gathering certain materials that may prove helpful to the advisory committee and in performing certain other tasks of a preliminary nature.

The comments and suggestions of persons whose work or interests bring them into contact with probate law will be helpful, if not essential, in the prosecution of the probate law revision project. There are a number of ways available to solicit these comments and suggestions, not the least of which is an effort to publicize the existence of the project. We are making a concerted effort to bring the project to the attention of the bench, bar, particular interest groups and general public. For example, recent issues of the Oregon State Bar Bulletin contained items, based on copy we furnished, reporting on the law improvement program and the probate project.[96] These items also requested suggestions from interested persons. News releases have also been sent to various newspapers in the state. Response to this appeal thus far has been negligible, but we hope the maintenance of this kind of publicity, together with employment of more direct methods of solicitation, will produce the necessary response.

Over the past several years the Legislative Counsel's office has received a few comments and suggestions concerning defects in and improvement of the Oregon probate law. Copies of these, as well as any such comments and suggestions received in the future, will be made available to the members of the advisory committee as a matter of course.

We have been able to acquire for each member of the

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[96] Ore. S. B. Bull., Jan. 1964, p. 10; Ore. S. B. Bull., Feb. 1964, p. 4.

advisory committee a copy of the recently enacted 1963 Iowa Probate Code, with comments of the special bar committee responsible for the revision project out of which that new code arose.[97] We have contacted persons involved in the current probate law revision projects underway in New York[98] and Wisconsin,[99] as well as in the joint project on a uniform or model probate code recently undertaken by special committees of the National Conference of Commissioners on Uniform State Laws and the American Bar Association,[100] and expect to receive copies of studies, drafts of proposed legislation and other materials produced in the course of these projects.

As possible sources of ideas for improvement of Oregon's probate law, we have scanned all the printed annual reports of the Committee on Probate Law and Procedure to the membership of the Oregon State Bar, and have attempted to identify and list all bills relating to probate matters introduced in Oregon legislative sessions in 1941 and since but which failed of enactment. With the same thought in mind, we have made an effort to find material relating to probate law published over the years in the Oregon Law Review. Further recourse to these items for purposes of more concentrated study may be in order.

We have attempted to identify and obtain copies of the product of studies on probate matters undertaken by the California Law Revision Commission and New York Law Revision Commission.

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97 See pp. 20-22 supra.
98 See pp. 27-30 supra.
99 See p. 31 supra.
100 See pp. 37-38 supra.

We plan to supply each member of the advisory committee a copy of the principal Oregon statutes pertaining to probate,[101] and, if available, of the Oregon annotations (including pertinent Oregon Supreme Court decisions, federal court decisions, Oregon Attorney General opinions and Oregon Law Review material) to those statutes.

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[101] ORS chapters 111 to 129. See note 19 supra.

OREGON PROBATE LAW REVISION

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Received by Legislative Counsel's Office

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OREGON PROBATE LAW REVISION

Comments and Suggestions
Received by Legislative Counsel's Office

1

Source: Robert Mix, Attorney, Corvallis, letter 8/26/59.

Inheritance tax; deductions.

"If an estate is probated all outstanding debts are normally deductible. On the other hand, if an estate is not probated, only very limited expenses can be deducted such as those of last illness, funeral charges, mortgages and liens, etc. [Note: See ORS 118.070.] I have never considered it fair that a distinction be made between an estate that is being probated and one that is not being probated as to the items which are deductible."

2

Source: George H. Layman, Attorney, Newberg, letter 5/17/60.

Appraisal of estates of decedents and wards.

"One of the Newberg attorneys, Herbert Swift, has suggested a change which would apply to both the administration of regular estates, as well as guardianships and conservatorships. He points out that many such matters have assets limited to government bonds and cash, for which an appraisal is required, but in which no appraiser's fee is properly payable. It would be his suggestion that ORS 116.420 be amended to exclude cash from appraisement, and ORS 116.425 to exclude sub-paragraph (e). While this is not a major revision, you might wish to make a note of it for further consideration.

"In practice, we sometimes file a petition setting forth the amount in cash, and obtain a court order waiving further inventory and appraisement. However, there is no statutory authority for such an order, and Mr. Swift's suggestion would save this trouble, and also legalize the omission of such appraisement." [Note: See also Comment and Suggestion No. 4.]

3

Source: Clifford E. Zollinger, Vice President, The First National Bank of Oregon, Portland, letter 5/19/60.

Dower and curtesy; conveyance or mortgage of real property.

"The provisions of ORS 113.610 to 113.660 appear to conflict with ORS 93.170, to the extent that the latter statute is applicable. Applying the rule of construction that when

particular provisions are in conflict with general provisions, the particular will prevail, it appears that the spouse of an insane person committed to a public insane asylum may convey free from the dower or curtesy interest of the insane person, but if the incompetent is not insane (whatever that means) or is not committed, rather elaborate provisions are made to protect his interest. This is not sensible, nor do I think that the procedures required under ORS 113.610 to 113.670 are very appropriate. I am also uncertain whether, in the event that both spouses are incompetent, the guardian of the spouse in whose name title is vested may initiate such a proceeding." [Note: See also Comment and Suggestion No. 17.]

4

Source: Campbell Richardson, Attorney, Portland, letter 6/24/60.

Appraisal of estates of decedents.

"I think that ORS 116.425, relating to the compensation of appraisers in estates, could be made more definite by specifying the compensation for appraisal of municipal, corporate and government bonds. These items are not presently specifically mentioned in the section. In some cases these items are capable of mathematic determination and would logically appear to fall within the section providing for compensation for appraising listed securities; in other situations, they might logically fall within the section providing for appraising unlisted over-the-counter securities." [Note: See also Comment and Suggestion No. 2.]

5

Source: Nicholas Jaureguy, Attorney, Portland, response to guardianship questionnaire 8/23/62.

Guardianship; private sale of real property; published notice.

"Amend ORS 126.441(2) by striking from line 8 the word 'therein' and substituting 'published nearest to the place of sale.'"

6

Source: Judge Charles M. Johnson, District Court, Clatsop County, Astoria, response to guardianship questionnaire 8/24/62.

Guardianship; disposition of nonresident's property by foreign guardian.

"Some confusion seems to exist as to how to accomplish the provisions of Section 126.565."

7

Source: Judge Charles M. Johnson, District Court, Clatsop County, Astoria, response to guardianship questionnaire 8/24/62.

Guardianship; winding up affairs after termination; bank deposits.

"Some provision should be made to prevent the banks, holding accounts or deposits by guardians, from dishonoring the checks of guardians issued in winding up the affairs of a deceased ward under the provisions of ORS 126.530.

"It is suggested that Section 126.530 be amended to contain a provision to the effect 'That no bank holding the deposit of a guardian shall dishonor the checks of a guardian issued under the provisions of this section.'"

8

Source: Judge John C. Warden, District Court, Coos County, Coquille, response to guardianship questionnaire 8/24/62.

Guardianship; bond of guardian; waiver of requirement.

"ORS 126.171 could be improved to allow court to waive the necessity of a bond. Where the assets consist solely of funds held in a depository and the funds cannot be withdrawn except on court order and the depository acknowledges this condition to the deposit of the funds, it may not be necessary to have any bond or bond expense. It is not clear whether this situation is covered by the words 'Unless otherwise provided by law' but I assume that means statute and not rule of court or court practice."

9

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter 8/24/62.

Sale of real property of decedents and wards; terms of sale.

"I have hardly made a close study of these new guardianship statutes but they do appear more detailed and specific. I do find a problem in both these statutes (126.436) and the probate equivalent (116.755) having to do with 'terms of sale' of realty.

"There appears to be an ambiguity in 116.755. Does the first sentence mean that the court shall prescribe the terms of sale regardless of whether the sale is for cash or on

credit or does it mean only that the court shall prescribe which -- that is 'on credit' or 'for cash'. In both statutes confirmation appears mandatory except in case of:

"1. Substantial irregularity or

"2. The sum bid is disproportionate to the value and 10% more can be obtained. (Note here the wording -- 'can be obtained'. How can a court ever say just what 'can be obtained'.) [Note: See ORS 116.810 and 126.456.]

"I've talked to other probate judges, including my respected brother, Bill Dickson, of Portland. None appears to construe that they should, in the order of sale, set a price or interest rate or down payment or type of security or amount or frequency of periodic payments on the balance.

"I judge the pattern to be that the court generally makes an order of sale 'on cash or credit' in the discretion of the fiduciary and then confirms except in case of 'substantial irregularity'. That appears to me to mean that the court actually exerts no control over the price except it be not 'disproportionate to the value'. (And there's no 'value' in view of the court except the appraisal -- which we all know is set by appraisers selected in most courts by the fiduciary.)

"The guardianship statute on sale clearly requires the order to be 'subject to such terms and conditions as the court may consider necessary or proper'. Note the permissive 'may'. I'm sure the practice is to leave this to the discretion of the fiduciary. So -- I suggest you consider clarifying the legislative intent. If the 'terms of sale' are to be set by the court it should be clearly stated what they (the terms) are to cover -- price, interest rate, type of security, amount of down payment and periodic payments -- and if to be left to the discretion of the fiduciary in whole or part, clearly say so. If the court is to review and be satisfied with the 'terms' as a condition of confirmation, the statute should clearly say so."

10

Source: Judge Samuel A. Hall, District Court, Curry County, Gold Beach, response to guardianship questionnaire 8/27/62.

Guardianship; Veterans Administration participation.

"ORS 126.346 and other sections relating to Veterans Administration. [Note: See also ORS 126.131 and 126.250.] I question that part of policy which casts burden upon Guardian, lawyers and court of, in effect, accounting to V. A. which is what those sections amount to. It consumes time and expense

which if the court is doing its duty is unnecessary. There is more that could be said but this is sufficient to point out that I consider it an unnecessary part of policy."

11

Source: Judge Samuel A. Hall, District Court, Curry County, Gold Beach, response to guardianship questionnaire 8/27/62.

Guardianship; handling claims of minors and incompetents and transferring property without guardianship.

"I would suggest that there be enacted statutes whereby personal injury settlements and other claims of minors and incompetents be examined and approved or disapproved by the court without necessity for opening a guardianship where the court finds from a petition and proposal and hearing thereon that the interest of the minor or incompetent is served best and there is assurance the proceeds will be used for him. In many instances it is an undue expense and hardship to have a continuing guardianship which may run for years on end. The same respecting the transfer of title to properties. There could be safeguards in the statute, without the necessity of guardianship." [Note: See ORS 126.555.]

12

Source: Judge Edwin L. Jenkins, District Court, Washington County, Hillsboro, response to guardianship questionnaire 8/27/62.

Guardianship; appointment of guardian; service of citation.

"126.146(3) has been misunderstood in that the 'person' referred to includes the incompetent which contention I have flatly rejected."

13

Source: Judge Edwin L. Jenkins, District Court, Washington County, Hillsboro, response to guardianship questionnaire 8/27/62.

Guardianship; appraisal of estates of wards.

"ORS 126.230(3). Appraisal should be required unless court orders otherwise. Bonding is difficult without a value of the assets."

14

Source: Harold V. Johnson, Attorney, Eugene, letter 9/10/62.

Guardianship; accounting by guardian.

"In regard to your review and evaluation of Oregon's new guardianship statute, I direct your attention to ORS 126.336 paragraph (4) that says 'the guardian of the estate shall give a copy of each account to the person or institution having the care, custody or control of the ward.'

"The above statute refers to an annual account. It is uncertain whether such account must be given before or after the annual account is approved. In either event, no time limitation is set forth concerning the number of days before or after the account is filed and approved, within which delivery shall be made. It is not specified whether proof or delivery shall be made by affidavit similar to that used when a citizen makes service of summons.

"I would suggest that the statute provide that the copy of account be delivered within ten days after the original account is filed and order approving that account is entered, and that proof of delivery be made by affidavit above referred to. [Note: See also Comment and Suggestion No. 18.]

"Sub-paragraph (5) in ORS 126.336 indicates the copy of final account shall be 'served,' and within ten days after date of service objections can be filed to the account. I would suggest that the copy of final account be served upon the persons mentioned, at least ten days prior to the date order approving final account is to be presented to the Court. I believe a show cause proceeding with citation issued to the persons mentioned in a procedure similar to that followed when the guardian is originally appointed would be a sound procedure to follow."

15

Source: Judge George R. Duncan, Circuit Court, Marion County, Salem, response to guardianship questionnaire 9/11/62.

Guardianship; appointment of guardian; factors considered.

"RE: ORS 126.166. It is suggested that there be added to subsection (1), a provision that the appointing judge may take into consideration any request made orally by the incompetent in open court."

16

Source: Judge George R. Duncan, Circuit Court, Marion County, Salem, response to guardianship questionnaire 9/11/62.

Guardianship; gifts from ward's estate; expenditures for ward's relatives.

"RE: ORS 126.295. Referring to gifts from ward's estate and expenditures of relatives:

"It is suggested that before authorizing gifts to religious or charitable institutions or providing estate funds for persons who have been but no longer are related to the ward by marriage, that notice of the proposal be given to the ward and to the spouse and children, or to the parents of the ward if there be no spouse or children, or if none of the former be living, then to the ascertained next-of-kin."

17

Source: James R. Ellis, Attorney, Portland, letter 9/12/62.

Dower and curtesy; proceedings for release.

"I am writing to you concerning the note in the Oregon State Bar Bulletin that your office is interested in hearing from members of the Bar who have had experience with the new Guardianship Act.

"A year or two ago our office handled what is evidently a rather unusual proceeding, the statutory proceeding for release of dower or curtesy of an incompetent person. As you know, ORS 113.610 and following sets forth what is required in this proceeding. I was somewhat disappointed to see that the new guardianship code did not incorporate this release of dower proceeding, or provide for release of dower in a guardianship proceeding.

"In the matter we handled, the wife was the incompetent. A guardianship had been in existence for some years, with her husband serving as both guardian of the person and of the estate. On two occasions, in different years, he sold parcels of real property held in his name only. Notwithstanding the existence of the guardianship, in each instance it was necessary, in order to obtain title insurance, that a proceeding be filed under Chapter 113 to obtain a decree authorizing a guardian ad litem to sign a deed conveying her dower interest in his property.

"Our experience here has that the presiding Judge was quite dubious whether he even had authority over such matters, particularly when there was a guardianship in existence.

The procedure itself seems a little pointless. ORS 113.630 requires service of the order to show cause why a deed should not be required upon the incompetent person, his guardian, next of kin, and all persons interested in the land. Service upon the incompetent in most instances would be useless. The guardian is very often the person requesting the release of dower. The next of kin probably would not have much interest in the matter, since the right of dower will be extinguished upon the death of the incompetent in any event.

"It seems to me that the welfare of the incompetent could be protected better by requiring that the authorization for the conveyance of dower or curtesy be given by the Court having jurisdiction of the guardianship of that incompetent, if there is a guardianship in existence. A provision could be made that, where the guardian is the spouse requesting the release of dower or curtesy, a special guardian ad litem could be appointed if the Court deemed necessary.

"The whole purpose of the proceeding for release of dower or curtesy is to assure that adequate provision has been made for the protection of the interest and for the proper support of the incompetent. The Probate Court, having before it the incompetent's complete guardianship file, should be in a much better position to determine that there has been proper provision for the incompetent." [Note: See also Comment and Suggestion No. 3.]

18

Source: James R. Ellis, Attorney, Portland, letter 9/12/62.

Guardianship; accounting by guardian.

"The only other criticism of the new guardianship act that I have heard is one regarding ORS 126.336(4), requiring the guardian of the estate to give a copy of each account to the person or institution having the care, custody or control of the ward. It is not entirely clear whether this requires that a copy of the account be furnished a nursing home which is caring for the ward. If there is a guardian of the person, the guardian of the person probably has the 'care, custody or control' of the ward, even though the ward is actually being cared for by a nursing home. In any event, the thought has been expressed to me by one of the trust officers of one of the banks we represent as guardian of several estates that, when the nursing home receives a copy of the account and sees what the ward's assets are, the cost of the nursing home's care is going to increase sharply. It might be desirable, under the circumstances, to amend that subsection to require a copy of the account to be given to the guardian of the person or institution to which the ward has been committed, rather than the person or institution having the care, etc." [Note: See also Comment and Suggestion No. 14.]

19

Source: George W. Neuner, Attorney, Roseburg, letter 9/30/63.

Administration of estates of decedents.

"Although I do not practice extensively in this field, our office, I believe, has had its share of probate practice in this area. I have been continuously reminded by clients, particularly, that our probate procedures are completely out of date. From two standpoints I feel that the need for revision is critical.

"First, in this modern age the average person of means is almost antagonistic to the time required in which to 'settle' an estate. In a great majority of the estates the payment of creditors is no problem and it would seem that there is every reason for a procedure by which solvent estates could be closed expeditiously and in a period of even as little as 30 days.

"You are, of course, aware of the so-called non-intervention procedures available in many states. The present notice requirements contemplate a horse and buggy or even a pony express era. Personally, I have no feelings for a creditor who is not quite aware of the existence of his debtor and I feel that procedures could easily be provided to protect any such creditor without such extended notice requirements.

"Secondly, from the standpoint of the bar, it would seem to me that, in effect, a lawyer 're-does' an estate some three to four times; first, when the petition is filed; second, when the inventory is prepared; third, when the inheritance and estate tax returns are prepared; and fourth, when the final account is prepared. Perhaps it is my mediocre ability, but I feel that I have to, in effect, re-analyze the entire estate each time one of these procedures are accomplished. This requires more time and more expense to the client. Further, I find that laymen are more and more resorting to trusts, inter vivos transfers and other mechanisms to preclude the necessity of a probate proceeding. In fact, I have been guilty of encouraging these procedures when they were indicated, primarily because of the problems in connection with our probate procedures."

20

Source: Samuel M. Bowe, Attorney, Grants Pass, letter 12/30/63.

Guardianship; filing name and address of guardian.

"Sec. 126.126 ORS provides for the contents of a petition for the appointment of a guardian. Sec. 126.181 provides for

the filing in the guardianship proceeding of the name, residence and post office address of the guardian. This is entirely superflous and unnecessary as all the information is contained in the petition. Sec. 126.181 should provide only for such filing in the event of change of residence."

21

Source: Samuel M. Bowe, Attorney, Grants Pass, letter 12/30/63.

Copy of will to legatees and devisees.

"Chapter 447 Oregon Laws of 1963 requires that upon entry of an order admitting any will to probate the appointed representative shall cause a copy of the will to be mailed to each legatee and devisee named therein. [Note: See ORS 115.220.] This should be amended to make the requirement only in the case of original probate. There appears to be no reason why ancillary proceedings initiated in Oregon should require this procedure."

22

Source: Judge Don H. Sanders, Circuit Court, Douglas County, Roseburg, letter to William E. Love, Attorney, Portland, 2/7/64.

Claims against estates of decedents; time for presentation.

"Donald Dole and I have often discussed various aspects of revising Oregon's probate laws. He has suggested that I write to you in your capacity as chairman of the Committee on Probate Practices and Procedure and give the committee, through you, my thoughts on the subject. As you may have deduced, probate matters normally come before me.

"First, there is a need for me to set out the bases of my suggestions, which are few, simple, and, most important, the reasons for the limits I have set on my suggestions. As a practical matter, I conclude it is easier, i.e., can be accomplished with greater facility, to attempt to obtain from the legislature a few significant but relatively minor changes rather than an overall sweeping and often complex revision. The latter seems prone to becoming bogged down. Moreover, for the usual obvious reasons, each time some chapter of our statute is drastically revised, particularly those revisions in which there is a relatively substantial departure from the former rules, the parade to the Supreme Court starts to get new rulings covering the revised material. Experience indicates, so far as I know and am able to determine its teachings from attorneys in practice, that where the changes are made only a few at a time, such result is to a large extent avoided.

"Accordingly, practical reasons seem to suggest avoiding a sweeping and drastic change, in favor of fewer changes, which do not have the appearance of complete revision. A classic example is, of course, the defeat of the attempted Constitutional revision. * * * For the foregoing reasons, which amount to no more than argument, I urge the piecemeal approach. * * *

"Based on the foregoing, I offer the following suggestions to the committee:

"Amend O.R.S. 116.510, changing the initial period of time in which claims may be made against an estate to three months.

"I assume that the reasons justifying this change will occur to your committee as they have to me. I doubt a shorter period of time is feasible in cases involving federal taxes.

"The foregoing change necessitates amendments as to periods of time under provisions of O.R.S. 113.060. [Note: ORS 113.060 relates to election by the surviving spouse of a decedent to take under the will of the decedent or to take an undivided one-fourth interest in all the personal property of which the decedent died possessed.] There may be other related changes in periods of time involved under other statutes. I confess I have not attempted a complete research. From memory, it presently occurs to me there is, or at one time was, a statutory provision allowing a widow one year in which to claim a homestead exemption. My memory is hazy on this and it may not be related to probate. In any event, the ramifications of the change suggested would necessarily need be exhausted, and this letter becomes of alarming length already.

"I feel compelled, however, to set out the reasons for giving these changes priority. If I need to argue that the one area in which attorneys and courts are subjected to the greatest valid and legitimate criticism, it is in the propensity to let estates drag on interminably. * * * There seems to be locally a consensus of opinion that shortening the period of time will greatly expedite the handling of estates. From where I sit this is the most pressing problem.

" * * * Consider me ready and willing to respond, by letter, telephone or in person, should you or your committee wish me to answer questions on these suggestions or any other matters involving probate."

23

Source: William M. Keller, Attorney, Portland, letter to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, and enclosure, 1/29/64.

Guardianship; access of guardian to ward's safe deposit box.

"Enclosed is a copy of a letter I am writing to the State Treasurer. The problem which has been assigned to me by the Probate Committee is fully outlined in the letter to Mr. Belton and I will not bore you by repeating it here.

"I would, however, appreciate it if you would give the matter some consideration and either call me or have your secretary indicate when I might come to the courthouse to discuss the matter with you.

"I would be interested primarily in your reaction to the following questions:

"1. Do you feel that the possibility of abuse of the powers of a guardian in the manner indicated is sufficiently strong to merit the consideration of corrective legislation?

"2. If your reaction to the first question is in the affirmative, do you have any ideas as to what party or agency should have the responsibility of taking an inventory of a safety deposit box.

"3. If such responsible party or agency is given the responsibility of taking such an inventory, is there any necessity for any further action? With reference to this matter the thought occurred to me that such inventory should probably be filed with the Probate records and that such would suffice.

"I would appreciate very much if you would let me have your reaction to this problem."

Enclosure: William M. Keller, letter to Howard C. Belton, State Treasurer, Salem, 1/28/64.

"The Committee on Probate Law and Procedure of the Oregon State Bar has been requested to consider the possible abuse of the power given to a Guardian by the issuance of Letters of Guardianship. Reference has been made to cases wherein an elderly, infirm or senile citizen has been made a ward in guardianship proceedings. The Court, of course, has no idea as to the extent or nature of the estate at the time of the making of the appointment. Upon receiving his appointment and proper Letters of Guardianship, the Guardian is thereupon legally entitled to gain access to any safety deposit box standing in the name of the ward. [Note: See ORS 126.230 and 126.240.]

"It has been suggested that this opens the way to abuses, in that no person or agency, other than the Guardian himself, need be present at the time of the opening of the deposit box. Whatever bond may have been fixed by the Court is of course no protection if any cash or negotiable securities found in the deposit box are never inventoried. Not having been inventoried, the guardian need never account for them and the chance of detection of defalcation is slight.

"It has been suggested that this possibility of abuse might be remedied by the requirement that some responsible person be present when a Guardian first opens the deposit box of a ward. Such person might be a bank officer, the attorney for the Guardian, a representative of the State Treasurer's office or someone appointed specially by the Court. Due to the generally satisfactory experience with the requirement that your office be present and inventory the contents of the safety deposit box of the decedent, it has been suggested that the practical solution might be to extend this responsibility to your office. [Note: See ORS 118.440.]

"It might be said that the State Treasurer's office logically can have no interest in the inventorying of the assets of a living person. However, it seems unrealistic not to recognize the fact that many elderly, senile or infirm persons will shortly become 'candidates' for the services of your office. It seems to be locking the barn door after the horse has long been stolen to require the presence of your office at the opening of a deposit box of a person who has long been under guardianship, when the guardian was alone entitled to access to the box.

"It is, of course, recognized that many people not under guardianship may improvidently place their valuables in the custody of another or give someone else power of attorney to enter their deposit box. In a free society, one cannot always protect a person against his foolish actions. However, that would not appear to be justifiable cause for failure to protect against abuses which might result from the issuance of Letters of Guardianship by the Court itself.

"The writer is a member of the Committee on Probate Law and Procedure of the Oregon State Bar and has been assigned the problem of studying this matter. I would appreciate very much your comments on the problem. * * * "

24

Source: Mrs. E. C. Lane, Eugene, letter to William P. Riddlesbarger, Attorney, Eugene, 1/31/64.

Descent and distribution; from stepparents to stepchildren.

"I was very glad to hear that a committee has been named to look into some of the antiquated Probate laws of the State.

I recently went thru the affect of this law. My step-father of 51 years died recently. He and my mother were married in 1912. He died intestate. My husband and I tho't he had made a will, as he always told me that when he passed on, I was to get his estate. When I went to have his estate settled, I was told that I would get nothing, that the state would take everything. * * * Mr. Lind had no living relatives, as his folks passed-away before he came to this country. I just wanted to write this letter as perhaps you and the members of your committee could look into this law, as I am sure there are others that have gone thru the same grief and heartache that I have. I am sure that the estate would have done me more good, now that I'm on a pension, than it would do for the State of Oregon. * * * " [Note: See ORS 111.020 and 111.030.]

25

Source: Otto J. Frohnmayer, Attorney, Medford, letter from John P. Bledsoe, Attorney, Portland, to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, and enclosure, 3/27/64.

Appraisal of estates of decedents; waiver of requirement.

"Enclosed is a copy of Otto J. Frohnmayer's Report to Committee on Probate Law and Procedure dated March 21, 1962.

"This Report deals with empowering the probate court to waive appraisal.

"I have been asked to report further upon this matter, and I should appreciate having your views. * * * "

Enclosure: Otto J. Frohnmayer, Report to Committee on Probate Law and Procedure, 3/21/62.

"Subject: Shall the court have the right to waive appraisal in proper cases? [Note: See also Comment and Suggestion No. 2.]

" * * * The answer to the question posed is yes.

"In a number of probates a formal appraisal is a useless, time consuming and expensive procedure. Several examples are:

"a. In a wrongful death action, or

"b. Where the assets consist of cash, listed securities, U. S. bonds and the like, or

"c. Where shortly prior to his death decedent sold property in an arm's length transaction and this with other property essentially equivalent to cash comprise the estate.

"This subject has been discussed by the writer with the Honorable Orval J. Millard, circuit judge at Grants Pass and the Honorable E. C. Kelly and the Honorable James M. Main, circuit judges at Medford. All agree that a personal representative should be required in every case to file an inventory. However, in proper cases, the court should have the right to waive the making of an appraisal of the property listed in the inventory.

"ORS 116.405 requires the personal representative to file an inventory with the clerk.

"ORS 116.420 requires, before the inventory is filed, the property to be appraised by three persons, except the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed $10,000.00 exclusive of cash and securities of the United States Government.

"It is suggested that ORS 116.420 be amended to give the court the right, in its discretion, to waive the appraisal of the property if no useful purpose is to be served thereby.

"ORS 116.420 might be amended to read:

"'116.420 Appraisement; appointment of appraisers; waiver of appraisal. (1) Before the inventory is filed, the property therein described shall be appraised at its true cash value by three disinterested and competent persons, who shall be appointed by the court; provided, that the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed $10,000, exclusive of cash and securities of the United States Government and provided further, that the court, in its discretion, may waive the appointment of any appraisers if in its judgment the value of the property may be definitely ascertained and entered in the inventory by the personal representative and no useful purpose will be served by the appraisal. (new matter underscored)

"(2) If any part of the property is in a county other than that wherein the administration is granted, the appraiser or appraisers thereof may be appointed by such court, or the court of the county in which the property is located. In the latter case, a certified copy of the order of appointment shall be filed with the inventory.

"(3) Nothing contained herein shall limit the power of the court to require the filing of an inventory and the making of an appraisal as provided in ORS 118.005 to ORS 118.840.' (new matter underscored)

"ORS 118.610 (Found under Inheritance Tax section of the Probate Code) provides for the filing of an inventory by the executor, administrator or trustee of every estate and for the appraisal of property as by law required.

"ORS 118.620 provides for the extension of time for filing the appraisement.

"ORS 118.630 provides that if no inventory or appraisement has been made or if the court deems it for any cause insufficient or inadequate, either on its motion or on application of any interested party, including the state treasurer, may appoint one or more persons to appraise the property embraced in any inheritance, devise, bequest or legacy subject to the payment of a tax imposed by ORS 118.005 to 118.850.

"Other sections follow which are in the interest of collecting inheritance taxes due to the state of Oregon.

"In view of the foregoing provisions it is suggested that the new subsection (3) be added to ORS 116.420 as set forth above."

26

Source: Donald E. Walters, Vice President and Legal Counsel, Oregon Title Insurance Company, Portland, letter 4/16/64.

Dower and curtesy; proceedings for release.

"It has been suggested that I call your attention to a provision in ORS 113.620 which I believe is unnecessary and which in some instances places a burden on the petitioner. The section covers a portion of the proceedings for release of dower and curtesy of an incompetent or a missing person. The proceedings are covered in full under ORS 113.610 to 113.690 inclusive.

"ORS 113.620 states that the return date for the show-cause order provided for therein shall be 'not less than four nor more than eight weeks from the time of making the order.' ORS 113.630 provides for a personal service of designated people at least 10 days before the hearing of the petition. Substitute service on non-residents may be had by publication for four successive weeks.

"Several of our customers who are attorneys have been unduly inconvenienced by this provision. We have had two very recent examples, where the property had been purchased prior to the adjudication and commitment of the incompetent spouse. Both incompetents had independent estates which would very

adequately care for them for the remainder of their life. Parties in interest and next of kin had no objections to the sale of the competent spouse's property. However, because of the noted provision in ORS 113.620 one party lost the sale of her property and the other was put to an unnecessary wait.

"ORS 113.620 adequately protects the incompetent without requiring this period of waiting. This section provides that the court must find that it would not be detrimental to the incompetent person that a deed be given relinquishing or conveying his or her curtesy or dower interest in the land. Waiting four weeks would seem to be unnecessary to hold the hearing on this order. I would, therefore, suggest the following language be deleted from ORS 113.620:

> "'Not less than four nor more than eight weeks from the time of making the order,'
>
> "This would make the section read as follows:
>
> "If it appears to the court from the petition that it is necessary or would not be detrimental to the incompetent person that a deed be given relinquishing or conveying his or her curtesy or dower interest in the land, the court shall make an order directing the guardian and next of kin of the incompetent person and all persons interested in the land to appear before such court at a time and place to be therein specified to show cause why such deed should not be directed to be made by the court.

"While the average attorney may not face this problem once in five or six years, I have seen this problem before different attorneys in Multnomah County at least 15 times in the last year. I hasten to add that the portion of the statute set forth above is no particular inconvenience to this company. All we can do is require that this portion of the statute be followed. However, we do realize that there are many people unnecessarily inconvenienced by this provision in the statute." [Note: See also Comment and Suggestion Nos. 3 and 17.]

27

Source: Judge Ralph M. Holman, Circuit Court, Clackamas County, Oregon City, letter 5/13/64, response to form letter to probate judges.

Probate jurisdiction; courts which exercise.

"I have only one suggestion for the Probate Advisory Committee, and that is wherever possible move probate out of the county court to the circuit court, preferably." [Note: See ORS 3.130, 5.040, 5.050, 5.070, 5.080 and 46.092; see also Comment and Suggestion No. 38.]

28

Source: Leo F. Young, Attorney, Eugene, memorandum to William P. Riddlesbarger, Attorney, Eugene, 5/16/64.

Executors and administrators; residence qualification.

"It has come to my attention that in certain cases the provisions of ORS 115.410, requiring that persons appointed as executors and administrators must be residents of the state of Oregon, creates a difficulty in having a person with a personal interest in the proper administration of the estate appointed to administer it. It would appear that with our modern means of communication a change in this section should be considered so that in some instances, non-residents could be appointed. In order for a court to exercise adequate jurisdiction and enforce the appointed individuals to perform their duties, non-residents could be required to file a bond or other undertaking and consent to the jurisdiction of the court. I believe that as long as a resident attorney is appointed to act for the estate, that it should be permissible, at least under specified circumstances, to appoint a nonresident administrator." [Note: See ORS 126.161.]

29

Source: H. E. Green, Group Supervisor, Internal Revenue Service, memorandum forwarded by Arthur G. Erickson, District Director of Internal Revenue, Portland, letter 5/18/64, response to form letter to Erickson.

Federal estate tax; estate assets liable; apportionment.

"1. In computing the Federal estate tax, the problem arises as to what assets of the probate estate are liable for the Federal tax when nothing is said in the will, or when the widow elects against the will [Note: See ORS 113.050.], or where the decedent died intestate. For example, is the personal property exhausted first and then real property, or are they both immediately and equally liable so that the beneficiaries are liable in proportion to their inheritances? Present practice is to exhaust the personal property first and often brings grave injustice.

"2. The present State law provides that State inheritance taxes are apportioned [Note: See ORS 118.110 and 118.290.], but it does not have a similar provision covering the Federal estate tax. The recent Oregon Supreme Court decision in the case of Beatty v. Cake [Note: (1963) [77 Adv. 509] Or. , 387 P.(2d) 355.] allowed apportionment in that particular set of facts, but many areas still remain undecided. This should be a matter of statutory determination rather than legislation by court decision."

30

Source: Edwin P. Morgan, County Clerk, Gilliam County, Condon, letter 5/15/64, response to form letter to county clerks.

Conservatorship; inventory and appraisal of estates of wards.

"One question that comes to my mind at this time is with regard to conservatorships. As you are aware, the fee for filing estates is based on the value of the estate. Under the conservatorship law, it is not clear whether or not inventory and appraisement must be filed. When no inventory is filed it is impossible to determine the value of the estate and filing fee cannot be established. It would appear equally important to the person administering the conservatorship to know as nearly as possible the true value of the estate for purposes of accounting to the court." [Note: See ORS 126.636 and 126.230.]

31

Source: Edwin P. Morgan, County Clerk, Gilliam County, Condon, letter 5/15/64, response to form letter to county clerks.

Closing inactive estates of decedents.

"I also have a suggestion with regard to closing estates which have been inactive for a long period of time. As you know, under the present law it requires considerable effort to close an estate which has been inactive. My suggestion would be that in cases where the estate of a deceased person has been inactive for a period of one year, and it appears that the estate is in a condition to be closed and no closing order has been made, that the Judge of the Probate Court be authorized to notify the attorney for the estate, at his last known address, that the estate will be closed. Since the Supreme Court requires reports of pending estates, this would help to clear this backlog of old cases. In many cases, a closing order is all that is needed. Too, an estate can always be opened if necessary."

32

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Executors and administrators; terminology.

"We use the terms: 'administrator', 'administrators', 'administratrix', 'administratrices', 'executor', 'executors', 'executrix', 'executrices'. Then, add to these labels 'with

will annexed', and occasionally 'ancillary', and possibly there are more. The use of the word 'executor' is unfortunate and is not commonly understood, and I feel that one term, such as 'administrator', could be used to designate all persons appointed by the court to administer the estates of intestate decedents, and testate decedents. The distinctions do not appear to serve any useful purpose."

33

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Letters testamentary and of administration.

"Similarly, we have letters of administration and letters testamentary, depending upon the situation. One form of letters of administration covering all areas would suffice." [Note: See ORS 115.210 and 115.350.]

34

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Notices in administration of estates of decedents.

"Notice to creditors can take any number of variable forms and each attorney may have his own opinion on what meets the statute. [Note: See ORS 116.505.] A simple concise form of notice specified by statute could be drafted so that publication costs are at a minimum. Likewise with other notices that may be given by publication including sales of real property." [Note: See, for example, ORS 116.186, 116.760 and 117.610.]

35

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Copy of will and order admitting to probate to intestate heirs.

"ORS 115.220 provides that upon the entry of an order admitting the will to probate, the representative shall mail a copy of the will to each legatee and devisee. (Oregon Laws, 1963, Chapter 447, Sec. 1). I assume the purpose to be to give notice of the terms of the will to the heirs so they can inquire, and possibly ascertain the nature and extent of their inheritance. I suggest that a petition for admission to probate contain the names and addresses of the heirs that would inherit in the case of intestacy, and that they also be mailed a copy of the will. Some experience indicates that wills may be changed at the last minute when there may be serious questions

of testamentary capacity and undue influence. I have understood that an unnatural disposition has some evidentiary weight, possibly minimal, on the question of influence. It would appear that those disinherited are entitled to notice of the contents of the will. This would also eliminate a possible harsh result of ORS 115.180, the six-month statute of limitations on a will contest, where the disinherited live a great distance and there is no communication prior to death between them and the decedent and those close to the decedent. I also suggest that a copy of the order admitting the will to probate be mailed as well." [Note: See also Comment and Suggestion No. 21.]

36

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Temporary provision for surviving spouse of decedents.

"I have also encountered difficulty reconciling ORS 113.070 'widow may remain in dwelling and have sustenance one year', and ORS 116.015 'further order for support,' and noted that it was adequately covered in Volume 1, Oregon Probate Law and Practice Section 161. Possibly, some attention could be given."

37

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Wills; pretermitted children.

"Another matter I have encountered has been the pretermitted children statute (ORS 114.250) and because it has received much litigation and certainty, I would be hesitant to amend. The statute reads that if the testator leaves a child or its descendant 'not named or provided for', the testator dies intestate as to the child or descendant 'not provided for'. You will note that the underscored words are not preceded by the words 'not named or'. The contention has been made that the mere naming of the child is insufficient, and that he must be expressly disinherited or actual provision made. This is contrary to the Oregon cases. The contenders premise their claim upon a passage in Wadsworth v. Brigham, 125 Or. at 452: 'While the testator has a right to disinherit his children, or expressly give them a nominal sum, when he fails to do that and does not expressly disinherit the children or expressly give them a nominal sum, in order to exclude the children, under these circumstances, from inheriting under the statute, they must be actually and substantially 'provided for.'

"My remembrance is that the Deady Code, page 937, Section 10, contained the words 'not named or' immediately preceding the underscored words. It appears that somewhere along the line and by the time of Hill's Code, Section 3075, (1888) the words 'not named' preceding the underscored phrase were eliminated, and the statute has remained the same ever since. Possibly, these words could be inserted."

38

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter 5/19/64, response to form letter to probate judges.

Compliance with statutes; probate courts; small estates of decedents.

"The area of the probate law which I think needs the most attention is the fact that the statutes in so many cases are simply ignored. At present there are, I think, nine Circuit Courts with probate jurisdiction and twelve District Courts with probate jurisdiction leaving fifteen non-lawyer probate courts. I doubt if many probate courts are accomplishing exact compliance with the statutes. It is only an opinion of course but I venture that there aren't more than two or three probate courts in Oregon which are achieving any compliance with the statutory provisions for semi-annual accountings or strict compliance with the requirements of filing vouchers, etc. An examination of the probate practice in this county prior to the institution of the District Court in January, 1961, indicates what to me was a shocking ignoring of the probate statutory requirements. In talking to other probate judges I have formed the opinion that very few are making the intimate studies of the probate files which would be necessary to achieve full compliance with the laws. Lawyers, it is my observation, bitterly resent being required to comply strictly with the statutes as they now exist. The probate fees have now been increased to a point where it would seem they could justify closer attention but of course no such result obtains. I would therefore recommend to your committee consideration of some self-operating penalties to achieve strict enforcement.

"On the subject of which courts should have probate jurisdiction I would like to offer a comment or two. Nine Circuit Courts and twelve District Courts (thirteen after next January) have probate jurisdiction. It appears that in the future there will be more District Courts installed in response to the announced position of the State Bar which calls for the elimination of the non-lawyer probate judge and Justices of the Peace. As this program develops there will be lawyer judges available in more and more counties. These counties generally are those with the least population (although Baker,

Columbia, Malheur, Tillamook and Union Counties have populations larger than Curry and Hood River which now have District Courts). These less populous counties will also have low work loads for their District Judges and consequently it is suggested that perhaps probate and juvenile jurisdiction be considered for District Courts hereafter organized. It is, of course, true that District Judges can do the probate work as Circuit Judges pro-tem. This has an advantage in that it avoids the rather absurd trial de novo (which is a relic of the County Judge system). [Note: See ORS 3.081 and 46.092; see also Comment and Suggestion No. 27.]

"I wish very much that there was some inexpensive way of probating an estate of less than $1,000.00. My experience is that lawyers detest these small matters and their fees are almost out of proportion to the amount of the average of these small estates. I have wondered if a statute couldn't be written that would work something like the Small Claims Department in my Court. I suspect that the Bar would not object." [Note: See ORS 116.020.]

39

Source: Raymond J. Salisbury, Attorney, Grants Pass, letter 6/9/64

Small estates of decedents; insolvent estates; sale of real property.

"We have recently handled two small estates where the principal asset was a parcel of real property. In both of these cases the claim of the State Welfare exceeded substantially the total appraised value of the estate. Because the estate was insolvent, it was necessary to sell the real property in both cases and it was necessary to go through the expense of service of citation on the heirs including the cost of publication. Since both of these estates were totally insolvent, it was a meaningless act to give the heirs notice of the application for authority to sell. Perhaps a provision in substance that the judge could dispense with service of citation upon the heirs where the estate was insolvent would correct this problem. [Note: See ORS 116.765.]

"At any rate, perhaps the committee would have some opportunity to consider this particular problem."

40

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, 8/13/64.

Claims against estates of decedents; action on presented claims.

"I believe that you are a member of a committee considering a revision of the probate statutes.

"It seems to me that the system of handling claims against estates which are set forth in Sec. 116.520 and 116.525 should be changed. As it now stands a claimant serves a claim on the attorney for the legal representative and at the end of ninety days the claim has, in effect, been outlawed unless the claimant takes action. The administrator can file the claim without rejection or allowance and the time within which action may be taken for either a summary hearing or Circuit Court action runs out. Most claims are filed by laymen and they feel that once they have filed their claim it will be paid. It seems to me that instead of being rejected that the claim should be considered allowed unless the administrator gives notice of rejection and if the claim is rejected the Court should set it for hearing automatically. I'm afraid a good many claimants with valid claims are being defeated through not being informed that there are any objections to the claim.

"I was once asked to make any suggestions about the probate law which came to my attention and I am just making this as a suggestion."

41

Source: William F. Schulte, Attorney, Portland, letter to Committee on Revision of Laws, Oregon State Bar Association, 9/2/64, forwarded by Norman A. Stoll, Chairman, Oregon State Bar Committee on Law Revision.

Small estates of decedents; deceased minors with no surviving spouse or minor children.

"I should like to call to your attention a 'blank spot' in the Probate code in this State. ORS 126.555

provides that in the situation where there is an estate of not more than $1,000.00, the Court may simply designate some one to receive the property of the person under legal disability, and ORS 126.516 provides that if, after the appointment of a guardian, the estate of a ward consists of personal property having a value not exceeding by more than $1,000.00 the aggregate amount of unpaid expenses, the Court may order a peremptory closing of the estate, by payment of the claims and expenses and delivering the overplus, if any, to a person designated by the Court.

"Generally this provision of the Oregon code comes into play in situations where minor children have small inheritances or claims of moderate value against other people. Generally the money is directed to be paid to the parents of such minor child to be held and used exclusively for the benefit of the minor child.

"ORS 117.315 provides that if a minor child is entitled to distribution of personal property of value less than $1,000.00 from the estate of a decedent, and has no Guardian, the Executor or Administrator may with the approval of the Court pay or transfer such personal property to a parent of the child who is entitled to the custody of said child.

"ORS 116.020 provides that if it appears from the inventory that the value of the estate does not exceed $1,000.00 over and above property exempt from execution, the Court or Judge thereof shall make an Order providing that the whole of the estate, after payment of funeral expenses and expenses of Administration be set apart for a surviving spouse or minor child of the deceased.

"It has been my misfortune quite recently to be involved in a wrongful death case representing the parents of a deceased five year old child. A settlement of $1,000.00 was agreed upon for the wrongful death claim authorized by ORS 30.020. After payment of attorney's fees, and funeral expenses, and necessary disbursements there is less than $100.00 in the Administratrix's account. Since the deceased was five years of age at the time of the death it appears to be an exercise in futility to advertise a notice to creditors. The only thing the deceased could have been legally liable to have to pay would be for his necessities, and his parents are liable for them, anyway. It would seem advisable that ORS 116.020 be amended to make proper provision for short order peremptory closing

of such small estates without requiring that the deceased die leaving a spouse, and/or minor children."

42

Source: Donald J. Morgan, Attorney, Portland, letter 11/18/64.

Appraisal of estates of decedents; securities.

"As you are aware, ORS 116.425 sets forth the compensation appraisers are to receive for their services in appraising the assets of an estate. Subsection (b) of that Section provides for payment at the rate of 25¢ per $1,000.00 of appraised value of listed securities and subsection (c) provides for compensation at the rate of $1.00 per $1,000.00 of appraised value for unlisted securities traded over the counter.

"While I am not familiar with the practice in other counties, in Multnomah County the appraisers determine the value of the securities mentioned in subsections (b) and (c) respectively, by looking in the Wall Street Journal for the date of decedent's death and taking the difference between the high and the low price of the listed securities and the difference between the bid and the asked price of over the counter securities.

"When the Executor or Executrix, who is often the principal heir of the decedent, is advised a fee is to be paid the three appraisers who read the Wall Street Journal it creates hard will towards the courts and the probate laws. As many people have no other contact with courts and lawyers other than when a death occurs and an estate is probated, it seems to me desirable to avoid this animosity.

"The solution may be to waive appraisal when actively traded securities are involved, leaving valuation to the Executor, (the OSTC, after all, also subscribes to the Journal) except where a blockage problem exists, or to allow waiver upon petition and order of the Court. Whatever the remedy, it does seem to me the laws relating to appraisal as presently written do create a problem where none need exist." [Note: See also Comment and Suggestion Nos. 2 and 25.]

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Release of Incompetent's Dower or Curtesy

June 13, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to revise certain provisions of the Oregon statutes relating to release of dower and curtesy interests of incompetents. The draft has been prepared pursuant to and is based upon action by the advisory committee at the May 16, 1964, meeting. It is submitted for your consideration.

The draft consists of amendments and repeal of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added, and matter in brackets, [like this], is existing matter to be deleted.

Each section of the draft is followed by a Comment, in which the draftsman sets forth a brief description of the revision proposed by the section, a reference to the advisory committee action upon which the revision is based, as recorded in the minutes of the May 16 meeting, or to some other reason for the revision and questions for consideration by the committee.

In the necessarily limited amount of time available, the draftsman experienced difficulty in producing a draft which would, in his opinion, satisfactorily implement the action by the advisory committee at the May 16 meeting, and he entertains some doubt as to the sufficiency of the draft submitted.

Robert W. Lundy
Chief Deputy Legislative Counsel

Dower and Curtesy Bill
Rough Draft
June 13, 1964

Section 1. ORS 113.410 is amended to read:

113.410. A married woman may [bar] be barred of her right of dower in any estate conveyed by her husband, or by [his guardian if he is a minor] the guardian of the estate for him, by her, or, if she is an incompetent, by the guardian of the estate for her as provided in ORS 126.476, joining in the deed of conveyance with, or [by] executing a deed separately from, her husband or [such] his guardian, with or without mentioning the barring of dower therein. [; provided, that such] A separate deed, if barring an inchoate right of dower, shall not be executed to a stranger to the title, but shall be executed to the grantee of her husband or to such grantee's heirs or assigns.

Comment: Section 1 amends ORS 113.410, in part, by adding thereto a provision that the right of dower of a married woman who is an incompetent may be barred by her guardian joining in a conveyance by her husband or his guardian or executing a separate conveyance to her husband's grantee, and that her guardian is to proceed pursuant to ORS 126.476. This addition is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2. The committee action was as follows:

> "That the statute sections commented upon (ORS 93.170 and 113.610 to 113.670) be repealed, and that in their stead ORS 113.410 (bar of dower by conveyance) be amended to provide for bar by a conveyance executed by the guardian of an incompetent as provided in ORS 126.476, and that ORS 126.476 (exchange, partition, sale or surrender of ward's property) be amended to include, in subsection (2) thereof, cases where the interest of the ward is an inchoate dower or curtesy interest."

ORS 113.410, while referring specifically only to barring the right of dower, also applies, of course, to barring the right of curtesy. See subsection (2) of ORS 113.020.

If a spouse is incompetent but a guardian of the estate for him has not been appointed, his right of dower or curtesy could not be barred under ORS 113.410, as amended by section 1, until such a guardian was appointed. Does this circumstance give rise to any problems? Note the approach to this circumstance taken by ORS 113.640, which is repealed by section 3.

If a spouse is a spendthrift for whom a guardian has been appointed, should the barring of his right of dower or curtesy be permitted under ORS 113.410, as amended by section 1, and 126.476, as amended by section 2, by the guardian? What about a spouse who is a ward under conservatorship?

Note that ORS 113.610 to 113.670, repealed by section 3, apply to relinquishment of rights of dower and curtesy in connection with mortgages as well as deeds of conveyance, while ORS 113.410, as amended by section 1, applies only in connection with deeds of conveyance. Is any provision for barring rights of dower and curtesy of incompetent spouses necessary in connection with mortgages? See ORS 113.120 to 113.150.

Section 1 also amends ORS 113.410 by substituting a reference to the guardian of the estate for the husband for "his guardian if he is a minor," thus expanding the application of ORS 113.410 to all situations in which the husband is under guardianship. Is this substitution desirable?

Section 1 also amends ORS 113.410 by making a separate sentence of that part thereof prohibiting execution of a separate deed barring inchoate right of dower to a stranger to the title. This prohibition would be applicable to both the spouse and, if the spouse were incompetent, the guardian. By referring to "inchoate" right of dower, this part of ORS 113.410 may be construed as implying that the preceding part applies to something other than the "inchoate" right. Would such a construction be valid? If not, should "inchoate" be deleted?

Section 2. ORS 126.476 is amended to read:

126.476. (1) A guardian of the estate, with prior

approval of the court by order, may accept an offer to exchange real or personal property, or both, of the ward for real or personal property, or both, of another, or to effect a voluntary partition of real or personal property, or both, in which the ward owns an undivided interest, where it appears from the petition therefor and the court determines that such exchange or partition is in the best interests of the ward.

(2) A guardian of the estate, with prior approval of the court by order, may accept an offer for the purchase or surrender of the interest or estate of the ward in real or personal property, or both, where it appears from the petition therefor and the court determines that:

(a) The interest or estate of the ward in such property is contingent or dubious;

(b) The interest or estate of the ward in such property is a servitude upon the property of the offeror;

(c) The interest or estate of the ward in such property is an undivided interest in property in which the offeror owns or is offering to purchase another or the other undivided interest or interests; [or]

(d) The ward is an incompetent and the interest or estate of the ward in such property is inchoate dower or curtesy; or

[(d)] (e) For any [other] reason other than those referred to in paragraphs (a) to (e) of this subsection, there is no market for the interest or estate of the ward in such property except by such sale or surrender to the offeror.

(3) A guardian of the estate may file in the guardianship proceeding a petition for authority to accept an offer under subsection (1) or (2) of this section. The petition shall include the following information, so far as known by the petitioner:

(a) The name, age, residence and post-office address of the ward.

(b) Whether the ward is an incompetent, minor or spendthrift.

(c) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(d) The name and address of the offeror.

(e) A specific description of the property, interest or estate to be exchanged, partitioned, sold or surrendered, and the price or property to be received therefor.

(f) Such other information as the petitioner may consider necessary to enable the court to be fully informed in respect of the subject matter.

(4) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists solely of personal property or an interest or estate therein, the provisions of ORS 126.416 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(5) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists in whole or in part of real property or an interest or estate therein, the provisions of ORS 126.426 and 126.431 and subsection (1) of ORS 126.471 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(6) Upon the entry of an order of the court authorizing acceptance of an offer under subsection (1) or (2) of this section, the guardian may execute such instruments as are appropriate to effect such exchange, partition, sale or surrender. If the guardian executes a conveyance of real property or an interest or estate therein, the provisions of ORS 126.461 and 126.466 and subsections (3) and (4) of ORS 126.471 shall apply. ORS 113.410 applies to a conveyance executed by the guardian barring the right of dower or curtesy of a ward who is an incompetent.

(7) Except as otherwise provided in this section, the provisions of ORS 126.406 to 126.471 do not apply to exchanges, partitions, sales or surrenders under this section.

Comment: Section 2 amends ORS 126.476, in part, by adding to subsection (2) thereof a new paragraph (d), authorizing a guardian of the estate to accept an offer for the purchase or surrender of an interest or estate of the ward in property when the ward is an incompetent and the interest or estate is inchoate dower or curtesy. This new paragraph is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2.

Is it proper to characterize inchoate dower and curtesy as an "interest or estate"? "Estate" is used in connection with dower and curtesy in ORS 93.170 and 113.020. "Right" is used in ORS 113.410, 113.610 and several other statute sections in ORS chapter 113. New paragraph (d) of subsection (2) of

ORS 126.476 uses "interest or estate" in order to conform with existing terminology used in that subsection. As long as "inchoate dower or curtesy" is used, perhaps it is immaterial that the characterization "interest or estate" is also used.

Section 2 also amends ORS 126.476 by adding to subsection (6) thereof a provision that ORS 113.410 is applicable to a conveyance by a guardian under ORS 126.476 barring the right of dower or curtesy of a ward who is an incompetent. The primary purpose of this provision is to make clear that the prohibition in ORS 113.410 against execution of a separate deed barring the right of dower or curtesy applies to a conveyance under ORS 126.476. Is this provision necessary or desirable?

Section 2 also amends ORS 126.476 by redesignating paragraph (d) of subsection (2) thereof as paragraph (e), and by revising somewhat the wording of this paragraph. It appeared to the draftsman that the wording "for any other reason" in this paragraph might be construed to limit the preceding paragraphs of the subsection to situations in which there was no market for the interest or estate of the ward except by the sale or surrender to the offeror, and that such was not the intention. The purpose of the revision of the wording is to make clear that the provision of the paragraph is to stand alone and not condition the other paragraphs. Is the draftsman's premise correct, and is the revision of the wording necessary or desirable?

Do any problems arise out of the circumstance that the guardian of an incompetent whose right of dower or curtesy is to be barred is the spouse of that incompetent?

ORS 126.481 provides for the acquisition of a ward's property by his guardian, and adopts by reference the provisions of ORS 126.406 to 126.495, which, of course, include ORS 126.476, as amended by section 2. Does ORS 126.481 thus authorize a guardian to acquire the ward's right of dower or curtesy? ORS 126.481 refers to "property of the ward," and this may not include dower and curtesy rights. Furthermore, the guardian would be prohibited from acquiring if he were a "stranger to the title" (see ORS 113.410). The guardian also probably would be prohibited from acquiring if he were the husband of the incompetent. Is there any problem here worth considering?

Should any specific statutory provision be made for protection of the interests and proper support of an incompetent spouse whose right of dower or curtesy is barred by conveyance by a guardian, or are the existing provisions of the guardianship statutes adequate for this purpose? Note the approach to this matter taken by ORS 113.660, which is repealed by section 3.

Section 3. ORS 93.170, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660 and 113.670 are repealed.

Comment: Section 3 repeals ORS 93.170 (conveyance by spouse of insane person) and ORS 113.610 to 113.670 (proceedings for release of dower or curtesy of incompetent persons), and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2.

Is there any necessity or desirability for a provision that proceedings under the statute sections repealed by section 3 pending on the effective date of the proposed legislation, if enacted, be completed pursuant to those repealed statute sections or pursuant to the provisions of the proposed legislation? See, for example, ORS 126.011 and 126.611.

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Changing Dower and Curtesy

August 4, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to change the nature of dower and curtesy to which the surviving spouse of a decedent is entitled from the present life estate in one-half of the real property owned by the decedent during the marriage to a fee estate in an undivided one-fourth interest in the real property owned by the decedent at the time of his death.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 3 to 5, 7 and 8. The subject matter of the draft also was discussed by the committee at the May 16 and July 18, 1964, meetings. See Minutes, 5/16/64, pages 3 to 6, and Appendix A; Minutes, 7/18/64, pages 4 and 5.

In preparing this draft pertinent portions of the Alaska statutes, Wisconsin preliminary draft, Missouri statutes and Model Probate Code reproduced in Staff Report No. 2 ("Materials on Family Rights in Decedents' Estates -- A Staff Report to the Advisory Committee on Probate Law Revision," dated June 1964) and the 1963 Iowa Probate Code were considered.

Mr. Allison and your draftsman collaborated in the preparation of this draft, selecting a general approach and supplying those details that appeared necessary or desirable to implement that approach. On July 14 your draftsman sent a preliminary draft to Mr. Allison, who, on July 22, responded with several proposals for changes in the preliminary draft. On July 31 Mr. Allison and your draftsman met and discussed and tentatively resolved certain problems with respect to details contained in the draft.

The general approach adopted by this draft is to abolish dower and curtesy, including the inchoate interest, but "save" interests already vested; and to give a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse dies possessed if the decedent dies intestate

and leaves children or other lineal descendants, and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent dies possessed.

This draft contains new statute sections, amendments of existing statute sections and repeal of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added, and matter in brackets, [like this], is existing matter to be deleted.

Each section of this draft is followed by a Comment, in which your draftsman sets forth a brief description of the subject matter and purpose of the section and questions and other matters for consideration by the advisory committee.

Robert W. Lundy
Chief Deputy Legislative Counsel

Changing Dower and Curtesy
Rough Draft
August 4, 1964

Section 1. ORS 111.020 is amended to read:

111.020. When any person dies seised of any real property, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, such real property shall descend, subject to his debts, expenses of administration and to being sold for the best interest of the estate or of the heirs, devisees or legatees or for the purpose of distribution, as follows:

(1) If the intestate leaves a surviving spouse and lineal descendants, an undivided one-fourth interest in such real property shall descend to the surviving spouse; and an undivided three-fourths interest in such real property shall descend in equal shares to [his or her] the children of the intestate, and to the issue of any deceased child by right of representation . [; and] If there is no child of the intestate living at the time of [his or her] the death of the intestate, such [real property] undivided three-fourths interest shall descend to all [his or her] the other lineal descendants of the intestate; and if all such descendants are in the same degree of kindred to the intestate, they shall take [such real property] equally, or otherwise they shall take according to the right of representation.

(2) If the intestate leaves a surviving spouse and no lineal descendants, such real property shall descend to the surviving spouse . [; and]

(3) If the intestate leaves no lineal descendants or surviving spouse, [then] such real property shall descend in equal [proportions] shares to [his or her] the father and mother of the intestate. [(3)] If the intestate leaves no lineal descendants, surviving spouse or father, such real property shall descend to [his or her] the mother of the intestate. [;] If the intestate leaves no lineal descendants, surviving spouse or mother, such real property shall descend to [his or her] the father of the intestate. [;]

(4) If the intestate leaves no lineal descendants, surviving spouse, father or mother, such real property shall descend in equal shares to the brothers and sisters of the intestate, and to the issue of any deceased brother or sister by right of representation.

[(4)] (5) If the intestate leaves no lineal descendants, surviving spouse, father, mother, brother or sister, such real property shall descend to [his or her] the next of kin of the intestate in equal degree, [excepting] except that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred.

[(5)] (6) When any child dies under the age of 21 years and leaves no surviving spouse or children, any real [estate] property which descended to such child shall descend to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor.

[(6)] (7) If the intestate leaves no lineal descendants, surviving spouse or kindred, such real property shall escheat to the State of Oregon.

Comment: Section 1 amends ORS 111.020, in part, by adding a new provision to subsection (1) thereof, the effect of which is that if a person dies intestate and leaves a surviving spouse and children or other lineal descendants, the surviving spouse is to receive, by descent, an undivided one-fourth interest in the real property of which the decedent dies seised, and the children and other lineal descendants are to receive the remaining undivided three-fourths interest. Presently, in such a situation, the children and other lineal descendants are entitled to receive all such real property, subject to the surviving spouse's dower or curtesy. The first priority right given to the surviving spouse by section 1 is the right so given in lieu of dower or curtesy in the intestate situation.

Section 1 also amends ORS 111.020 by rearranging and revising some of the wording in an attempt to clarify and improve such wording, while retaining the present meaning.

Further improvements in the wording of ORS 111.020 might be made. For example, note that the description of real property in the first clause of ORS 111.020 unnecessarily duplicates some of the definition of "real property" in subsection (2) of ORS 111.010. Also, no attempt has been made to examine the policy of the various provisions of ORS 111.020 or to suggest changes in such policy. For example, should the doctrine of ancestral estates, embodied in subsection (5) of ORS 111.020 (subsection (6) of ORS 111.020, as amended by section 1) be retained; and should the provisions for descent of real property and distribution of personal property be combined in one statute section and the distinctions abolished? The advisory committee may wish to consider further improvements in wording and examine policy at some time in the future when the matter of intestate succession generally is before the committee.

Section 2. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent [domiciled in this state at the time of death] shall have an election whether to take under the will of the decedent or to have and take by descent and upon distribution an undivided

one-fourth interest in all the real and personal property of which the decedent died possessed, which interest shall be in addition to, and not in lieu of, any right of [dower or curtesy or] homestead.

(2) Such undivided one-fourth interest in real and personal property shall be subject to the following:

(a) A proportionate share of the debts of the decedent, the expenses of last illness and administration, the inheritance tax computed under subsection (1) of ORS 118.100, and, if applicable, the inheritance tax of any other state.

(b) A proportionate share of the federal estate tax, if any, provided the total of all property passing to the surviving spouse of a type which qualifies for the marital deduction under the federal estate tax law exceeds the maximum marital deduction permitted under such law. Said proportionate share shall be determined by first multiplying the total federal estate tax by the lesser of:

(A) The total of all such property so passing to the surviving spouse less the maximum marital deduction allowable; or

(B) The value of such undivided one-fourth interest;

and then dividing the product thereof by a sum equal to the value of the taxable estate for federal estate tax purposes plus the exemption allowable under the federal estate tax law.

(c) Being sold for the best interest of the estate or for purpose of distribution.

Comment: Section 2 amends ORS 113.050, in part, by adding thereto words giving a right to the surviving spouse of a decedent to elect to take under the will of the decedent or to take by descent an undivided one-fourth interest in the real property of which the decedent dies possessed. Presently, ORS 113.050 applies only to the personal property of which the decedent dies possessed. The right to elect real property given to the surviving spouse by section 2 is the right so given in lieu of dower or curtesy in the testate situation.

Section 2 also amends ORS 113.050 by deleting from subsection (1) thereof the condition that the decedent be "domiciled in this state at the time of death" in order for the surviving spouse to be entitled to elect. Mr. Allison initially proposed that the new words "or leaving real property therein" be inserted after the existing words "domiciled in this state at the time of death," in order to accommodate the extension of the right to elect to real property. However, it appeared that the new words would be as applicable to election with respect to personal property as with respect to real property, and other problems arising from insertion of the new words occurred to Mr. Allison and your draftsman. Ultimately, both of us concluded that the new words should not be inserted and that "domiciled in this state at the time of death" should be deleted, leaving the matter of election in the case of a decedent not domiciled in this state at the time of death to be governed by the rules of conflict of laws, rather than by specific statutory provision.

No attempt has been made to improve the wording or examine the policy of the provisions of ORS 113.050. For example, the description of the "net estate" (i.e., the estate passing after deduction of certain items and subject to certain conditions) in ORS 113.050 appears to differ somewhat from such description applicable in the intestate situation (see ORS 111.020 and 111.030), and it may be appropriate to at least question the distinction. However, the advisory committee may wish to postpone consideration of such matters until some time in the future, and restrict itself at this time to consideration of the dower and curtesy matter only.

Section 3. ORS 113.060 is amended to read:

113.060. (1) The surviving spouse is deemed to have elected to take under the will unless, within six months after the date of the admission of the will to probate, [she or he] the surviving spouse makes, acknowledges, serves on the executor or his attorney and causes to be filed in the estate

proceedings a statement that [she or he] the surviving spouse elects to take the undivided one-fourth interest mentioned in ORS 113.050 instead of under the will. The clerk of the court shall record every such statement of election in the record of wills.

(2) The right of election of a surviving spouse under ORS 113.050 may be waived before or after marriage by a written contract, agreement or waiver signed by the person waiving the right, after full disclosure of the nature and extent of the right and if the thing or promise given to the person waiving the right is a fair consideration under all the circumstances.

Comment: Section 3 amends ORS 113.060, in part, by adding thereto a new provision (i.e., subsection (2)) on waiver of the right of election of a surviving spouse under ORS 113.050. The wording of this new provision is based upon the wording of section 39 of the Model Probate Code (see Staff Report No. 2, page 45). See also ORS 108.140 (relating to prenuptial property agreements); Alaska Stat. § 13.05.105 (Supp. 1963) (Staff Report No. 2, page 1); Wisconsin preliminary draft § 4 (Staff Report No. 2, page 13); Mo. Rev. Stat. § 474.220 (1959) (Staff Report No. 2, page 31).

Section 3 also amends ORS 113.060 by revising some of the wording in an attempt to clarify and improve such wording, while retaining the present meaning. Further improvements in such wording might be made.

Note that subsection (1) of ORS 113.060, as amended, requires that the election of a surviving spouse be served on the executor or his attorney. Should the manner of that service be specified?

ORS 126.300 authorizes a guardian of the estate, with prior approval of the court by order, to exercise for and on behalf of the ward the right of the ward to make an election under ORS 113.050. Should some provision be made for an election under ORS 113.050 for and on behalf of an incompetent surviving spouse for whom there is no guardian of the estate? See Alaska Stat. § 13.05.105 (Supp. 1963) (Staff Report No. 2, page 1); 1963 Iowa Probate Code § 244.

Should some provision be made with respect to the nature of the right to make an election under ORS 113.050 (e.g., personal, not transferable and not exercisable after the death of the surviving spouse)? See Mo. Rev. Stat. § 474.200 (1959) (Staff Report No. 2, page 31); Model Probate Code § 37 (Staff Report No. 2, page 45); 1963 Iowa Probate Code § 242.

Should some provision be made with respect to whether an election under ORS 113.050 once made is binding and with respect to the effect of failure to exercise the right to elect? See Mo. Rev. Stat. §§ 474.210, 474.230 (1959) (Staff Report No. 2, pages 31 and 32); Model Probate Code §§ 38, 40 (Staff Report No. 2, pages 45 and 46); 1963 Iowa Probate Code § 246.

Should some provision be made for barring, denying or reducing an election under ORS 113.050 in other circumstances; for example, where other adequate provision has been made for the surviving spouse, or the decedent and the surviving spouse were living apart at the time of the decedent's death, or the surviving spouse has abandoned the decedent? See Wisconsin preliminary draft §§ 4, 5 (Staff Report No. 2, pages 13 and 14); Mo. Rev. Stat. § 474.140 (Staff Report No. 2, page 27).

Section 4. Dower and curtesy, including inchoate dower and curtesy, are abolished. That abolishment does not affect any right to or estate of dower or curtesy which became vested before the effective date of this Act, and any right or estate so vested is governed by the law in effect immediately before the effective date of this Act.

Comment: Section 4 is a new provision that expressly abolishes dower and curtesy, including inchoate dower and curtesy, and expressly "saves" dower and curtesy interests that have become vested, whether unassigned (i.e., dower or curtesy consummate) or assigned (i.e., admeasured; an estate) by specifying that such vested interests are not affected by the abolishment and are to be governed by the law in effect prior to the effective date of the proposed legislation, including the statute sections wholly or partially pertaining to dower and curtesy that are repealed or amended by the proposed legislation.

The "saving" provision might not be necessary, since in any event vested interests could not constitutionally be affected by the abolishment of dower and curtesy. Furthermore, a statement of the abolishment of dower and curtesy might not

be necessary in view of deletion from the statutes, by repeal or amendment of statute sections, of all or most of the provisions pertaining to dower and curtesy. However, even if not necessary, the statement of the abolishment and the "saving" provision appear to serve a useful and desirable purpose.

Section 5. ORS 93.170, 105.065, 111.050, 113.010, 113.020, 113.030, 113.040, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530, 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680 and 113.690 are repealed.

Comment: Section 5 repeals a number of statute sections that appear to relate wholly to dower and curtesy. Note that in so far as these statute sections are applicable to dower and curtesy interests that have become vested, they are retained in force and effect by section 4. You will probably wish to examine each of the statute sections referred to in section 5 in order to determine the appropriateness of its repeal.

Section 5 does not repeal ORS 113.090, which reads as follows: "No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent." Apparently on the ground that this statute section is quite often referred to, Mr. Allison proposes that it not be repealed at this time, even though it would appear to have an effective life of only 10 years after the effective date of the proposed legislation.

Amendments of other statute sections that appear to relate partially to dower and curtesy for the purpose of deleting the pertinent portions thereof are not included in this draft because of the substantial bulk they would add thereto at this time. However, amendments of, for example, ORS 5.040, 68.420, 93.240, 94.105, 105.050, 105.330, 105.340, 107.280, 111.130 and 114.020 should be included in the proposed legislation in its final form. You will probably wish to examine each of these statute sections to determine the appropriateness and nature of the amendment thereof.

In spite of a fairly exhaustive search, your draftsman is not sure that he has found all the statute sections that appear

to relate wholly or partially to dower and curtesy.

There are at least two possible approaches to the treatment of existing statutory provisions that relate to dower and curtesy abolished by this draft. The first of these approaches is to delete all such provisions by repeal or amendment, relying on the "saving" provision of section 4 to retain in force and effect such of those provisions as are applicable to vested interests. The second of these approaches is to delete by repeal or amendment only such of those provisions as are applicable to inchoate interests, retaining those provisions that pertain to vested interests or that otherwise would have some effect after the effective date of the proposed legislation. With the one exception of ORS 113.090 referred to above, this draft adopts the first of these approaches, which has the advantages of deleting statutory provisions which ultimately will become obsolete and of avoiding what in some cases may be the difficult problem of determining which statutory provisions will have some effect after the effective date of the proposed legislation.

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Protecting Property Right During Marriage

August 4, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to protect a right of a surviving spouse to receive, upon the death of the other spouse, a fee estate in an undivided one-fourth interest in real property owned during the marriage by the other spouse in his sole right against an attempt by the owner spouse to convey or mortgage such real property without the joinder of the nonowner spouse in the conveyance or mortgage, and thus to defeat or diminish the right of the surviving spouse to receive such an interest in the real property by intestate succession or election against will under the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964. A recorded declaration is the means to be employed for the purpose of protecting such right under this draft.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 3 to 8. The subject matter of the draft also was discussed by the committee at the May 16 and July 18, 1964, meetings. See Minutes, 5/16/64, pages 5 and 6, and Appendix A; Minutes, 7/18/64, pages 4 and 5.

Mr. Allison and your draftsman collaborated in the preparation of this draft, selecting a general approach and supplying those details that appeared necessary or desirable to implement that approach. On July 14 your draftsman sent a preliminary draft to Mr. Allison, who, on July 22, responded with several proposals for changes in the preliminary draft. On July 31 Mr. Allison and your draftsman met and discussed and tentatively resolved certain problems with respect to details contained in the draft.

Each section of this draft is followed by a Comment, in which your draftsman sets forth a brief description of the subject matter and purpose of the section and questions and other matters for consideration by the advisory committee.

Robert W. Lundy
Chief Deputy Legislative Counsel

Protecting Property Right During Marriage
Rough Draft
August 4, 1964

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county in which real property owned by the spouse of the declarant in his sole right is situated a written, signed and acknowledged declaration claiming an inchoate marital right in and to an undivided one-fourth interest in the real property so owned by the spouse of the declarant and described in the declaration. The declaration shall include a description of the real property and a statement of the effect of the recording of the declaration as provided in subsection (2) of this section. Before causing the declaration to be recorded the declarant shall cause a copy of the declaration to be served personally on the spouse of the declarant, and the declaration shall include a statement of such service and the date thereof.

(2) If a declaration claiming an inchoate marital right has been recorded as provided in subsection (1) of this section, the spouse of the declarant may not, during the marriage and while the declaration remains unrevoked, convey or mortgage the real property described in the declaration free of the inchoate marital right of the declarant in and to an undivided one-fourth interest in the real property unless the declarant joins in the conveyance or mortgage to release or subordinate the inchoate marital right.

(3) If a declaration recorded as provided in subsection

(1) of this section is not sooner revoked, the inchoate marital right in and to an undivided one-fourth interest in the real property described in the declaration becomes vested in the declarant upon the death of the spouse of the declarant. The declaration so recorded is revoked by:

(a) Joinder by the declarant in a conveyance or mortgage of the real property described in the declaration as provided in subsection (2) of this section.

(b) A written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration was recorded.

(c) A decree declaring the marriage void or dissolved.

(d) The death of the declarant before the death of the spouse of the declarant.

(e) A court order as provided in subsection (4) of this section.

(4) The spouse of a declarant who is served personally with a copy of a declaration as provided in subsection (1) of this section, or any person to whom he conveys or mortgages the real property described in the declaration without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the revocation of the declaration.

(5) The declaration may be in the following form:

DECLARATION CLAIMING INCHOATE MARITAL RIGHT

Declarant, _____ (name of wife or husband), the spouse of _____ (name of owner husband or wife), hereby claims an inchoate marital right in and to the real property owned in sole right by the spouse of the declarant and described as follows:

in the County of _____, State of Oregon.

The effect of the recording of this declaration, as provided in section 1, chapter , Oregon Laws 1965 (Enrolled Bill), is that the spouse of the declarant may not, during the marriage and while this declaration remains unrevoked, convey or mortgage the real property described in this declaration free of the inchoate marital right of the declarant in and to an undivided one-fourth interest in the real property unless the declarant joins in the conveyance or mortgage to release or subordinate the inchoate marital right.

A copy of this declaration was served personally on the spouse of the declarant on _____ (date).

(Acknowledgment)

_____
Declarant

Comment: Section 1 is a new provision that would permit one spouse, by means of a recorded declaration, to claim an inchoate right to an undivided one-fourth interest in any real property owned by the other spouse in his sole right. The effect of the recorded declaration would be that

a conveyance or mortgage of the real property by the owner spouse without the joinder of the nonowner spouse in the conveyance or mortgage would be subject to the inchoate right of the nonowner spouse.

The purpose of this new provision is to provide a means of protecting the ultimate right of a surviving spouse to receive an undivided one-fourth interest in real property owned by the deceased spouse by intestate succession or election against will against inter vivos conveyance or mortgage of the real property by the owner spouse without the joinder of the nonowner spouse, thereby defeating or diminishing that ultimate right. This new provision supplements the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964, and the protection afforded thereby resembles somewhat that afforded by inchoate dower and curtesy.

The right which may be claimed under section 1 is referred to as an "inchoate marital right," for want of a better designation. It is probably accurate to characterize the right as "inchoate" in nature. In some of the advisory committee discussion on the matter and in the early drafting stages the right was referred to as a right of "inheritance." While the purpose of section 1 is to protect inheritance rights, the right described in section 1 is not, strictly speaking, an "inheritance" right, since the undivided one-fourth interest in real property that is reserved by that right and that may vest on the death of the deceased owner spouse is not a part of the estate of the decedent and does not pass to the surviving spouse under the usual rules of inheritance. Such vesting does not depend, for example, on exercise by the surviving spouse of an election against the will of the decedent. This nature of the right described in section 1 and the interest in real property arising therefrom that may vest, by the way, appears to raise a question as to the treatment of the interest upon vesting for purposes of federal estate tax and state inheritance tax.

Subsection (1) of section 1 authorizes a nonowner spouse to record in the deeds record a declaration claiming the inchoate marital right in real property owned by the other spouse in his sole right. Note that the declaration must describe the real property to which it is intended to be applicable and must describe the effect of the recording. An approach taken in the early drafting stages that a declaration would apply to all real property of the owner spouse situated in the county in which the declaration was recorded was abandoned in favor of application to particular real property described in the declaration. Before the declaration is recorded, a copy thereof must be served personally on the owner spouse.

Subsection (2) sets forth the effect of the recording of the declaration; that is, the owner spouse may not convey or

mortgage the real property described in the declaration free of the inchoate marital right unless the nonowner spouse joins in the conveyance or mortgage. An approach taken in the early drafting stages that a conveyance or mortgage in which the nonowner spouse did not join would be invalid was abandoned in favor of the approach embodied in subsection (2).

Subsection (3), in part, describes the nature of the inchoate marital right and the vesting of the interest in real property arising therefrom. Some such description would appear to be necessary or desirable. However, this particular description represents merely a suggestion by your draftsman, which Mr. Allison did not previously review and for which he bears no responsibility.

Subsection (3) also specifies the several ways by which a recorded declaration is revoked. Should there be other grounds for revocation, such as prolonged absence of the nonowner spouse, abandonment of the owner spouse by the nonowner spouse or subsequent separate conveyance or release to a grantee or mortgagee of the owner spouse by the nonowner spouse?

Subsection (4) permits the owner spouse or his grantee or mortgagee to maintain an action in the circuit court to contest the validity and sufficiency of a recorded declaration within 10 years after the date of the recording. This 10-year statute of limitation provision compares with the present 10-year statute of limitation provision applicable to suits for the determination of a right, claim or interest in real property (see ORS 12.040 and 12.050).

Subsection (5) sets forth a nonmandatory form for a declaration claiming the inchoate marital right.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward, the right of the ward to cause a declaration claiming an inchoate marital right of the ward or a revocation thereof to be recorded as provided in section 1 of this 1965 Act.

Comment: Section 3, which is to be added to the present guardianship statutes, is a new provision authorizing a guardian of the estate, with prior approval of the court by order, to record a declaration claiming an inchoate marital right or a revocation thereof under section 1 for and on behalf of the ward. The wording of section 3 is patterned after the wording of ORS 126.300, which authorizes a guardian of the estate to exercise rights of the ward as to the estate of the deceased spouse of the ward.

An approach taken in the early drafting stages incorporating the authority of a guardian of the estate to record the declaration or a revocation thereof in section 1 was abandoned in favor of a separate statutory provision embodying this authority. Mr. Allison expressed a preference for the separate statutory provision approach, since the incorporation in section 1 approach complicated somewhat the drafting of section 1. The addition of the substance of section 3 to ORS 126.300 was considered, but your draftsman is of the opinion that it is preferable that this substance constitute a separate statute section. ORS 126.300 relates to rights as to the estate of a decedent, while the substance of section 3 relates to a right of a somewhat different nature.

Should some provision be made for the recording of a declaration and a revocation thereof for and on behalf of an incompetent nonowner spouse for whom there is no guardian of the estate?

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Changing Dower and Curtesy

October 9, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to change the nature of dower and curtesy to which the surviving spouse of a decedent is entitled from the present life estate in one-half of the real property owned by the decedent during the marriage to a fee estate in an undivided one-fourth interest in the real property owned by the decedent at the time of his death. It is a revision of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the September 12, 1964, meeting. See Minutes, 9/12/64, pages 2 to 7. See also the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964; Minutes, 8/22/64, pages 2 to 7; Minutes, 7/18/64, pages 4 and 5; Minutes, 6/13/64, pages 3 to 5, 7 and 8; Minutes, 5/16/64, pages 3 to 6, and Appendix A.

The general approach adopted by this draft is to abolish dower and curtesy, including the inchoate interest, but "save" interests already vested; and to give a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse dies possessed if the decedent dies intestate and leaves children or other lineal descendants, and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent dies possessed.

There are at least two possible approaches to the treatment of existing statutory provisions that relate to dower and curtesy abolished by this draft. The first is to delete all such provisions by repeal or amendment, relying on the "saving" provision of section 3 to retain in force and effect such of those provisions as are applicable to vested interests. The second is to delete by repeal or amendment only such of those provisions as are applicable to inchoate interests, retaining those provisions that pertain to vested interests or that

otherwise would have some effect after the effective date of the proposed legislation. With the one exception of ORS 113.090 (a 10-year statute of limitations on actions to recover or reduce to possession dower or curtesy,, this draft adopts the first of these approaches.

Sections 4 to 19 of this draft are amendments of existing statute sections to delete portions thereof that appear to relate to dower and curtesy. Section 20 repeals a number of existing statute sections that appear to relate wholly to dower and curtesy. I suggest that you examine carefully each of the existing statute sections set forth or referred to in these sections of the draft for the purpose of determining whether the deletions by way of amendment or repeal are proper. With respect to each deletion, consider, among other matters, the effect of the "saving" provision of section 3.

In spite of a fairly exhaustive search, I am not sure that I have found all the existing statute sections that appear to relate wholly or partially to dower and curtesy.

This draft contains new statute sections, amendments of existing statute sections and repeal of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added and matter in brackets, [like this], is existing matter to be deleted.

Robert J. Landy
Chief Deputy Legislative Counsel

Changing Dower and Curtesy
Rough Draft
October 9, 1964

Section 1. ORS 111.020 is amended to read:

111.020. When any person dies seised of any real property, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, such real property shall descend, subject to his debts, expenses of administration and to being sold for the best interest of the estate or of the heirs, devisees or legatees or for the purpose of distribution, as follows:

(1) If the intestate leaves a surviving spouse and lineal descendants, an undivided one-fourth interest in such real property shall descend to the surviving spouse; and an undivided three-fourths interest in such real property shall descend in equal shares to [his or her] the children of the intestate, and to the issue of any deceased child by right of representation. [; and] If there is no child of the intestate living at the time of [his or her] the death of the intestate, such [real property] undivided three-fourths interest shall descend to all [his or her other] the lineal descendants of the intestate. [; and] If all such descendants are in the same degree of kindred to the intestate, they shall take [such real property] equally; [, or] otherwise they shall take according to the right of representation.

(2) If the intestate leaves a surviving spouse and no lineal descendant[s], such real property shall descend to the surviving spouse. [; and]

(3) If the intestate leaves no lineal descendant or surviving spouse, [then] such real property shall descend [in equal proportions] to [his or her] the father and mother of the intestate as tenants by the entirety if they are married to each other; otherwise as tenants in common. [(3)] If the intestate leaves no lineal descendant[s], surviving spouse or father, such real property shall descend to [his or her] the mother of the intestate. [;] If the intestate leaves no lineal descendant[s], surviving spouse or mother, such real property shall descend to [his or her] the father of the intestate. [;]

(4) If the intestate leaves no lineal descendant[s], ~~surviving spouse, father or mother, such real property shall~~ descend in equal shares to the brothers and sisters of the intestate, and to the issue of any deceased brother or sister by right of representation.

[(4)] (5) If the intestate leaves no lineal descendant[s], surviving spouse, father, mother, brother or sister, such real property shall descend to [his or her] the next of kin of the intestate in equal degree, [excepting] except that when there are two or more collateral kindred in equal degree but claiming through different ancestors, such real property shall descend to those who claim through the nearest ancestor [shall be preferred].

[(5) When any child] (6) If the intestate dies under the age of 21 years and leaves no surviving spouse or [children] child, any real [estate] property which descended to [such

child] the intestate shall descend to the heirs of the ancestor from [which] whom such real property descended the same as [if such child] though the intestate died before the death of such ancestor.

[(6)] (7) If the intestate leaves no lineal descendant[s], surviving spouse or kindred, such real property shall escheat to the State of Oregon.

Section 2. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent [domiciled in this state at the time of death] shall have an election whether to take under the will of the decedent or to take by descent an undivided one-fourth interest in all the real property of which the decedent died possessed and, if the decedent was domiciled in this state at the time of death, to [have and] take upon distribution an undivided one-fourth interest in all the personal property of which the decedent died possessed. [, which] Such interest shall be in addition to, and not in lieu of, any other statutory right [of dower or curtesy or homestead].

(2) Such undivided one-fourth interest in real and personal property shall be subject to the following:

(a) A proportionate share of the debts of the decedent, the expenses of last illness and administration, the inheritance tax computed under subsection (1) of ORS 118.100, and, if applicable, the inheritance tax of any other state.

(b) A proportionate share of the federal estate tax, if any, provided the total of all property passing to the surviving spouse of a type which qualifies for the marital deduction under the federal estate tax law exceeds the maximum marital deduction permitted under such law. [Said] The proportionate share shall be determined by first multiplying the total federal estate tax by the lesser of:

(A) The total of all such property so passing to the surviving spouse less the maximum marital deduction allowable; or

(B) The value of such undivided one-fourth interest;

~~and then dividing the product thereof by a sum equal to the~~ value of the taxable estate for federal estate tax purposes plus the exemption allowable under the federal estate tax law.

(c) Being sold for the best interest of the estate or for purpose of distribution.

Section 3. Dower and curtesy, including inchoate dower and curtesy, are abolished, but any right to or estate of dower or curtesy of the surviving spouse of any person who died before the effective date of this Act shall continue and be governed by the law in effect immediately before that date.

Section 4. ORS 5.040 is amended to read:

5.040. County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining

to a court of probate; that is, to:

(1) Take proof of wills.

(2) Grant and revoke letters testamentary, of administration, of guardianship and of conservatorship.

(3) Direct and control the conduct, and settle the accounts of executors and administrators.

(4) Direct the payment of debts and legacies, and the distribution of the estates of intestates.

(5) Order the sale and disposal of the property of deceased persons.

(6) Order the renting, sale or other disposal of the property of minors.

~~(7) Appoint and remove guardians and conservators,~~ direct and control their conduct and settle their accounts.

[(8) Direct the admeasurement of dower.]

Section 5. ORS 68.420 is amended to read:

68.420. (1) A partner is co-owner with his partners of a specific partnership property, holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to [dower, curtesy, or] allowances to widows, heirs, or next of kin.

Section 6. ORS 91.020 is amended to read:

91.020. Tenancies are as follows: Tenancy at sufferance, tenancy at will, tenancy for years, tenancy from year to year, tenancy from month to month, [tenancy by curtesy,] tenancy by entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 7. ORS 91.030 is amended to read:

91.030. A [tenancy by curtesy, a] tenancy by entirety and a tenancy for life shall be such as now fixed and defined by the laws of the State of Oregon.

Section 8. ORS 93.240 is amended to read:

93.240. (1) Subject to the provisions contained in this section, whenever two or more persons join as sellers in the execution of a contract of sale of real property, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price shall be owned by them in the same proportions, and with the same incidents, as title to the real property was vested in them immediately preceding the execution of the contract of sale.

(2) If immediately preceding the execution of any such contract one or more of the sellers held no estate in the real property covered thereby [other than an inchoate estate of or right to dower or curtesy], then, [unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the purpose of barring dower or curtesy only and,] except to the extent specifically prescribed therein, such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of [said] the real property.

(3) If immediately prior to the execution of a contract of sale of real property title to any interest in the

property therein described was vested in the sellers or some of the sellers as tenants by the entirety or was otherwise subject to any right of survivorship, then, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price of such property shall likewise be subject to like rights of survivorship.

(4) This section, being declaratory of existing law, applies to contracts of sale of real property heretofore executed as well as to those hereafter executed. Nothing contained in this section shall be deemed to modify or amend the provisions of subsection (4) of ORS 118.010 relating to inheritance taxes payable by reason of succession by survivorship as provided by subsection (3) of this section.

Section 9. ORS 94.105 is amended to read:

94.105. The court may, in any proceeding under this chapter:

(1) Find and decree in whom the title to, or any interest in, the land is vested, whether in the applicant or in any other person.

(2) Remove clouds upon the title.

[(3) By its decree, bar dower and curtesy rights, whether inchoate, vested, initiate or consummate, in the land sought to be registered, of all persons except the wife or husband of the applicant, unless appearance is made by such persons and such rights are set forth and established, in which case the

same shall be preserved in the decree. Upon failure of such persons to appear and set forth and establish such rights or claims, they shall be forever barred and concluded by the decree from asserting the same in like manner as other defendants, and all such persons shall be made parties defendant in like manner as other defendants.]

[(4)] (3) Find and decree whether the land is subject to any lien, encumbrance, estate, trust or interest, and declare the same.

[(5)] (4) Order the registrar of titles to register such title or interest, and in case the land is subject to any lien, encumbrance, estate, trust or interest, give directions as to the manner and order in which the same shall appear upon the certificate of title to be issued by the registrar.

[(6)] (5) Make all such orders and decrees as are equitable and are in conformity with the principles of this chapter.

Section 10. ORS 94.330 is amended to read:

94.330. No transfer or mortgage of any estate or interest in registered land shall be registered until it is made to appear to the registrar that the land has not been sold for any tax or assessment upon which a deed has been given and the title is outstanding, or upon which a deed may thereafter be given, and that [the dower, right of dower, and] estate of

homestead, if any, [have] has been released or extinguished or that the transfer or mortgage is intended to be subject thereto, in which case it shall be stated in the certificate of title.

Section 11. ORS 94.445 is amended to read:

94.445. For the purpose of final distribution, the court of probate may determine the right of all persons in the estate or interest of the deceased in registered lands, declare and enforce the rights of devisees, heirs, persons entitled to [dower and] homestead and others, assign [dower and] homestead, and make partition and distribution according to the rights of the parties. The court may give direction to the executor or administrator as to the transfer of any estate or interest in registered lands to the devisees or heirs, and may direct the transfer to be to several devisees or heirs as tenants in common, or otherwise, as shall appear to the court to be most convenient, consistent with the rights of the parties, or as the parties interested may agree.

Section 12. ORS 105.050 is amended to read:

105.050. In an action [for the recovery of dower before admeasurement or] by a tenant in common of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right or did some act amounting to a denial.

Section 13. ORS 105.220 is amended to read:

105.220. The plaintiff shall make a tenant [in dower, by the curtesy,] for life or for years of any portion of the entire property and creditors having a lien upon any portion of the property defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties and a partition is made, it is thenceforth a lien only upon the share assigned to such party; but such share shall be first charged with its just proportion of the cost of the partition in preference to such lien.

Section 14. ORS 105.330 is amended to read:

105.330. [The proportion of the proceeds of the sale to be invested, as provided in ORS 105.325, shall be ascertained and determined as follows: (1) If an estate in dower or curtesy is included in the order of sale its proportion shall be one-half of the proceeds of the sale of the property, or of the sale of the undivided share in the property upon which the claim or dower existed. (2) If any [other] estate for life or years is included in the order of sale [its] the proportion of the proceeds of the sale to be invested, as provided in ORS 105.325, shall be the whole proceeds of the sale of the property, or of the sale of an undivided share of the property in which the estate existed.

Section 15. ORS 105.340 is amended to read:

105.340. In all cases of sales in partition when it appears [that a married woman has an inchoate right of dower

in any of the property sold, or] that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of the [inchoate,] contingent or vested right or estate according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Section 16. ORS 107.280 is amended to read:

107.280. Whenever a decree of permanent or unlimited separation from bed and board has been granted, the party at whose prayer such decree was granted shall be awarded an individual right such undivided or several interest in any right, interest or estate in real or personal property owned by the other or owned by them as tenants by the entirety at the time of such decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. The court may, in making such award, decree that [dower and curtesy, as well as] homestead rights under ORS 116.010 and the election provided in ORS 113.050[,] are extinguished and barred.

Section 17. ORS 111.130 is amended to read:

111.130. If the intestate leaves a [widow] <u>surviving spouse</u> and issue, and any of such issue has received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing

the part to be given to the [widow, but the widow shall only be entitled to receive one-half of the residue, after deducting the value of the advancement] surviving spouse.

Section 18. ORS 114.020 is amended to read:

114.020. Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal[, saving to the widow, if any, her dower, and to the widower, if any, his curtesy].

Section 19. ORS 118.010 is amended to read:

118.010. (1) All property, tangible or intangible, and any interest therein, within the jurisdiction of the state, whether belonging to the inhabitants of this state or not, which passes or vests by [dower, curtesy,] survivorship, will or by statutes of inheritance of this, or any other state, or by revesting, repayment or settlement of any previously escheated estate or part thereof, or by the exercise of a general power of appointment as provided in subsection (5) of this section, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate, made in contemplation of the death of the grantor or bargainor or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body

politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, is subject to tax at the rate specified in ORS 118.100, to be paid to the State Treasurer for the use of the state.

(2) (a) Whenever property, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a taxable transfer in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if the property has been acquired from decedent for less than such fair consideration, there shall be excepted from the value of the property a portion equal to the amount of the consideration so furnished.

(b) Upon the death of one of the tenants of real property held by the entirety, the right of the surviving tenant to the immediate ownership or possession and enjoyment of such property

shall be deemed a taxable transfer in the same manner as though one-half of the whole property to which such transfer relates belonged absolutely to the deceased tenant and had been devised or bequeathed to the surviving tenant.

(3) Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to the decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of ORS 118.005 to 118.840; but no such transfer made before such three-year period shall be treated as having been made in contemplation of death if:

(a) No gift taxes were payable under ORS chapter 119 on such transfer; or

(b) All gift taxes payable under ORS chapter 119 on such transfer were paid when due.

(4) In the event of death of one of the tenants of property held by the entirety, after sale thereof upon an executory or instalment contract, the transfer of the decedent's interest in the unpaid balance owing upon such contract at the time of death shall be deemed a taxable transfer in the same manner as under paragraph (b) of subsection (2) of this section.

(5) When, after August 3, 1955, property passes or vests subject to a general power of appointment, for the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donor, the donee is deemed to have acquired the

full taxable interest from the donor. For the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donee of such a general power, an appointee is deemed to have acquired from the donee the full taxable interest of such of the property which passes or vests only by reason of the exercise of the power by the donee. A general power of appointment is one where the donee has substantial beneficial enjoyment of the property, including one which the donee may exercise in favor of himself, his estate, his creditors or the creditors of the estate, during lifetime or at death, and including one under which the donee may convey or transfer ownership of the property to whomever he may choose.

Section 20. ORS 93.170, 105.065, 111.050, 113.010, 113.020, 113.030, 113.040, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530, 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680 and 113.690 are repealed.

MATERIALS ON

FAMILY RIGHTS IN DECEDENTS' ESTATES

(Including dower and curtesy, election against will, family allowances during administration and homestead and exempt personal property)

A Staff Report to the
Advisory Committee on Probate Law Revision

June 1964

Prepared by
Legislative Counsel's Office
410 State Capitol
Salem, Oregon 97310

Oregon Probate Law Revision
Staff Report No. 2

To the Members of the Advisory Committee on
Probate Law Revision:

At your meeting on May 16, 1964, you requested that your staff supply each of you with a copy of the Alaska statutory provision which affords some protection to a wife or husband against inter vivos conveyance of the homestead by act of the other spouse only, by means of a requirement that both spouses join in the conveyance; a copy of a preliminary draft of proposed legislation relating to family rights in decedents' estates prepared in the course of the current Wisconsin study on probate law, and a copy of any other materials relating to dower and curtesy and other family rights in decedents' estates readily available to your staff. This report is an effort by your staff to comply with your request.

This report consists of the following materials:

In selecting relevant provisions of the Missouri statutes and the Model Probate Code as "other materials" relating to dower and curtesy and other family rights in decedents' estates, your staff does not intend to represent that these provisions constitute ideal approaches to the handling of the subject or that they are representative of approaches which have been adopted by the several states. It appears that many different approaches are embodied in the statutes of the

several states, as well as many variations of similar approaches. In addition, a considerable body of literature on the subject has been published in recent years. The selection of the Missouri statutes and the Model Probate Code might well be ascribed to the circumstance that they were readily available to your staff. More valid reasons may be that the Missouri statutes are part of a relatively recent (1955 and 1957) probate law revision in another state, which attempt to adapt some of the ideas presented by the Model Probate Code, and that the Model Probate Code, although published in 1946, contains some relatively new ideas on the subject.

Since the most recent revision of probate law in another state was enacted by the Iowa legislature in 1963, you may be interested in the provisions of the 1963 Iowa Probate Code on the subject. Each of you received a copy of this Code at your meeting on April 18, 1964. The Iowa election against will provisions are embodied in sections 236 to 258 of that Code, while section 332 gives the surviving spouse exempt personal property and sections 374 to 377 and 433 provide an allowance for the surviving spouse and minor children.

Your staff hopes that the materials contained in this report will prove useful in your consideration of the matter of dower and curtesy and other family rights in decedents' estates.

Robert W. Lundy
Chief Deputy Legislative Counsel

Salem, Oregon
June 1964

I. ALASKA STATUTES

At present the Alaska statutes do not appear to provide for either dower or curtesy. According to a recent study (Alaska Legislative Council, Study on the Proposed Alaska Probate Code (1961)), statutes adopted in 1913 provided for both dower and curtesy, but in 1923 the wife was empowered to convey or sell any real property held by her without her husband joining in the conveyance, in which event such property was not subject to any curtesy right in the husband, and in 1935 the estate by curtesy was completely abolished. Statutory provisions for dower continued until 1963 (Alaska Stat. §§ 13.35.010-210 (1962)). The primary dower provision read as follows:

> "The widow of a deceased person is entitled to dower, or the use during her natural life of one-third part in value of all the lands whereof her husband died seized of an estate of inheritance." (Alaska Stat. § 13.35.010 (1962))

It may be of interest to note that the pre-1963 Alaska statutes on dower included a provision on the right of the widow to remain in the dwelling house of her husband and to sustenance (Alaska Stat. § 13.35.150 (1962)) identical to the provision by ORS 113.070 for Oregon.

The Alaska dower statutes (Alaska Stat. §§ 13.35.010-210 (1962)) were repealed by an Act of the 1963 Alaska legislature (Alaska Laws 1963, ch. 38), effective July 1, 1963, which included a new statutory provision on election against will reading as follows:

> "(a) If a testator or testatrix leaving a surviving wife or husband bequeaths or devises away from the surviving wife or husband more than two-thirds of his or her net estate, the surviving wife or husband, in his or her option and notwithstanding the will, may take and receive one-third of the net estate of the testator or testatrix. The right to receive one-third of the net estate may be waived in writing in a premarital or submarital agreement.

"(b) The surviving wife or husband must exercise the option by filing in the court in which the will is admitted to probate, within three months thereafter, his or her election, in writing, to take and receive one-third of the net estate unless election has been waived by a premarital or submarital agreement. Upon the filing of the election within that time, the will is inoperative as to that one-third of the net estate. The failure to make and file the election within the three-month period is conclusive evidence of consent to the provisions of the will by the surviving wife or husband.

"(c) If the surviving spouse is incompetent, the guardian of the spouse or, if there is no guardian, the court shall make the election for the spouse, which is considered more advantageous to the spouse and the election is considered as effectual as if made by a competent spouse.

"(d) The election set out in this section may be made and filed within three months from the admission to probate of any will admitted to probate before the effective date of this section. Failure to make and file the election within the period of three months is conclusive evidence of consent to the provisions of the will by the surviving wife or husband." (Alaska Stat. § 13.05.105 (Supp. 1963))

Prior to 1963 and at present, an Alaska statutory provision afforded and affords some protection to a wife or husband against inter vivos conveyance of the homestead by act of the other spouse only, by means of a requirement that both spouses join in the conveyance. This provision reads as follows:

"(a) A conveyance of land, or of an estate or interest in land, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, who is of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded as directed in this chapter, without any other act or ceremony whatever.

"(b) In a deed or conveyance of the family home or homestead by a married man or a married woman, the husband and wife shall join in the deed or conveyance.

"(c) The requirement that a spouse of a married person join in a deed or conveyance of the family home or homestead does not create a proprietary right, title or interest in the spouse not otherwise vested in the spouse.

"(d) Failure of the spouse to join in the deed or conveyance does not affect the validity of the deed or conveyance, unless the spouse appears on the title. The deed or conveyance is sufficient in law to convey the legal title to the premises described in it from the grantor to the grantee when the deed or conveyance is otherwise sufficient, and (1) no suit is filed in a court of record in the judicial district in which the land is located within one year from the date of recording of the deed or conveyance by the spouse who failed to join in the deed or conveyance to have the deed or conveyance set aside, altered, changed, or reformed, or (2) the spouse whose interest in the property is affected does

not file, within one year in the office of the recorder for the recording district where the property is situated, a notice of his interest in the property." (Alaska Stat. § 34.15.010 (1962))

In a decision involving the homestead conveyance provision of the statute set forth above, the United States District Court in Alaska indicated that the homestead interest embodied in the provision did not constitute a restriction on alienation and that only as it regarded a right of occupancy would it be treated as such; that the provision constituted a right to occupy the homestead during marriage regardless of title in a third party, but gave no right, title or interest by reason of occupancy; and that the right to occupy did not survive divorce. Spracher v. Spracher, 17 Alaska 698 (1958).

The nature of a "homestead" in Alaska is described in the statutory provision relating to exemption of the homestead from judicial sale. The pertinency, if any, of this description to the "family home or homestead" referred to in the homestead conveyance provision of the statute set forth above is not clear. The homestead exemption provision reads as follows:

"The homestead of any family is, or the proceeds of the homestead are exempt from judicial sale for the satisfaction of any liability contracted or judgment on debt except as provided in this section. The homestead consists of the actual abode of and owned by the family or some member of the family. It shall not exceed $8,000 in value, and not exceed 160 acres in extent if located outside a town or city laid off into blocks or lots, or not exceed one-fourth of one acre if located in a town or city. This section does not apply to decrees for the foreclosure of a mortgage or deed of trust properly executed. If the owners of a homestead are married, it shall be executed by husband and wife. When an officer levies upon a homestead, the owner or the wife, husband, agent, or attorney of the owner may notify the officer

that he claims the premises as his homestead, describing it by metes and bounds, lot or block, or legal subdivision. The officer shall notify the creditor of this claim, and, if the homestead exceeds the maximum in this section and he deems it of greater value than $8,000, then he may apply to the court for the appointment of three disinterested persons to appraise the homestead, commencing with the 20 acres of the lot upon which the dwelling is located, appraising each lot or 20 acres separately; and, if the homestead exceeds $8,000, then the officer shall proceed to sell all in excess of $8,000 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor if he chooses to direct; otherwise, he shall sell them so as to leave the homestead as compact as possible. The homestead is exempt from sale or legal process after the death of the person entitled to the homestead for the collection of a debt for which it could not have been sold during his lifetime." (Alaska Stat. § 09.35.090 (1962))

The Alaska statutory provisions similar to ORS 116.005 (possession of homestead, wearing apparel and furniture before inventory; provision for support) 116.010 (setting apart property exempt from execution) and 116.015 (further order for support), respectively, read as follows:

"Until administration of the estate has been granted and the inventory filed the widow and minor children of the deceased are entitled to remain in possession of the homestead, all the wearing apparel of the family, and household furniture of the deceased, and also to have a reasonable provision allowed for their support during

the period, to be allowed by the judge." (Alaska Stat. § 13.30.120 (1962))

"(a) After the filing of the inventory, if the deceased died leaving a widow or minor children, the judge, upon such notice as may be fixed by him, upon being satisfied that the funeral expenses, expenses of last illness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving widow or minor children property of the estate not exceeding the value of $8,000, exclusive of any mortgage or mechanic's, laborer's or other lien upon the property so set off, which property so set off shall include the home and household goods, if any, and all property of the deceased exempt from execution. The award shall be by an order or judgment of the judge and vest the absolute title, and there shall be no further administration upon the portion of the estate so set off and awarded, but the remainder of the estate, if any, shall be settled as other estates. The property thus set apart, if there is a widow, shall be decreed by the judgment, her property to be used and expended by her for the maintenance of herself and the minor children of the deceased, if any, or if there is no widow it shall be decreed the property of the minor child, or if there are more than one, of the minor children in such proportions as the judge considers proper, taking into consideration their age and the expense of maintenance, to be used and expended in the nurture, maintenance and

support of the child or children, until they become of legal age, by the guardian thereof, as the law may direct. The judgment, decree and award shall specifically describe the property set apart and is final, except in case of appeal or for fraud.

"(b) In probate proceedings commenced before April 30, 1961, the award allowed in (a) of this section is $4,000." (Alaska Stat. § 13.30.130 (1962))

"In addition to the award provided for in § 130 of this chapter, the judge may make further reasonable allowance out of the estate as may be necessary for the maintenance of the widow and minor children, according to their circumstances and condition in life, during the progress of the settlement of the estate, as he considers proper, and the allowance shall be paid by the executor or administrator in preference to all other charges except funeral charges, expenses of last illness, and expenses of administration." (Alaska Stat. § 13.30.140 (1962))

II. WISCONSIN PRELIMINARY DRAFT

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), a Probate Study Committee of the Wisconsin Bar Association commenced work on a revision of that state's probate law in January 1963. Among other matters, the Wisconsin committee has considered study memorandums and preliminary drafts of proposed legislation on family rights in decedents' estates (including dower and curtesy, election against will, family allowances during administration and related matters). These memorandums and drafts were prepared by Professor Richard W. Effland, University of Wisconsin Law School, who is serving as Research Reporter to the Wisconsin committee. Except for some change in form and style, the following is a copy of a preliminary draft of proposed legislation relating to family rights in decedents' estates, with explanation and comment by the draftsman, prepared for the Wisconsin committee by Professor Effland and dated February 10, 1964.]

CHAPTER ON RIGHTS OF FAMILY IN DECEDENT'S ESTATE

Sec. 12. Selection of exempt personal property by surviving spouse.

Sec. 13. Special allowance for support and education of minor children.

Sec. 14. Exemption of property to be assigned to surviving spouse.

General Memo on Rights of Family in Decedent's Estate:

This chapter is the result of our prior frustration in trying to work out a satisfactory solution to several related problems: (1) protection of the surviving spouse against inadequate and unfair testamentary provisions, in lieu of dower or curtesy rights, (2) allowances to the surviving spouse and family, and (3) a modern exemption from creditors in place of the present homestead statute. After carefully exploring a much more flexible approach of the kind suggested by text and Law Review writers, we have abandoned such an approach because it is (a) too drastic a departure from our well established institutions to have much chance of legislative enactment, (b) too complex to be acceptable to the Bar and the public without an extensive educational campaign, and (c) subject to possible wide variation in administration by the various county judges, despite the verbal standards set. The present chapter is designed to moderate the changes and narrow the scope of judicial discretion. * * *

The principal features of the new draft are:

(1) It abolishes inchoate dower, dower and curtesy and substitutes a fixed elective share for the surviving spouse.

(2) The surviving husband is given the same rights in his wife's estate as she has in his.

(3) The power to elect is cut down in two kinds of situations: the spouse cannot elect if the decedent makes adequate provision under the will or by nonprobate assets (life insurance, joint tenancy, living trust, etc.) for the surviving spouse; and the court has discretion to reduce or cut out the elective share where the husband and wife have separated.

(4) The surviving spouse is entitled to a share in nonprobate assets only under very restricted conditions, with the burden of proving that the transfers were made for the purpose of defeating the spouse's rights. This reverses our original proposals which would have automatically given the spouse a share in certain kinds of transfers which are really testamentary in essence (life insurance, joint tenancy, etc.).

(5) The allowances have been liberalized but with some attempt to limit them when creditors will be unduly prejudiced, at least to the extent of requiring the court to balance the needs of the family against the rights of creditors.

(6) A $10,000 exemption from creditors, regardless of the kind of property, has been substituted for the cumbersome and fixed homestead exemption. Again the court has discretion to consider the fairness of the need for such an exemption in order to protect the family, where other assets pass to the family free of creditors and outside of probate (again the life insurance, joint tenancy, etc.).

This package represents a compromise (as indeed must any solution in this field where there are so many conflicting interests -- the decedent's wishes, the rights of creditors, and the interest of the family). It introduces some flexibility, primarily to take account of the growing problem of interrelation of probate and nonprobate assets, yet retains fixed standards (a flat one-third elective share, maximum dollar limits on allowances and exemptions).

You may find instructive the bill which the Temporary Commission on the Law of Estates has just introduced in the New York Legislature. It is not unlike the proposal which we considered earlier and discarded. It treats certain kinds of nonprobate transfers as "testamentary provisions . . . insofar as the surviving spouse is concerned": gifts causa mortis, Totten trusts, half of joint bank accounts, all joint tenancies, and living trusts over which decedent retained the power to revoke or a power to invade principal. This feature automatically gives the spouse a share in such nonprobate assets if election is made against the will and at the same time considers such assets in determining whether the spouse is entitled to elect. Several other features of the proposed N.Y. law are worth considering. The surviving spouse gets one-third if there are issue, but one-half where there is no surviving descendant, as elective share. If the surviving spouse is given the income under a trust of more than the elective share, he or she can withdraw $10,000 but the balance of the will stands and there is no election. In every other case the elective share is reduced by the value of any testamentary provision in favor of the spouse; in other words, the surviving spouse can only elect the difference between the testamentary provisions and the elective share. The bill also provides for a waiver or release during lifetime of the decedent; our present draft allows the elective right to be barred by a contract, although our prior drafts permitted a simple release.

This chapter cannot be understood except in the total probate situation. Allowances and exemptions affect both creditors and the normal testate or intestate plan. In the case of the intestate estate, the allowances affect intestate distribution: (a) by increasing the share of the surviving spouse (sec. 12) and (b) by increasing the share of the minor children over children who have reached majority and to some extent placing minor children ahead of the surviving spouse (sec. 13) since such an allowance comes ahead of the normal plan for distribution. In the case of an estate disposed of by will, the allowances alter the testator's plan, since the allowances come out of the residue; and if the surviving

spouse elects against the will, the elective share (sec. 3) is actually supplemented by allowances under secs. 11 and 12. Where the estate is insolvent, or almost so, assignment of property to the surviving spouse ahead of creditors (sec. 14) displaces both the will and the elective share and may thus give the spouse a greater share in that limited situation; but in most intestate situations, since the spouse would receive the first $25,000 anyway, this section does not alter the intestate distribution (although it would in the less common case where there are issue by a prior marriage -- but remember that if any of those issue is a minor, he can be protected under sec. 13 which has priority over this section). Actually there is nothing new or startling about these principles, which are inherent in our present sec. 313.15 and the homestead laws.

My prediction is that the present proposal will reduce both the actual number and the threat of elections against wills. Most elections today are in order to take a share outright although the will amply provides for the widow by a trust, or to take a share of the probate estate where the widow has been amply provided for by insurance, joint tenancy or a living trust. Such cases are eliminated under sec. 4(2) of the proposed chapter. My guess is that this will eliminate 95% of the election cases so far as the widow is concerned. However, it is not so clear what impact will result from conferring an election right on the widower, a right he does not have at present. We can only speculate on the incidence of this right: (1) wives outlive their husbands in the majority of cases; (2) husbands have less need and are perhaps less inclined to assert rights where the wife has disposed of her independent estate (perhaps due to that intangible "male pride"); (3) there may be tax reasons for the husband to elect in a few situations (to get the immediate benefit of the marital deduction even though the husband's estate is thereby increased), but in most cases of moderate and large estates the husband will be deterred by the tax structure from electing; (4) this leaves a few situations where the husband has little separate property and will elect because he needs to. I think we must rely on the contract as a means of barring election in the remarriage situation, and the Bar should be encouraged to educate the public on the need for contracts in such cases.

Sec. 1. Definitions. (1) "Probate estate" means all property passing under the will and under the law of intestate succession.

(2) "Net probate estate" means the probate estate after deducting allowances, expenses of administration, and debts and claims but before payment of taxes.

(3) "Property in joint names" means all property held or owned under any form of ownership with right of survivorship, including conventional joint tenancy, cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, United States government bonds either in co-ownership form or payable on death to a designated person, shares in credit unions or building and loan associations payable on death to a designated person or in joint form, etc.
[Balance to be drafted.]

Sec. 2. Dower and curtesy replaced by elective share. Dower, including inchoate dower, and curtesy are abolished. In lieu thereof the surviving spouse has the right to elect a share as provided in this chapter.

Sec. 3. Right to elective share. If decedent dies testate, the surviving spouse has a right to elect to take the share provided in this section rather than any provision made for such spouse by decedent's will. An election to take under this section forfeits all right to take under the will and under the law of intestate succession. The elective share consists of property equal to one-third of the net probate estate. The right to elect may be barred under sec. 4 or may be denied or the share reduced under sec. 5.

Note to Committee on Sec. 3:

Assuming we agree on the general shape of this chapter, one problem to be decided is whether the surviving spouse forfeits any power of appointment created by the will, if the

spouse elects against the will. The present law is that the spouse retains such powers unless the will provides otherwise (a fairly common practice). Certainly the spouse should forfeit any general power of appointment, which is tantamount to ownership. Special powers (as to appoint among issue) are analogous to trusts, yet often have beneficial aspects. I merely want to point out a problem which eventually must be covered by this section, or perhaps by a new section dealing with impact of election on the estate.

Sec. 4. How elective share barred. (1) By written agreement. The surviving spouse may be barred by the terms of a written agreement signed by the surviving spouse whereby he or she has agreed to give up all rights in the decedent's estate, or to accept the terms of the decedent's will, or to accept any other provision outside the will in lieu of rights in the estate. Such an agreement may be entered into before or after marriage.

(2) By adequate provision for the surviving spouse. The surviving spouse is barred from electing to take under this chapter if adequate provision has been made for such spouse by the decedent. Any of the following provisions are deemed adequate:

(a) If the surviving spouse has received from decedent property adequate for his or her support and comfort, including property passing under the will or by intestate succession, transfers during lifetime (outright or in trust), property in the joint names of both spouses to the extent to which decedent furnished the consideration, and the proceeds of life insurance for which decedent paid the premiums.

(b) If the surviving spouse receives at least one-half of the total of all property passing under will or by intestate

succession, the proceeds of life insurance for which decedent paid the premiums, all gratuitous transfers within two years of death, and property in the joint names of the decedent and one or more persons to the extent to which decedent furnished the consideration. For this purpose, the surviving spouse is deemed to "receive" any property as to which he or she is given the income and there is a power, either in the spouse or in a trustee, to invade or consume the corpus or principal of the property for the support and comfort of the spouse, or a general power of appointment.

Sec. 5. Denial of election or reduction of share when decedent and surviving spouse are living apart. In any case where the decedent and the surviving spouse were living apart at the time of the decedent's death, whether or not there has been a judgment for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the share of the spouse to such amount as the court deems reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: Length and cause of separation, length of the marriage, whether the marriage was a first or second marriage for either or both of the parties, the contribution of the surviving spouse to the decedent's property either in the form of services or transfers of property, and any other relevant circumstances.

Sec. 6. Action to recover elective share in nonprobate property transferred in fraud of surviving spouse. (1) If the surviving spouse elects to take the share provided under sec. 3, such spouse may also maintain an action to recover a one-third share of any of the following items if the court finds that the decedent transferred the property or furnished the consideration for such property primarily for the purpose of defeating the rights of the surviving spouse under this chapter:

(a) Property acquired by gift from decedent, or traceable to such a gift, if the gift was made within two years of decedent's death in contemplation of death;

(b) Proceeds of life insurance under policies owned by decedent at the time of his death and payable either to a named beneficiary or a trustee;

(c) Property acquired as a result of the death of decedent by survivorship or beneficiary designation to the extent that the decedent furnished the consideration for such property;

(d) Property transferred by decedent during lifetime in trust over which decedent had at the time of his death a power, exercisable alone or in conjunction with any other person, to alter, amend or revoke.

The spouse must bring suit directly against the holder of the property or insurance proceeds to recover under this section. Until served with notice of such suit, an insurer, trustee or other person has no liability to the surviving spouse and nothing in this section affects the power or duty of such a

third party to make payment, or to transfer good title to property, in accordance with normal rules of law.

(2) Such action must be commenced within one year of decedent's death.

Note to Committee on Sec. 6:

Obviously this section is one on which there may be doubts and questions. Is such a provision necessary at all? If we had sufficient funds, we ought to do some studies to determine how frequently, if ever, the surviving spouse is unfairly cut off. Remember that many of the present elections would be barred under the new proposed provisions: (1) the widow can no longer elect merely to get her share outright, since she would be barred under sec. 4(2) (b) in almost all instances I can think of; (2) where the widow is deliberately cut off, it is usually because of a marital fight; in some of these cases the husband is justified and the widow would probably be barred under sec. 5 from any election. Further, sec. 5 of the Wills chapter takes care of the outmoded will executed prior to marriage with no provision for the surviving spouse. This leaves only the extreme case: the person who deliberately transfers the bulk of his estate during life out of cussedness, but who cannot be found to lack capacity. I think we have to leave the back door open for such a case by a section like this. We can hedge this right substantially if you wish by setting forth a heavy burden of proof and by requiring the surviving spouse to get permission from the probate court before bringing separate actions to recover such nonprobate assets. It is significant that New York may be moving toward a far more drastic approach, treating will substitutes such as joint tenancy and revocable trusts as "testamentary" for purposes of the widow's election.

Some worry has been expressed that this kind of provision may drive trust business out of the state. I think this is unrealistic. If I am correct, a suit like this would lie under our present law and there has been no great exodus of trust business. Second, there is no reason to adopt a law permitting particular conduct which we condemn, merely because business may go elsewhere (gambling is an example). Third, if this is a real problem, I believe we can draft a constitutional statute, which other states might have to recognize under full faith and credit, to reach trusts set up by Wisconsin residents in other states to avoid Wisconsin laws.

There remain numerous procedural problems. Must the surviving spouse bring separate actions for each nonprobate asset and in what court? Can the probate court be given jurisdiction or at least some control over such actions? Would there be any advantage to having the personal representative bring the action rather than the surviving spouse?

As presently drafted this chapter contains an obvious loophole for the person who wishes to defraud the surviving spouse. He or she can make nonprobate transfers and die intestate as to the small remaining balance; since nothing in this chapter provides for election against the intestacy laws, there would have to be a special provision for this kind of case. If we can agree on the basic theory of this section, I shall of course "button-up" this loophole.

Sec. 7. Partial intestacy; right of surviving spouse to share in intestate property. (1) In case of partial intestacy, an election to take under the will does not affect the right of the surviving spouse to take property not disposed of by the will, under the law of intestate succession as provided in sec. [2 of the Intestate Succession chapter], unless decedent's will clearly provides otherwise.

(2) An election to take under sec. 3 gives the surviving spouse only the share provided by that section, and such spouse has no additional rights in intestate property.

Note to Committee on Sec. 7:

Subsection (1) is a reversal of the Wisconsin rule of Chapman v. Chapman, 128 Wis. 413, 107 N.W. 668 (1906) but accords with Model Probate Code § 40. Most cases of partial intestacy are caused by oversight on the part of the will draftsman, such as inadvertent failure to dispose of all fractional shares of the residue (Will of Uihlein, 264 Wis. 362, 59 N.W. 2d 641 (1952)) or lapse. Usually a gift under the will to the surviving spouse does not manifest an intent to cut out the spouse from any intestate share. The Chapman decision was based on the language of present 233.13 and not on any policy reasoning. Most states follow the rule as proposed in sub. (1). The only doubt I have is whether the spouse in such a case should take the first $25,000 of the intestate property in such a case, or only a fractional share, if there are issue. As presently drafted, sec. 2(2) of the Intestate Succession chapter would reduce the first $25,000 of intestate property by the amount of the gifts to the spouse under the will.

Subsection (2) retains the present rule of Will of Uihlein, cited above. The spouse has by electing against the

will already received a share in the intestate property, since sec. 3 gives the spouse a one-third share of the entire probate estate (defined to include intestate property); hence any intestate property should be used to make up the share of those affected by the election. See also sec. 10.

Sec. 8. Procedure for electing.

[To be drafted.]

Note to Committee on Sec. 8:

This section will displace present 233.14. I have no firm convictions about procedure, with one exception discussed hereafter, although any procedure ought to be simple and clear. I think the right to elect should be personal to the surviving spouse (but exercisable by a guardian if the spouse is incompetent). Death of the spouse ought to end the right to elect, since the provisions for election are intended to provide for continuing support of the spouse. While such a proposal may result in some loss of tax benefits under the marital deduction, I see no reason why we should shape our general law to confer a tax benefit on a fraction of the estates, a principle we have previously agreed upon.

Do we put the burden on the surviving spouse of initiating an election? Or should the court require an affirmative election for or against the will? As you know, our present statute adopts the first approach; the widow is deemed to take under the will unless she files an election against the will within one year, or in certain cases an extended period. Further, the personal representative has no duty to inform the widow that she has a right to elect. Ludington v. Patton, 111 Wis. 208, 86 N.W. 571 (1901). Some county courts have adopted the practice of notifying her of such a right, and this practice might be codified in the statute. In some other states the surviving spouse must file an election one way or the other before he or she is deemed to have elected. Our present rule has the advantage of encouraging distribution in accordance with the will, and there has not been any great dissatisfaction with the rule so far as I know. There may be some cases where the widow loses her rights by default because of ignorance. The rule requiring an affirmative election creates problems for the rare case where a widow or widower is missing, although possibly this could be settled under sec. 5 on the grounds that the surviving spouse has abandoned the decedent and should be barred completely.

In our preliminary drafts of a flexible statute to protect the surviving spouse against unfair death transfers (7/18/63 and 8/2/63) subsection (5) set a six months period for filing of a petition. This reflected the sentiment that a

shorter period than the present one year would facilitate settlement of estates, but the problems were also more complicated under the earlier proposals than under the present draft where the spouse gets a fractional share.

Sec. 9. Power of sale in will not affected by elective right. Whenever an executor or trustee is given a power of sale by a will, the right of the surviving spouse to elect against the will does not prevent the exercise of the power as to any property in the estate. Title to property sold under such a power or under order of the court shall be free and clear of any elective share.

Sec. 10. What property assigned out of probate estate as elective share. The elective share is to be assigned by the court in cash or property or both in such manner as will least disrupt the testator's plan for disposition of his estate, subject to the following guiding rules:

(a) Intestate property shall be assigned first;

(b) Upon request of the surviving spouse, the home may be assigned as part of the share;

(c) Property given to the spouse outright by the terms of the will shall be assigned next if needed to make up the share;

(d) Unless the will directs otherwise, each beneficiary under the will must contribute proportionately to the share; and

(e) Any interests given to the surviving spouse under the terms of the will, which are forfeited by election to

take against the will and not assigned under (c), are to be marshalled by the court for the benefit of beneficiaries forced to contribute to the elective share.

Sec. 11. Allowances to family during administration of the estate. The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate. The allowance hereunder shall have priority over debts, funeral expenses, expenses of last illness and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

Sec. 12. Selection of exempt personal property by surviving spouse. The following items of personal property shall be turned over to the surviving spouse upon filing of a special inventory of such items: decedent's wearing apparel, jewelry, household furniture, furnishings and paintings, all not to exceed a total of $3,000 in value; and other personal property selected by the spouse not to exceed $2,000 in value. This section does not apply to any items which decedent has specifically bequeathed to other persons, but otherwise applies

whether the estate is testate or intestate. These items are not subject to further administration nor to payment of debts or expenses.

Sec. 13. Special allowance for support and education of minor children. (1) If decedent is survived by a minor child or children, the court may in its discretion order an allowance for the support and education of each such minor child until he reaches a specified age, not to exceed 21. This allowance is made in recognition of the continuing obligation of a decedent to provide out of his estate for the support and education of his minor children and may be made whether the estate is testate or intestate; but no allowance may be made if the decedent has amply provided for such child by the terms of his will and if the estate is sufficient to carry out such terms after payment of all debts and expenses, or if such support and education have been provided for by any other means, or if the surviving spouse is legally responsible for such support and education and has ample means to provide such support and education in addition to his or her own support. The amount set by the court for such an allowance shall not exceed $10,000 for each minor child. In its discretion the court may, in addition to or as part of such allowance, in any case where the decedent is not survived by a spouse allot directly to the minor child or children the household furniture and furnishings.

(2) The court may set aside property to provide such allowance and may appoint a trustee to administer the property,

subject to the continuing jurisdiction of the court. If at any time the property held by such trustee is no longer required for the support and education of the minor child, or when the child dies or reaches 21, any remaining property is to be distributed by the trustee as directed by the court.

(3) All allowances under this section and the allotment of household furniture and furnishings under sub. (1) take priority over claims of creditors except expenses of administration, reasonable funeral expenses and necessary expenses of last illness; but the court must take into account the effect of an order under this section on claims of creditors and balance the needs of the minor child against the nature of the creditors' claims in setting the amount allowed hereunder.

Note to Committee on Sec. 13:

This section retains the basic principle of 313.15(3) that the decedent has an obligation for support and education of his minor children that extends after death. Normally this accords with the decedent's intent, of course. While it may seemingly result in a greater share going to minor children than adult children, it should be remembered that the decedent has already discharged his obligation to the adult children, and the allowance under this section merely equalizes the shares in the same manner as the law of advancements does with regard to inter vivos gifts of property. The proposed draft would impose a limit on the allowance for any one child ($10,000) and also provide machinery for recovery of any part of the allowance not actually needed for support and education. Those features are lacking in the present statute.

Should this section include an allowance for adult children who are in fact dependent on the decedent? This would be particularly important in the intestate situation. Normally the decedent who has executed a will or other estate planning documents has provided specially for an incompetent or incapacitated adult child, but the intestate law has no such provision.

Sec. 14 (Alternative 1). Exemption of property to be assigned to surviving spouse. After the allowances under sections 11-13 have been made and the amount of claims against the estate has been ascertained, the court may enter an order assigning to the surviving spouse, after payment of necessary expenses of administration, reasonable funeral expenses and necessary expenses of last illness but prior to payment of all other debts, an amount of property reasonably necessary for the support of such spouse but not to exceed $10,000, if it appears that the assets are insufficient to pay all the debts and still leave the surviving spouse such an amount of property. In determining the necessity of an assignment under this section and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and other assets for support of such spouse, including the value of property passing to the spouse on death of the decedent by reason of survivorship, life insurance payable to the spouse, annuities and pensions payable to the spouse by reason of the death of decedent (including social security and veteran's benefits), and any gifts made to the spouse in contemplation of death. If the decedent's estate includes a home the court may upon petition of the spouse include as part or all of the amount of property assigned to the spouse hereunder either a fee or a life interest in the home. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign such an interest to the spouse upon payment to the

estate of the excess of the value of such interest over the amount set by the court hereunder.

Sec. 14 (Alternative 2). Exemption of property to be assigned to surviving spouse. (1) After the allowances under sections 11-13 have been made and the amount of claims against the estate has been ascertained, the surviving spouse may petition the court to set aside for such spouse property not to exceed $10,000 in value as exempt from the claims of creditors, but after payment of necessary expenses of last illness, reasonable funeral expenses and the expenses of administration.

(2) The court shall grant such petition if it determines that such an assignment ahead of creditors is reasonably necessary for the support of such spouse. In determining the necessity and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and other assets available for support of such spouse, including the value of property passing to the spouse on death of the decedent by reason of survivorship, life insurance payable to the spouse, annuities and pensions payable to the spouse by reason of the death of decedent (including social security and veteran's benefits), and any gifts made to the spouse in contemplation of death.

(3) An assignment of property hereunder shall be deemed in lieu of any right of the surviving spouse to take under the will, under the intestate succession law, or under the elective share provided by sec. 3 of this chapter, except that if after payment of all debts, claims and expenses, sufficient

assets remain in the hands of the personal representative so that the surviving spouse would receive a greater amount of property had no assignment been made hereunder, then the remaining property shall be distributed accordingly.

(4) If the decedent's estate includes an interest in a home, the court may upon request of the spouse include as part or all of the property assigned to the spouse hereunder either a fee or a life interest in the home, to the extent of the decedent's interest therein. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign such an interest to the spouse upon payment to the personal representative of the excess of the value of such interest over the amount set by the court hereunder; for this purpose the court may require a new appraisal or use the value as appraised in the estate under sec. 312.01.

III. MISSOURI STATUTES

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), in 1955 the Missouri legislature enacted a new probate code for that state, which was drafted under the supervision of a joint legislative committee and with the assistance of an advisory committee consisting of probate judges and lawyers. The following are selected provisions of the Missouri probate code relating to family rights in decedents' estates, taken from the Revised Statutes of Missouri as compiled in Vernon's Annotated Missouri Statutes through 1963.]

474.110. Curtesy and dower abolished. The estates of curtesy and dower are hereby abolished, but any such estate now vested is not affected by this code.

[Note: This section is patterned after section 31 of the Model Probate Code. Curtesy was abolished in Missouri in 1921. Dower was abolished by this section, effective January 1, 1956.]

474.120. Inheritance and statutory rights deemed waived, when. The rights of inheritance or any other statutory rights of a surviving spouse of a decedent who dies intestate shall be deemed to have been waived if prior to, or after, the marriage such intended spouse or spouse by a written contract did agree to waive such rights, after full disclosure of the nature and extent thereof, including the nature and extent of all property interests of the parties, and if the thing or promise given to the waiving party is a fair consideration under all the circumstances.

474.130. Estate conveyed determines on failure of contractual bar. When any deed, conveyance, assurance, agreement or contract in lieu of the inheritance or other statutory rights

of a spouse, through any default, fails to be a legal bar to such rights and the surviving spouse demands his inheritance and statutory rights, then the estate and interest so conveyed to the surviving spouse ceases and determines.

474.140. Inheritance and statutory rights barred on misconduct of spouse. If any married person voluntarily leaves his spouse and goes away and continues with an adulterer or abandons his spouse without reasonable cause and continues to live separate and apart from his spouse for one whole year next preceding his death, or dwells with another in a state of adultery continuously, or if any wife after being ravished consents to her ravisher, such spouse is forever barred from his inheritance rights, homestead allowance, exempt property or any statutory allowances from the estate of his spouse unless such spouse is voluntarily reconciled to him and resumes cohabitation with him.

474.150. Gifts in fraud of marital rights--presumptions on conveyances. 1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

2. Any conveyance of real estate made by a married person at any time without the joinder or other written express

assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.

3. Any conveyance of the property of the spouse of an incompetent person is deemed not to be in fraud of the marital rights of the incompetent if the probate court authorized the guardian of the incompetent to join in or assent to the conveyance after finding that it is not made in fraud of the marital rights. Any conveyance of the property of a minor or incompetent made by a guardian pursuant to an order of court is deemed not to be in fraud of the marital rights of the spouse of the ward.

[Note: Subsection 1 of this section is patterned after section 33(a) of the Model Probate Code.]

474.160. Election by surviving spouse to take against will, effect. 1. When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated.

(1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and the allowance under section 474.260 one-half of the estate, subject to the payment of claims, if there are no lineal descendants of the testator; or, if there are lineal descendants of the testator, the surviving spouse shall receive one-third of the estate subject to the payment of claims;

(2) When a surviving spouse elects to take against the

will he shall be deemed to take by descent, as a modified share, such part of the estate as comes to him under the provisions of this section, and shall take nothing under the will.

(3) Whenever there is an effective election to take against a will which provides for benefits to accrue upon the death of the surviving spouse, the election has the same effect as to the benefits as if the surviving spouse had predeceased the testator, unless the will otherwise provides.

2. The rights of the surviving spouse under this section are not given in lieu of the homestead allowance under section 474.290, but any homestead allowance made to the surviving spouse shall be offset against the share taken under this section.

[Note: The first sentence and subdivision (2), subsection 1 of this section are patterned after parts of section 32 of the Model Probate Code.]

474.170. Notice of right to elect. The clerk of the court, after the will of a married person is admitted to probate, shall, within one month thereafter, mail by ordinary mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him that a written election must be filed by or on behalf of the surviving spouse in order to take against the will, within ten days after the expiration of the time limited for contesting the will of the decedent, unless the time is extended pursuant to law. Failure of the clerk to mail or of any surviving spouse to receive the notice herein required does not affect

the time for making an election as prescribed by section 474.180. If the court is informed that a surviving spouse had been adjudicated incompetent or of unsound mind but has no guardian the notice need not be given but the court may appoint a guardian to make the election.

[Note: The first sentence of this section is similar to section 34 of the Model Probate Code.]

474.180. Time for making of election. The election by a surviving spouse to take the share herein provided may be made at any time within ten days after the expiration of the time limited for contesting the will of decedent, except that if, at the expiration of the period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the decedent, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of the surviving spouse to make an election shall not be barred until the expiration of ninety days after the final determination of the litigation.

[Note: This section is similar to section 35 of the Model Probate Code.]

474.190. Form of election, filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A. B., surviving wife (or husband) of C. D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C. D., and do hereby renounce all provisions in the will of the said C. D. inconsistent herewith.

(Acknowledgment) Signed, (Signature)

[Note: This section is the same as section 36 of the Model Probate Code.]

474.200. Right of election personal to surviving spouse. The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised after his death; but if the surviving spouse is incompetent or a minor, his guardian may elect for him with the approval of the court or, on application of an interested person, the court may order his guardian to elect for him.

[Note: This section is patterned after section 37 of the Model Probate Code.]

474.210. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 474.160 once made is binding and is not subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

[Note: This section is the same as section 38 of the Model Probate Code.]

474.220. Waiver of right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or

waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of the right, if the thing or the promise given to the waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

[Note: This section is the same as section 39 of the Model Probate Code.]

474.230. Effect of failure to elect to take against will. When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 474.010 to 474.030, in any estate undisposed of by the will. By taking under the will or consenting thereto, he does not thereby waive his right to a homestead allowance, to exempt property or to an allowance under section 474.260 unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights or any of them.

[Note: This section is patterned after section 40 of the Model Probate Code.]

474.250. Exempt property of surviving spouse or minor children. The surviving spouse, or unmarried minor children of a decedent are entitled absolutely to the following property of the estate without regard to its value: The family bible and other books, all wearing apparel of the family, all household electrical appliances, all household musical and other amusement instruments and all household and kitchen furniture,

appliances, utensils and implements. Such property shall belong to the surviving spouse, if any, otherwise to the unmarried minor children in equal shares.

474.260. Family allowance of spouse and minor children. In addition to the right to homestead allowance and exempt property the surviving spouse and unmarried minor children of a decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of one year after the death of the spouse, according to their previous standard of living, taking into account the condition of the estate of the deceased spouse. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be made payable to the surviving spouse, if living, for the use of the surviving spouse and the unmarried minor children, unless the court finds that it would be just and equitable to make a division thereof, otherwise to the guardians or other persons having the care and custody of any unmarried minor children. The court may authorize the surviving spouse to receive any personal property of the estate in lieu of all or part of the money allowance authorized by this section, and in any case where the court makes such allowance in money, the surviving spouse shall be entitled to select and receive any personal property of the estate, of a value not exceeding such allowance in money, which shall be in lieu of and which value shall be credited against the allowance. The right of selection provided for herein is subject to the provisions of section 473.620, RSMo. The allowance

herein authorized is exempt from all claims.

[Note: Parts of this section are patterned after section 44 of the Model Probate Code.]

474.270. Exempt property applied for, when. The surviving spouse or other custodian of unmarried minor children shall apply for the property named in section 474.250 before the same is distributed or sold, but the property so delivered shall in no case be liable for the payment of the claims against the estate.

474.280. Proceeds of sale of exempt property paid over, when. If the surviving spouse or unmarried minor children do not receive the property allowed him or them under section 474.250 and the same is sold by the executor or administrator, the court shall order the money to be paid to the surviving spouse or unmarried minor children at any time before the same is paid out for claims or distributed.

474.290. Homestead allowance--partition of real estate selected, procedure--waiver. 1. At any time after the return of the inventory, the court, on application of the surviving spouse or of the guardian or person having custody of the persons of the unmarried minor children of a decedent, shall make an allowance to the surviving spouse or unmarried minor children of an amount not exceeding fifty per cent of the value of the estate, exclusive of exempt property, and the allowance made under section 474.260, but in no case shall the allowance exceed seven thousand five hundred dollars. Such allowance shall be known as a homestead allowance and is in

addition to the exempt property and the allowance to the surviving spouse and unmarried minor children under section 474.260. The homestead allowance is exempt from all claims against the estate. The homestead allowance shall be offset against the share to which the surviving spouse or any minor child who receives it is entitled as a distributee of the estate, but the allowance shall not be diminished if it is greater than the distributive share. The allowance may consist, in whole or in part, of money or property, real or personal, and subject to the provisions of section 473.620, RSMo, property may be selected as hereinafter provided. The homestead allowance is the property of the surviving spouse, if any; otherwise it is the property of the unmarried minor children in equal shares. When a decedent is survived by married minor children or children of full age, or both, and also by unmarried minor children but no spouse, the homestead allowance as determined under the foregoing provisions of this section shall be divided by the total number of all of the children of the decedent and the shares of the unmarried children as so determined shall, notwithstanding the foregoing provisions, constitute the homestead allowance. The selection of property shall be made by the surviving spouse, if any, otherwise by the guardian of each unmarried minor child for such child, or by a person designated by the court, but no real estate may be selected or included in any homestead allowance unless selection of the specific real estate is requested in the application filed within the time provided by subsection 2 [7?].

2. If real estate is included in the homestead allowance, the executor or administrator shall convey the same as determined by this section by deed to the person entitled thereto.

3. If a surviving spouse selects, as a homestead allowance, an interest in property having a value in excess of the homestead allowance, the court shall order the executor or administrator to convey the property to the surviving spouse upon the payment to the estate by such spouse of an amount of money equal to the difference between the value of the property and the homestead allowance or it shall order the executor or administrator to convey an undivided interest in the property to the surviving spouse which is equivalent to the ratio which the homestead allowance bears to the value of the property, at the option of the spouse.

4. If the court finds that real estate selected by the surviving spouse is a part of a larger tract and that the real estate selected may be separated from the residue of the larger tract without great prejudice to the owners, the probate court may proceed to set off to the surviving spouse the real estate constituting the homestead allowance in the same manner as is provided for the circuit court by sections 528.200 to 528.240, RSMo, for the partition of real estate, and this portion so set off shall be conveyed by the executor or administrator, by deed, to the surviving spouse.

5. In all proceedings under this section the court may order such appraisals of the property selected as it deems necessary and it shall determine the value of the property after

due notice to all interested parties in manner as ordered by the court under section 472.100, RSMo, and hearing pursuant thereto.

6. If within five days after the court's determination of the value of the property any interested party files written exception thereto and avers therein that the amount so determined is excessive or inadequate and if the court finds that a sale of the property would be in the best interests of the estate, then the court, in lieu of the procedures provided in subsections 1 and 2, may order a public sale of such property in the manner provided by sections 473.507 and 473.510, RSMo. Upon such sale, if the surviving spouse be the high bidder, the amount of the homestead allowance shall be credited against the purchase price. Within ten days after such sale a report thereof shall be filed and upon approval thereof by the court, the executor or administrator shall execute, acknowledge and deliver a conveyance to the purchaser according to the order of approval which in form and substance shall be the same as that provided for in subsection 2 of section 473.520, RSMo, omitting any reference to certificate of appraisement.

7. If no application for setting apart and allowance herein authorized is filed within ten days after expiration of the time allowed for filing of claims, the homestead allowance is deemed waived by the surviving spouse or the unmarried minor children and the spouse or the unmarried minor children have no right to homestead or homestead allowance under any law of this state.

8. The allowance made under this section is in lieu of all dower and homestead rights in the property of a decedent. After January 1, 1956, no right of homestead under sections 513.495 and 513.500, RSMo, vests in the surviving spouse or minor children of any decedent, but neither this section nor the repeal of sections 513.495 and 513.500, RSMo, affects homestead rights heretofore vested in any surviving spouse or minor children.

474.300. Effect of death of spouse or child or marriage of minor on family and homestead allowances. When a surviving spouse dies, or if an unmarried minor child dies, marries or comes of age, no allowance shall be made under section 474.260 for his maintenance for any period after such death, marriage or coming of age. When a surviving spouse dies without having received the homestead allowance, it may be paid (if it has been allowed but not paid) or may be allowed (if not already deemed waived) to the unmarried minor children. If an unmarried minor child entitled to homestead allowance, dies, marries or comes of age before his homestead allowance has been made, and within the time for applying for it, he shall not be entitled to such allowance, but if he dies, marries or comes of age after it has been allowed but before it was paid, he shall be entitled to it.

IV. MODEL PROBATE CODE

[Note: As pointed out in Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), the Model Probate Code was prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association by the Division's Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan Law School. The code, with comments on the provisions thereof and monographs on problems in probate law prepared by two of the principal draftsmen of the code, were published in 1946 (Simes, Problems in Probate Law (1946)). The following are selected provisions of the code relating to family rights in decedents' estates, with the comments, or parts thereof, which appear under those provisions.]

§ 31. Dower and curtesy abolished. The estates of dower and curtesy are hereby abolished.

Comment. Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse. For this reason, this section, which is in accordance with modern statutory trends, abolishes dower and curtesy. * * *

The substitutes for dower and curtesy provided in the Model Code are § 22(a), the share of the surviving spouse in case of intestacy, and §32, the spouse's share in case of election against the will. While these shares are ordinarily much more liberal than dower in case of a solvent estate, they are both subject to the decedent's debts.

To the effect that a statute which extinguishes existing inchoate dower interests is not unconstitutional on that ground, see cases collected in 20 A.L.R. 1330. It should be noted that accrued rights are excepted by § 2(b) hereof. Hence, to the extent that existing dower or curtesy interests are deemed accrued rights, they are excepted from the operation of this Code.

§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving

husband or wife solely under the limitations and conditions hereinafter stated.

(a) Extent of election. The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [$5,000], one-half the estate that would have passed to him had the testator died intestate.

(b) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.

Comment. The general plan of subsection (a) follows the provisions for a widow's election against the will as to personal property as provided in Mich. Stat. Ann. § 27.3178 (139). Doubtless, a statute of this type can be regarded as caring for the needs of a surviving spouse in that the percentage of the estate given by it is greater in small estates. In a sense it may be said to provide a kind of allowance, subject, however, to the rights of creditors.

* * *

Subsection (b) is inserted to eliminate a prolific source of litigation. Much difficulty has arisen under some election statutes in determining whether the share which the surviving spouse takes against the will is taken as heir or in some other capacity. This problem has arisen in connection with the construction of devises "to heirs" and in statutes in which the word "heirs" is used with reference to inheritance taxes and many other matters. This subsection specifically states that the surviving spouse takes by descent.

* * *

In view of the fact that there is no single accepted theory on which statutory provisions for the election of a surviving spouse are based and that a satisfactory statute could be drawn based on entirely different theories from those involved in the above section, it seems desirable to present,

as an alternative, the following provisions, which can be substituted for § 32 hereof:

"§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

"(a) Net estate not over [$20,000]. If the value of the net estate does not exceed [$20,000] and the value of all legacies and devises given absolutely to the surviving spouse plus the value of any portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share is less than half the value of the net estate, then the surviving spouse may elect to receive that amount which, when added to the value of such items, will equal one-half the value of the net estate. In so electing, the surviving spouse is deemed to renounce any legacies and devises not given absolutely.

"(b) Net estate over [$20,000]. If the value of the net estate exceeds [$20,000], the surviving spouse may act under the provisions of one or the other, but not both, of the following subdivisions:

"(1) Election to receive one-half with life income from a trust credited at value of principal. If the value of the net estate exceeds [$20,000] and if the total value of the legacies and devises given to the surviving spouse, when valued in the manner hereinafter stated, plus the portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share, is less than half the value of the net estate, then the surviving spouse may elect to receive, in addition to all legacies and devises given to him by the will and the intestate share in any portion of the net estate undisposed of by the will, the difference between the value of such items and the value of half the net estate. When, by the terms of the will, property of the net estate is left in trust with the income to be paid to the surviving spouse for life, the value of such gift, for purposes of determining the amount the surviving spouse is entitled to receive under the will, shall be the value of the principal from which such income is to be paid. All other legacies and devises given to the surviving spouse from the net estate shall be valued at the actual value of the interests given to the surviving spouse.

"(2) Election to receive [$10,000] in value absolutely. If the value of the net estate exceeds [$20,000] the surviving spouse may nevertheless treat the net estate as if it were of the value of not over [$20,000] and make an election in accordance with the provisions of subdivision (a) hereof, provided, however, that the total value of all items which the surviving spouse may receive from the net estate when this election is made shall be [$10,000] and no more.

"(c) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the will."

The alternative provisions just stated proceed on the theory that, except in larger estates, a surviving spouse should receive one-half of the estate of a deceased spouse. However, they also follow a modern trend to limit the surviving spouse to a life interest in a trust of half of the estate which the surviving spouse may elect to receive. It is believed that in the case of a smaller estate one spouse probably contributed about as much to its accumulation as the other. Moreover, such a share is in recognition of the strong moral obligation to provide support for a surviving wife. However, it is likely that larger estates were acquired by the testator from some ancestor; and it is deemed fair to permit him to pass them on pretty much as he wishes after he has made adequate provision for the maintenance of the surviving spouse. The plan of limiting the spouse to life interests in the case of larger estates follows legislation in New York and Massachusetts. See Mass. Ann. Laws (1932) c. 191, § 15, and N. Y. Dec. Est. Law, §18.

* * *

It should be observed that, although the proposed substitution is quite liberal in permitting a surviving spouse to demand a large share in the estate, it goes much farther than most statutes in compelling a surviving spouse to take what is given under the will. Thus, the tendency to upset a testamentary scheme by an election is minimized as far as is consistent with an adequate provision for the surviving spouse.

By way of comparison, it may be noted that § 32 represents an older but simpler solution of the problem. The proposed substitution is more complicated but goes much farther in leaving a testator's will intact. In both sections, the amounts stated are necessarily somewhat arbitrary and may be varied to suit local needs.

* * *

§ 33. Gifts in fraud of marital rights. (a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking

from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

Comment. This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud.

§ 34. Notice of right to elect. It shall be the duty of the clerk of the court, within one month after the will of a married person is admitted to probate, to mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him of the date before which a written election must be filed by or on behalf of such surviving spouse in order to take against the will.

§ 35. Time limitation for filing election. The election by a surviving spouse to take the share hereinbefore provided may be made at any time within one month after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of one month after the final determination of the litigation.

§ 36. Form of election; filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C.D., and I do hereby renounce all provisions in the will of the said C.D. inconsistent herewith.

Signed,
[Signature]

(Acknowledgment)

Comment. If the alternative form proposed in the comment to § 32 is used, the following sentence should be added to the form of election, immediately before the signature:

"If it is determined that the net estate exceeds [$20,000]

in value, I elect to take against the will under the terms of section 32(b)(1) [or section 32(b)(2)]."

§ 37. Right of election personal to surviving spouse. The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him.

§ 38. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 32 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

§ 39. Waiver of right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given to such waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

Comment. It is clear that at common law the right of a surviving spouse to take an intestate share against the will may be waived under certain circumstances. But the rules applied to determine the validity of the waiver are unique and involve something quite distinct from the requirements for the execution of a simple contract. This section is designed to express the common-law doctrine. * * *

§ 40. Election by surviving spouse to take under will. When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 22 and 23 hereof, in any estate undisposed of by the will. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, to exempt property or to a family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

Comment. The first sentence of this section is in accord with the general rule that mere expressions in a will of intent to disinherit an heir do not exclude him from the inheritance; there must be an effective devise of the entire estate to someone else. * * *

The second sentence of this section follows in substance Kan. Gen. Stat. (Supp. 1943) § 59-404.

§ 42. Homestead. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the persons entitled thereto. The homestead so set apart shall not be subject to administration and shall be exempt from all claims against the estate excepting any lien thereon at the time of the decedent's death. The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of final distribution.

Comment. Statutes or constitutional provisions are found in nearly every state, exempting the homestead from the claims of unsecured creditors. While there is great diversity in these legislative provisions, their principal function appears

to be to reserve a residence for the use of the family. See, for example, Mich. Stat. Ann. (1938) § 27.1572.

It is obviously impracticable to work out in detail legislation of this sort as a part of a model probate code. In the first place the homestead law is much broader than the law of decedents' estates. Thus, it deals with claims of creditors which are asserted by action before the decedent dies; and, also, with claims of creditors of the wife and children of the decedent, if a homestead is subsequently established for them. In the second place, in a number of states, provisions for the homestead are inserted in the constitution, and it is hardly to be expected that these provisions will be amended in the near future. Furthermore, the diversity of legislative provisions for the homestead makes it impossible to indicate in this code more than in barest outline, the relation of the law of decedents' estates to them. Therefore, in this section, homestead is not defined, nor are the requirements for this exemption from the claims of creditors of the decedent stated. But it is assumed that adequate provisions along these lines will be found elsewhere in the statute books.

While in a few jurisdictions the homestead is a fee simple interest, in most states it appears to be either a much more limited possessory estate or else is regarded merely as a privilege of occupation exempt from claims of creditors. In either of these two cases, if the decedent owned the property covered by the homestead in fee, there would be a non-possessory interest not covered by the exemption. According to the last sentence of this section, this interest passes like any other property of the decedent.

If the homestead is limited in value, as is the case in many states, it may be necessary to add provisions for its sale and a division of the proceeds where the property exceeds the value fixed in the statute and is not susceptible of division without injury. See, for example, Mich. Stat. Ann. (1943) §§ 27.3178(520) to 27.3178(522) and Cal. Prob. Code Ann. (Deering, 1944) §§ 664 to 666. Moreover, even if there is no such limitation, it might be desirable to sell, since the surviving members of the family may wish to live somewhere else and there is no reason for forcing them to remain in the homestead in order to retain the benefit of their exemption. For such a statute see Mass. Ann. Laws (1932) c. 188, § 8. If provisions for sale are added, it might be desirable to have a specific statement as to the exemption of the proceeds or of the substituted residence. Of course, if the homestead is regarded as an estate, it should be possible to alienate it without specific legislation. See Roberts v. First National Bank, 126 Kan. 503, 268 P. 799 (1928). But in some states it is held that an attempted sale is an abandonment. See Graves v. Simms Oil Co., 189 Ark. 910, 75 S.W. (2d) 809 (1934). Moreover, there may be a question whether the surviving spouse can

sell without the consent of minor children. If a section providing for sale of the homestead is desired, the following form might be inserted:

> "The surviving spouse may convey the homestead interest and pass good title thereto regardless of the existence of minor children. If the minor children are entitled to possession of the homestead, their interests may be conveyed by the guardians of their estates upon order of the court as in other cases for sale of lands of minors. If two or more minors become entitled to the proceeds of the sale of the homestead interest the proceeds shall be divided between them in proportion to the number of years during which they would otherwise have been entitled to the possession of the homestead."

Commonly the homestead exemption may be asserted against all creditors except lien creditors whose liens attached prior to the death of the decedent. But in some states a mechanic's lien for improvements might attach after the owner dies. See Minn. Stat. (1941) §§ 510.01 and 510.05.

It is thus apparent that in many states a substantial amount of adaptation may be necessary before the provision for the homestead herein presented can be used. Moreover, a legislature might well consider whether it would not be desirable to revise, simplify and rationalize the whole law of homestead exemption, in its relation to exemption statutes generally, to the family allowance and to the provisions for the election of a distributive share by a surviving spouse. But such a task is obviously far beyond that undertaken in this Code.

As to liability of the homestead for debts, see comment to § 44.

§ 43. Distribution of exempt property. The surviving spouse or minor children of a decedent shall be entitled absolutely to such personal property of the estate as may be exempt from execution or forced sale under the constitution and laws of this state or such other personal property as shall be selected, of the total appraised value of [$2,000], whichever is greater, any portion or all of which may be taken in money. Such property shall belong to the surviving spouse, if any, otherwise to the minor children in equal shares. The selection

shall be made by the surviving spouse, if living; otherwise by the guardian of the estate of each minor child for such child, or by the court. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the exempt property to the persons entitled thereto. Such property shall not be subject to administration and shall be exempt from all claims against the estate except any lien thereon at the time of the decedent's death.

Comment. This section, similar to the preceding one on homestead, sets off to the surviving spouse or children, the property exempted to the head of the family under other provisions of the constitution and statutes. Because of the diversity of these provisions, no attempt is made here to enumerate such property. Many of these exemption statutes are now archaic and in view of the tendency to permit a selection of other property or money in lieu of the property so exempt, such a provision is incorporated here. It permits the greatest degree of flexibility in accordance with the needs and desires of the individual members of the family. It also permits the selection of articles of sentimental family value and of an automobile for family use. As to liability of the exempt property for debts, see comment to § 44.

§ 44. Family allowance. In addition to the right to homestead and exempt property the surviving spouse and minor children of a decedent shall be entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration according to their previous standard of living, which allowance must not continue for longer than one year in the case of an insolvent estate. Such allowance may be made upon petition at any time after the filing of the inventory, but a temporary allowance may be made prior thereto in case of great need. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be payable to the surviving spouse, if living, for

the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child shall not be living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable.

Comment. The purpose of this section is to provide an allowance to the surviving spouse and minor children of the decedent during the period of administration for their support in the manner to which they have been accustomed. See § 142, providing that administration and funeral expenses have priority over the family allowance; but the homestead and exempt property are not liable for these expenses, and do not constitute assets for any purpose except to benefit the family.

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Guardianship and Conservatorship

June 13, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to revise certain provisions of the Oregon statutes relating to guardianship and conservatorship. The draft has been prepared pursuant to and is based upon action by the advisory committee at the May 16, 1964, meeting. It is submitted for your consideration.

The draft consists of new statute sections and amendments of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added, and matter in brackets, [like this], is existing matter to be deleted.

Each section of the draft is followed by a Comment, in which the draftsman sets forth a brief description of the revision proposed by the section, a reference to the advisory committee action upon which the revision is based, as recorded in the minutes of the May 16 meeting, or to some other reason for the revision and, in some cases, questions for consideration by the committee.

Following the draft (see page 17) is a report by the draftsman on his assignment to examine the two 1963 enactments relating to guardianship (i.e., investment by guardians in common trust funds without prior court approval, and lease of real property of wards for oil, gas and mineral purposes) and bring to the attention of the advisory committee any problems discovered.

Robert W. Lundy
Chief Deputy Legislative Counsel

Guardianship and Conservatorship Bill
Rough Draft
June 13, 1964

Section 1. ORS 126.250 is amended to read:

126.250. (1) A guardian of the estate may invest the property of the ward as provided in this section, ORS 128.020 and any other law applicable to investments by guardians. No investment shall be made without prior approval of the court by order in any property other than interest-bearing obligations of or fully guaranteed by the United States, or common trust funds, as defined in ORS 709.170, composed of investments in interest-bearing obligations of or fully guaranteed by the United States, and time or other deposits of cash, or interest-bearing obligations of this state or any county, city, port district or school district of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment.

(2) Subject to subsection (1) of this section, a guardian of the estate for two or more wards may invest the property of two or more of the wards in property in which each ward whose property is so invested shall have an undivided interest. The guardian shall keep a separate record showing the interest of each ward in the investment and the income, profits or proceeds therefrom.

representative of the Veterans Administration may give to the guardian and file in the guardianship proceeding, written notice requesting that a copy of all accounts and petitions for court approval of any guardianship matter requiring court approval which are to be filed in the guardianship proceeding be given to a representative of the Veterans Administration designated in the notice. [Except as otherwise provided in ORS 126.250,] After such notice is given and filed the guardian shall give a copy of all such accounts and petitions to the designated representative of the Veterans Administration before they are filed in the guardianship proceeding, and, unless the notice is waived in writing, shall give written notice of the hearing by the court on each such account or petition to the designated representative of the Veterans Administration at least 10 days before the date of the hearing. A representative of the Veterans Administration may appear and be heard at any such hearing.

(2) If a guardian of the estate for a ward who is receiving moneys paid or payable by the United States through the Veterans Administration fails to file in the guardianship proceeding any account or report required by law, the court, upon the petition of a representative of the Veterans Administration, shall make an order requiring the guardian to file the account or report or to show cause why he should not be required to do so.

Comment: Section 2 amends ORS 126.346 by deleting that part of subsection (1) thereof which refers to the provisions of ORS 126.250. The pertinent provisions of ORS 126.250 so

referred to are all embodied in subsection (3) thereof, which is deleted by the amendment of ORS 126.250 by section 1. Thus, the reference in subsection (1) of ORS 126.346 is unnecessary and should be deleted.

Section 3. ORS 126.516 is amended to read:

126.516. Where, at the time of the appointment of the guardian or thereafter, the estate of a ward consists of personal property having a value not exceeding by more than $1,000 the aggregate amount of unpaid expenses of administration of the guardianship estate and claims against the estate, the guardian of the estate, with prior approval of the court by order, may pay such expenses and claims from the estate and deliver all the remaining personal property to such person as the court may designate in the order, to be held, invested or used as ordered by the court. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence, satisfactory to the court showing such delivery. The guardianship is terminated by the order of the court, but the guardian is not subject to section 6 of this 1965 Act or ORS 126.530.

Comment: Section 3 amends ORS 126.516 by adding to the last sentence thereof a reference to section 6. The last sentence presently contains a reference to ORS 126.530. Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 6. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs

of a guardianship of the estate terminated by the death of the ward. See the comment under section 7.

The amendment of ORS 126.516 by section 3 proceeds on the premise that ORS 126.516 may be applicable upon the death of the ward, and that therefore the last sentence thereof should specify that the guardian proceeding under ORS 126.516 is not subject to either section 6 or ORS 126.530, as amended by section 7. If this premise is false, and ORS 126.516 is not intended to be applicable upon the death of the ward, then the reference to ORS 126.530 should be deleted and perhaps some further specific clarification of the application of ORS 126.516 should be made.

Section 4. ORS 126.525 is amended to read:

126.525. Except as otherwise provided in ORS 126.336, section 6 of this 1965 Act, ORS 126.530 and 126.535, the authority and duties of a guardian terminate when the guardianship is terminated.

Comment: Section 4 amends ORS 126.525 by adding thereto a reference to section 6. ORS 126.525 presently contains a reference to 126.530. Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 6. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See the comment under section 7.

Section 5. Section 6 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 6. Within 90 days after the date of termination of a guardianship of the estate other than by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and

hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination; and

(b) All claims against the estate allowed before of after the termination.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) The guardian shall deliver to the ward all property of the ward in his possession after payment, if any, of expenses and claims under subsections (1) and (2) of this section.

The ward shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See comment under section 7. The division of the present provisions of ORS 126.530 into two separate statute sections is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Section 6 permits the court to extend the present fixed 90-day winding up period upon application by the guardian during or after the 90-day period and upon such notice and hearing as the court may order. This provision for extension is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 8 to 10; Appendix B, pages 4 to 6. Note that a petition for extension filed after the 90-day period must be filed "within a reasonable time." Is the quoted wording desirable? Note also that the notice and hearing on the extension is to be "as the court may order." Should some notice and hearing be required in every case, with the nature thereof left to the discretion of the court, or should the court have discretion to dispense with notice and hearing altogether in appropriate cases? This matter should be clarified.

Section 6 specifies that the continuing authority of the guardian in winding up the affairs of the guardianship includes his right to possession of the ward's property whether or not in the physical possession of the guardian. This specification is an effort to resolve a matter brought to the attention of the advisory committee involving the purported failure of banks to honor checks drawn by guardians in winding up the affairs of guardianships terminated by the death of the ward (see Comment & Suggestion No. 7), and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10. The present wording of the continuing authority of the guardian in ORS 126.530 seems reasonably clear. The added wording (i.e., "including his right to possession of all property of the ward whether in the physical possession of the guardian or another") may be surplusage, but perhaps at the same time desirable reinforcement of the intended nature

of the guardian's continuing authority. There are probably better ways to resolve the matter than the added wording. The draftsman solicits suggestions.

Subsection (3) of section 6 requires the guardian to deliver property to the ward, and is based, of course, upon subsection (3) of ORS 126.530. Are there any possible circumstances under which, upon termination of the guardianship while the ward is living, the ward would not be competent to accept delivery of the property and give the required receipt to the guardian?

Section 7. ORS 126.530 is amended to read:

126.530. Within 90 days after the date of termination of a guardianship of the estate by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination;

(b) All claims against the estate allowed before or after the termination; and

(c) [If the guardianship is terminated by the death of the ward, and] If the estate of the ward is solvent, and with prior approval of the court by order, expenses for the proper care, maintenance and support of the ward's surviving spouse and minor children during the [90-day] winding up period.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) Except as otherwise provided in subsection (5) of this section, the guardian shall deliver to [the ward or] the executor or administrator of the [deceased] ward's estate all property of the ward in his possession after payment, if any, of expenses and claims under subsections (1) and (2) of this section. At any time during the winding up period the court, upon a petition filed by the executor or administrator, may order the guardian to deliver to the executor or administrator any part of the property of the ward in his possession not necessary for such payment. The recipient of the property so

delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

(4) Except as otherwise provided in subsection (5) of this section, [if the guardianship is terminated by the death of the ward, and] if the sale, mortgage or pledge of property of the guardianship estate is necessary for the payment of all expenses and claims referred to in paragraphs (a) and (b) of subsection (1) of this section, and if such sale, mortgage or pledge cannot be made and the proceeds used to pay all such expenses and claims within the [90-day] winding up period, the guardian shall pay none of such expenses and claims, but such expenses and claims are liens upon and shall be paid first from property delivered under subsection (3) of this section.

(5) If [the guardianship is terminated by the death of] the ward <u>died</u> intestate, and if the guardianship estate exceeds the aggregate amount of the expenses and claims referred to in subsection (1) of this section and the expenses of last sickness and funeral of the ward, but does not exceed such aggregate amount by more than $1,000, the guardian may, after payment of such expenses and claims from the guardianship estate, deliver all property of the ward in his possession to:

(a) The ward's surviving spouse;

(b) If there is no surviving spouse, the ward's surviving children in equal shares;

(c) If there is no surviving spouse and no surviving children, the ward's surviving parent or parents in equal shares;

(d) If there is no surviving spouse, no surviving children and no surviving parent or parents, the ward's surviving brothers and sisters in equal shares; or

(e) If any person who may receive property under this subsection is under legal disability, the guardian of the estate, if any, for such person, and if none, the person designated by the court in a proceeding under ORS 126.555.

The guardian may rely upon proof by affidavit which he believes to be true to establish the fact of intestacy and the relationship of those surviving the ward who may receive property under this subsection. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered, but the recipient is accountable as to the property so delivered to an executor or administrator, if any, of the [deceased] ward's estate, and if none, to any person beneficially interested therein. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. For disposition of that part of ORS 126.530 relating to winding up

the affairs of a guardianship of the estate terminated other than by the death of the ward, see section 6 and comment thereunder.

Section 7 amends ORS 126.530, in part, by adding provisions permitting extension of the present fixed 90-day winding up period and specifying that the continuing authority of the guardian in winding up the affairs of the guardianship includes his right to possession of the ward's property. See comment on these matters under section 6.

Section 7 amends ORS 126.530, in part, by adding to subsection (3) thereof a new provision authorizing the court to order the guardian to deliver to the executor or administrator of the deceased ward's estate during the winding up period any property of the ward not necessary for winding up purposes. This new provision is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Subsection (2) of ORS 126.530 authorizes the sale, mortgage or pledge of property of the guardianship estate for the purpose of paying expenses and claims during the winding up period. Would it be desirable and feasible to impose some limitation on this authority with respect to specific property devised or bequeathed by the will of the deceased ward or with respect to property exempt from execution? ORS 126.495 (transfer of ward's property not an ademption) does not appear to apply during the winding up period since it speaks of specifically devised or bequeathed property "not contained in the estate of the ward at the time of his death."

Subsection (4) of ORS 126.530 provides that when all expenses and claims cannot be paid within the winding up period, none of them shall be paid and they are liens upon property delivered under subsection (3). Are there any possible circumstances under which payment of expenses and claims might be commenced but not completed even where the winding up period is extended, and some expenses and claims remain unpaid at the time of delivery of property under subsection (3)?

Section 8. ORS 126.555 is amended to read:

126.555. Where it appears that a guardian of the estate for a person under legal disability has not been appointed and that the value of the [estate] <u>personal property</u> of such person<u>, including debts and other choses in action due to such person,</u> is not more than $1,000, any court having probate

jurisdiction, upon petition therefor and with such notice as the court may order or without notice, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to settle debts and other choses in action due to such person under legal disability and receive payment thereof, and to receive property of such person under legal disability. The person so designated in the order of the court may give a release and discharge for any such debt or other chose in action or for any such property, and shall hold, invest or use all funds or other property so received as ordered by the court.

Comment: Section 8 amends ORS 126.555 by changing the limitation upon its application from situations in which the value of the estate of the person under legal disability is not more than $1,000 to situations in which the value of such person's personal property, including debts and other choses in action due to him, is not more than $1,000, and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 11; Appendix B, pages 11 and 12.

Should any consideration be given to expressing the limitation upon the application of ORS 126.555 in terms of the value of the debt or other chose in action to be settled and paid or the value of the property to be received, instead of the total value of the personal property of the person under legal disability?

Should any consideration be given to permitting a court other than one having probate jurisdiction to make an order under ORS 126.555?

Does a court order under ORS 126.555 constitute a continuing authority to settle and receive payment of debts and other choses in action and to receive property, or is it limited to particular debts or other choses in action or property? Is this matter in need of clarification?

Section 9. ORS 126.660 is amended to read:

126.660. (1) A conservatorship is terminated:

(a) By the death of the ward; or

(b) By the appointment and qualification of a guardian of the person and estate or a guardian of the estate for the ward.

(2) The court by order may terminate a conservatorship if the court determines that:

(a) The ward is competent and desires to terminate the conservatorship; or

(b) The conservatorship no longer is necessary.

[(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if competent, and otherwise to the ward's personal representative.]

Comment: Section 9 amends ORS 126.660 by deleting subsection (3) thereof. For disposition of subsection (3) of ORS 126.660, see section 11 and comment thereunder.

Section 10. Section 11 of this Act is added to and made a part of ORS 126.606 to 126.660.

Section 11. (1) Except as otherwise provided in subsection (2) of this section, the authority and duties of a conservator terminate when the conservatorship is terminated.

(2) If a conservatorship is terminated other than by the death of the ward, the conservator shall, if the ward is living and competent, account to the ward, or, if the ward is living and incompetent, account to the guardian of the person and estate or guardian of the estate for the ward. If a conservatorship is terminated by the death of the ward, the

conservator shall wind up the affairs of the conservatorship, and his authority and duties and the provisions of law applicable thereto shall continue for such purpose, as provided in ORS 126.336 and 126.530, and ORS 126.535 to 126.545 shall apply.

Comment: The advisory committee at the May 16, 1964, meeting adopted in principle the following amendment of subsection (3) of ORS 126.660:

> "(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if living and competent, [and otherwise to the ward's personal representative] or, if living and incompetent, to the guardian of the estate of the ward, or, if the ward has died, the affairs of the conservatorship shall be wound up in the same manner as provided in ORS 126.530 to 126.545."

See Minutes, 5/16/64, page 8; Appendix B, page 4. Upon consideration of the matter, the draftsman determined upon an approach involving deletion of subsection (3) of ORS 126.660 and a new separate statute section containing the substance of subsection (3) as revised, instead of an approach involving amendment of subsection (3).

The wording of parts of section 11 follow, in so far as appropriate, the pattern of ORS 126.525 and the first clause of ORS 126.530, which relate to winding up the affairs of a guardianship of the estate. As in the case of the amendment of subsection (3) of ORS 126.660 adopted in principle by the advisory committee, that part of section 11 relating to a conservatorship terminated by the death of the ward adopts by reference the provisions of ORS 126.530 to 126.545, which relate to winding up the affairs of a guardianship of the estate terminated by the death of the ward. ORS 126.336 also is adopted by reference, in order to make applicable the provisions of that statute section relating to a final account.

That part of section 11 relating to the duty of the conservator to account where the ward is living and incompetent refers to the "guardian of the person and estate or guardian of the estate for the ward," in order to conform to the wording of paragraph (b) of subsection (1) of ORS 126.660.

The first sentence of subsection (2) of section 11 prescribes the duty of the conservator to account upon termination of the conservatorship other than by the death of the ward.

It appears that neither ORS 126.636 nor any other provision of the conservatorship statutes makes applicable the provisions of ORS 126.336 relating to a final account. Further, it does not appear that the provisions of ORS 126.540 and 126.545, relating to discharge of a guardian of the estate, are applicable in the conservatorship termination other than by the death of the ward situation. Should more detail be provided on what happens when a conservatorship is terminated other than by the death of the ward, particularly with respect to accounting and discharge?

Common Trust Funds; Mineral Leases

At the May 16, 1964, meeting of the advisory committee, the draftsman pointed out that since enactment of the present Oregon guardianship and conservatorship statutes in 1961 there had been two enactments that had changed those 1961 statutes (ORS 126.250, relating to investment by guardians in common trust funds without prior court approval; and ORS 116.890, 116.900, 126.436 and 126.490, relating to lease of real property of wards for purposes of exploring for or obtaining oil, gas and minerals). The committee agreed that the draftsman should examine the provisions of these two enactments and bring to the attention of the committee any problems discovered. See Minutes, 5/16/64, page 12.

ORS 126.250, which includes the common trust fund provision, is otherwise amended by section 1 of the rough draft of proposed legislation set forth above. At the time the committee considers section 1 of the rough draft the draftsman will comment orally on the common trust fund provision and his examination thereof. Also, Mr. Carson, the chairman of the Subcommittee on Guardianship and Conservatorship, has asked Mr. Zollinger to examine and comment orally on the common trust fund provision.

At an appropriate time the draftsman will comment orally on the mineral leases and his examination thereof. Also, Mr. Carson has indicated his intention to examine and comment orally on these provisions. For the purpose of facilitating this comment, the pertinent statute sections are set forth below. ORS 116.890 and 116.900 were new provisions in 1963 (sections 9 and 10, respectively, chapter 417, Oregon Laws 1963). ORS 126.436 and 126.490 were amended in 1963 by sections 1 and 2, respectively, chapter 417, Oregon Laws 1963, and are set forth in such a form as to show, by brackets and underscoring, the deletions and additions made by the 1963 amendments.

116.890. No lease executed by a guardian, executor, administrator or other fiduciary pursuant to the terms of ORS 116.745, 116.825, 116.840 to 116.900, 126.436 and 126.490 and the order of the court, including, without limitation, a lease granting the right to explore or prospect for and remove and dispose of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, which may be produced from a well drilled pursuant to such lease, shall be void or voidable because the term thereof may or will extend beyond the duration of such guardianship or estate proceeding.

116.900. ORS 116.745, 116.825, 116.840 to 116.900, 126.436 and 126.490 apply to guardianships, conservatorships and estate proceedings that are now or may hereafter be pending in the courts of this state.

126.436. If it appears to the court that the sale, mortgage or lease referred to in ORS 126.426 is necessary or proper for any purpose referred to in ORS 126.406, the court shall order the sale, mortgage or lease to be made. [The] A mortgage or surface lease ordered shall be made subject to such terms and conditions as the court may consider necessary or proper. An order authorizing the execution of a lease or other instrument for the purpose of exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, that may be produced from a well drilled by the lessee, shall require a minimum of one-eighth royalty and shall set

forth the annual rental, if any rental is required to be paid, the period of the lease which shall be for a primary term of 10 years and so long thereafter as oil, gas, other hydrocarbons or other leased substances are produced in paying quantities from the leased premises or lands pooled or unitized therewith, or mining or drilling operations are conducted on the leased premises or lands pooled or unitized therewith, and may authorize such other terms and conditions as the court may consider necessary or proper including, without limitation, a provision empowering the lessee to enter into any agreement authorized by ORS chapter 520 with respect to the land covered by the lease, including provisions for pooling or unitization by the lessee. [The] A sale ordered shall be made as provided in ORS 126.441 to 126.466, and subject to such additional terms and conditions as the court may consider necessary or proper.

126.490. No proceedings for the sale, exchange, surrender, partition, mortgage, pledge or lease (including a lease executed for the purposes of exploring or prospecting for and extracting, removing and disposing of oil, gas, other hydrocarbons and all other minerals or substances, similar or dissimilar, that may be produced from a well drilled pursuant to such lease) of any property of the ward by a guardian of the estate are subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the sale, exchange, surrender, partition, mortgage, pledge or lease had jurisdiction to do so.

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Guardianship and Conservatorship

July 18, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to revise certain provisions of the Oregon statutes relating to guardianship and conservatorship. The draft has been prepared pursuant to and is based upon action by the advisory committee at the May 16 and June 13, 1964, meetings. It is submitted for your consideration.

The draft consists of new statute sections and amendments of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added, and matter in brackets, [like this], is existing matter to be deleted.

Each section of the draft is followed by a Comment, in which the draftsman sets forth a brief description of the revision proposed by the section, a reference to the advisory committee action upon which the revision is based, as recorded in the minutes of the May 16 and June 13 meetings, or to some other reason for the revision and, in some cases, questions for consideration by the committee.

Robert W. Lundy
Chief Deputy Legislative Counsel

Guardianship and Conservatorship Bill
Rough Draft
July 18, 1964

Section 1, ORS 126.250 is amended to read:

126.250. (1) A guardian of the estate may invest the property of the ward as provided in this section, ORS 128.020 and any other law applicable to investments by guardians. No investment shall be made without prior approval of the court by order in any property other than:

(a) Time or other deposits of cash;

(b) Interest-bearing obligations of or fully guaranteed by the United States; [, or common trust funds, as defined in ORS 709.170, composed of investments in interest-bearing obligations of or fully guaranteed by the United States, and time or other deposits of cash, or]

(c) Interest-bearing obligations of this state or any county, city, port district or school district of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment; or

(d) Common trust funds maintained by the guardian as provided in ORS 709.170 and composed only of any property referred to in paragraphs (a) to (c) of this subsection.

(2) Subject to subsection (1) of this section, a guardian of the estate for two or more wards may invest the property of two or more of the wards in property in which each ward whose property is so invested shall have an undivided

interest. The guardian shall keep a separate record showing the interest of each ward in the investment and the income, profits or proceeds therefrom.

[(3) (a) A guardian of the estate for a ward who is receiving moneys paid or payable by the United States through the Veterans Administration shall give written notice of each proposed investment under this section to a representative of the Veterans Administration. The notice shall specify whether the proposed investment is to be made with or without prior approval of the court, and if with prior approval, the time and place of the hearing on the petition of the guardian therefor.]

[(b) If the proposed investment is to be made with prior approval of the court, the notice shall be given at least 10 days before the date of the hearing.]

[(c) If the proposed investment is to be made without prior approval of the court, the notice shall be given at least 15 days before the date of the proposed investment. If, within 10 days after the date the notice is given, a representative of the Veterans Administration files in the guardianship proceeding an objection to the investment and serves a copy thereof on the guardian, the proposed investment shall not be made without prior approval of the court.]

[(d) A representative of the Veterans Administration may appear and be heard at any hearing under this subsection.]

Comment: Section 1 amends ORS 126.250, in part, by rearranging the list of investments in subsection (1) thereof a guardian of the estate may make without prior court approval and by placing each category of investment in a separate

paragraph. This change is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, page 9; Appendix A.

Section 1 amends ORS 126.250, in part, by deleting subsection (3) thereof, and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 11; Appendix B, pages 9 and 10.

Section 2. ORS 126.336 is amended to read:

126.336. (1) A guardian of the estate shall make and file in the guardianship proceeding a written verified account of his administration:

(a) Unless the court orders otherwise, annually within 30 days after the anniversary date of his appointment.

(b) Upon filing his petition to resign and before his resignation is accepted by the court.

(c) Within 30 days after the date of his removal.

(d) Within 90 days after the date of termination of the guardianship.

(e) At such other times as the court may order.

(2) Each account made and filed by a guardian of the estate shall include the following information:

(a) The period of time covered by the account.

(b) The amount of the property of the ward according to the inventory, or if there was a previous account, the amount of the balance of the next previous account, and all property and rents, income, issues, profits and proceeds from property received during the period covered by the account.

(c) All disbursements made during the period covered

by the account. Receipts for such disbursements shall accompany the account.

(d) The property of the ward on hand.

(e) Such other information as the guardian considers necessary to show the condition of the affairs of the guardianship or as the court may order.

(3) Each account made and filed by a guardian of the estate for two or more wards shall show the interest of each ward in receipts, disbursements and property on hand.

(4) Before filing any account other than his final account the guardian of the estate shall [give a copy of each account to the person or institution having the care, custody or control of the ward.] cause a copy of the account to be mailed or delivered:

(a) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, to the superintendent of the institution and the Secretary of the Oregon State Board of Control;

(b) If there is a guardian of the person for the ward other than the guardian of the estate, to the guardian of the person;

(c) If the ward is not a minor or an incompetent, to the ward; and

(d) If the ward is a minor or an incompetent, to the ward's spouse who is a resident of this state and not under legal disability; or, if there is no such spouse, to the ward's children who are residents of this state and not under legal

disability; or, if there is no such spouse and no such children, to the ward's parents who are residents of this state and not under legal disability; or, if there is no such spouse, no such children and no such parents, to the ward's brothers and sisters who are residents of this state and not under legal disability.

The guardian of the estate shall file with each account other than his final account proof satisfactory to the court that copies of the account have been mailed or delivered as provided in this subsection, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

(5) The guardian of the estate shall cause a copy of his final account to be served personally on [a ward not under legal disability, the person or institution having the care, custody or control of a ward under legal disability,] each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (4) of this section, the executor or administrator of a deceased [ward] ward's estate and a successor guardian. Within 10 days after the date of the service, any person [or institution] so required to be served may make and file in the guardianship proceeding written objections to the final account.

(6) The court, before settlement of any account, may provide for inspection of the balance of the property of the ward on hand. The court shall settle each account filed by a guardian of the estate by allowing or disallowing, either in whole or in part, or surcharging such account; but without

prejudice to objections thereto at the time and in the manner that objections may be made to a final account.

Comment: Section 2 amends ORS 126.336 by specifying with more particularity therein the persons who are to receive copies of final and other accounts made and filed by a guardian of the estate and the procedure for giving copies of accounts other than final accounts. This change is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 11 to 13; Appendix C.

Section 3. ORS 126.346 is amended to read:

126.346. (1) Where a guardian of the estate has been appointed for a ward who is receiving moneys paid or payable by the United States through the Veterans Administration, a representative of the Veterans Administration may give to the guardian and file in the guardianship proceeding, written notice requesting that a copy of all accounts and petitions for court approval of any guardianship matter requiring court approval which are to be filed in the guardianship proceeding be given to a representative of the Veterans Administration designated in the notice. [Except as otherwise provided in ORS 126.250,] After such notice is given and filed the guardian shall give a copy of all such accounts and petitions to the designated representative of the Veterans Administration before they are filed in the guardianship proceeding, and, unless the notice is waived in writing, shall give written notice of the hearing by the court on each such account or petition to the designated representative of the Veterans Administration at least 10 days before the date of the hearing. A representative of the Veterans Administration may appear and be heard at any such hearing.

(2) If a guardian of the estate for a ward who is receiving moneys paid or payable by the United States through the Veterans Administration fails to file in the guardianship proceeding any account or report required by law, the court, upon the petition of a representative of the Veterans Administration, shall make an order requiring the guardian to file the account or report or to show cause why he should not be required to do so.

Comment: Section 3 amends ORS 126.346 by deleting that part of subsection (1) thereof which refers to the provisions of ORS 126.250. The pertinent provisions of ORS 126.250 so referred to are all embodied in subsection (3) thereof, which is deleted by the amendment of ORS 126.250 by section 1. Thus, the reference in subsection (1) of ORS 126.346 is unnecessary and should be deleted.

Section 4. ORS 126.516 is amended to read:

126.516. Where, at the time of the appointment of the guardian or thereafter, the estate of a ward consists of personal property having a value not exceeding by more than $1,000 the aggregate amount of unpaid expenses of administration of the guardianship estate and claims against the estate, the guardian of the estate, with prior approval of the court by order, may pay such expenses and claims from the estate and deliver all the remaining personal property to such person as the court may designate in the order, to be held, invested or used as ordered by the court. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian

shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery. The guardianship is terminated by the order of the court, but the guardian is not subject to section 7 of this 1965 Act or ORS 126.530.

Comment: Section 4 amends ORS 126.516 by adding to the last sentence thereof a reference to section 7. The last sentence presently contains a reference to ORS 126.530. Section 7 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 7. Section 8 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See the comment under section 8.

The amendment of ORS 126.516 by section 4 proceeds on the premise that ORS 126.516 may be applicable upon the death of the ward, and that therefore the last sentence thereof should specify that the guardian proceeding under ORS 126.516 is not subject to either section 7 or ORS 126.530, as amended by section 8. If this premise is false, and ORS 126.516 is not intended to be applicable upon the death of the ward, then the reference to ORS 126.530 should be deleted and perhaps some further specific clarification of the application of ORS 126.516 should be made.

Section 5. ORS 126.525 is amended to read:

126.525. Except as otherwise provided in ORS 126.336, section 7 of this 1965 Act, ORS 126.530 and 126.535, the authority and duties of a guardian terminate when the guardianship is terminated.

Comment: Section 5 amends ORS 126.525 by adding thereto a reference to section 7. ORS 126.525 presently contains a reference to 126.530. Section 7 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 7. Section 8 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See the comment under section 8.

Section 6. Section 7 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 7. Within 90 days after the date of termination of a guardianship of the estate other than by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination; and

(b) All claims against the estate allowed before or after the termination.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) The guardian shall deliver to the ward all property of the ward in his possession after payment, if any, of expenses and claims under subsections (1) and (2) of this section. The ward shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 7 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. Section 8 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See comment under section 8. The division of the present provisions of ORS 126.530 into two separate statute sections is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Section 7 permits the court to extend the present fixed 90-day winding up period upon application by the guardian during or after the 90-day period and upon such notice and hearing as the court may order. This provision for extension is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 8 to 10; Appendix B, pages 4 to 6. Note that a petition for extension filed after the 90-day period must be filed "within a reasonable time." Is the quoted wording desirable? Note also that the notice and hearing on the extension is to be "as the court may order." Should some notice and hearing be required in every case, with the nature thereof left to the discretion of the court, or should the court have discretion to dispense with notice and hearing altogether in appropriate cases? This matter should be clarified.

Section 7 specifies that the continuing authority of the guardian in winding up the affairs of the guardianship includes

his right to possession of the ward's property whether or not in the physical possession of the guardian. This specification is an effort to resolve a matter brought to the attention of the advisory committee involving the purported failure of banks to honor checks drawn by guardians in winding up the affairs of guardianships terminated by the death of the ward (see Comment & Suggestion No. 7), and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10. The present wording of the continuing authority of the guardian in ORS 126.530 seems reasonably clear. The added wording (i.e., "including his right to possession of all property of the ward whether in the physical possession of the guardian or another") may be surplusage, but perhaps at the same time desirable reinforcement of the intended nature of the guardian's continuing authority. There may be better ways to resolve the matter than the added wording. The draftsman solicits suggestions.

Subsection (3) of section 7 requires the guardian to deliver property to the ward, and is based, of course, upon subsection (3) of ORS 126.530. Are there any possible circumstances under which, upon termination of the guardianship while the ward is living, the ward would not be competent to accept delivery of the property and give the required receipt to the guardian?

Section 8. ORS 126.530 is amended to read:

126.530. Within 90 days after the date of termination of a guardianship of the estate by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination;

(b) All claims against the estate allowed before or after the termination; and

(c) [If the guardianship is terminated by the death of the ward, and] If the estate of the ward is solvent, and with prior approval of the court by order, expenses for the proper care, maintenance and support of the ward's surviving spouse and minor children during the [90-day] winding up period.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) Except as otherwise provided in subsection (5) of this section, the guardian shall deliver to [the ward or] the executor or administrator of the [deceased] ward's estate all property of the ward in his possession after payment, if any,

of expenses and claims under subsections (1) and (2) of this section. At any time during the winding up period the court, upon a petition filed by the executor or administrator, may order the guardian to deliver to the executor or administrator any part of the property of the ward in his possession not necessary for such payment. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

(4) Except as otherwise provided in subsection (5) of this section, [if the guardianship is terminated by the death of the ward, and] if the sale, mortgage or pledge of property of the guardianship estate is necessary for the payment of all expenses and claims referred to in paragraphs (a) and (b) of subsection (1) of this section, and if such sale, mortgage or pledge cannot be made and the proceeds used to pay all such expenses and claims within the [90-day] winding up period, the guardian shall pay none of such expenses and claims, but such expenses and claims are liens upon and shall be paid first from property delivered under subsection (3) of this section.

(5) If [the guardianship is terminated by the death of] the ward died intestate, and if the guardianship estate exceeds the aggregate amount of the expenses and claims referred to in subsection (1) of this section and the expenses of

last sickness and funeral of the ward, but does not exceed such aggregate amount by more than $1,000, the guardian may, after payment of such expenses and claims from the guardianship estate, deliver all property of the ward in his possession to:

(a) The ward's surviving spouse;

(b) If there is no surviving spouse, the ward's surviving children in equal shares;

(c) If there is no surviving spouse and no surviving children, the ward's surviving parent or parents in equal shares;

(d) If there is no surviving spouse, no surviving children and no surviving parent or parents, the ward's surviving brothers and sisters in equal shares; or

(e) If any person who may receive property under this subsection is under legal disability, the guardian of the estate, if any, for such person, and if none, the person designated by the court in a proceeding under ORS 126.555.

The guardian may rely upon proof by affidavit which he believes to be true to establish the fact of intestacy and the relationship of those surviving the ward who may receive property under this subsection. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered, but the recipient is accountable as to the property so delivered to an executor or administrator, if any, of the [deceased] ward's estate, and if none, to any

person beneficially interested therein. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 8 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. For disposition of that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward, see section 7 and comment thereunder.

Section 8 amends ORS 126.530, in part, by adding provisions permitting extension of the present fixed 90-day winding up period and specifying that the continuing authority of the guardian in winding up the affairs of the guardianship includes his right to possession of the ward's property. See comment on these matters under section 7.

Section 8 amends ORS 126.530, in part, by adding to subsection (3) thereof a new provision authorizing the court to order the guardian to deliver to the executor or administrator of the deceased ward's estate during the winding up period any property of the ward not necessary for winding up purposes. This new provision is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Subsection (2) of ORS 126.530 authorizes the sale, mortgage or pledge of property of the guardianship estate for the purpose of paying expenses and claims during the winding up period. Would it be desirable and feasible to impose some limitation on this authority with respect to specific property devised or bequeathed by the will of the deceased ward or with respect to property exempt from execution? ORS 126.495 (transfer of ward's property not an ademption) does not appear to apply during the winding up period since it speaks of specifically devised or bequeathed property "not contained in the estate of the ward at the time of his death."

Subsection (4) of ORS 126.530 provides that when all expenses and claims cannot be paid within the winding up period, none of them shall be paid and they are liens upon property delivered under subsection (3). Are there any possible circumstances under which payment of expenses and claims might be commenced but not completed even where the winding up period is extended, and some expenses and claims remain unpaid at the time of delivery of property under subsection (3)?

Section 9. ORS 126.555 is amended to read:

126.555. (1) Where it appears that a guardian of the estate for a person under legal disability has not been appointed [and that the value of the estate of such person is not more than $1,000], any court having probate jurisdiction, upon petition therefor and with such notice as the court may order or without notice, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to:

(a) Settle [debts and other choses] any debt or other chose in action not exceeding $1,000 due to [such] the person under legal disability and receive payment thereof; [, and to]

(b) Receive property having a value not exceeding $1,000 of [such] the person under legal disability; or

(c) Sell for cash any of the real or personal property having a value not exceeding $1,000 of the person under legal disability and receive the proceeds thereof. The sale shall be approved by the court.

(2) The person [so] designated in the order of the court under subsection (1) of this section may give a release and discharge for any [such] debt or other chose in action so settled and paid or for any [such] property so received, or may execute such instruments as are appropriate to effect the conveyance or transfer of any real or personal property so sold for cash. [, and] He shall hold, invest or use all funds or other property so received as ordered by the court.

Comment: Section 9 amends ORS 126.555 by adding to the transactions that may be accomplished without guardianship

under the provisions thereof the sale for cash of real or personal property of a person under legal disability, and by changing the limitation upon the application of the provisions thereof from situations in which the value of the estate of the person under legal disability is not more than $1,000 to a limitation of $1,000 upon the particular transaction involved (i.e., debt or other chose in action to be settled and paid, property to be received or real or personal property to be sold for cash). This addition and change are based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 13 to 16; Appendix D.

Action by the advisory committee at the June 13 meeting supersedes its action at the May 16, 1964, meeting, which would have changed the limitation upon the application of ORS 126.555 from situations in which the value of the estate of the person under legal disability is not more than $1,000 to situations in which the value of such person's personal property, including debts and other choses in action due to him, is not more than $1,000. See Minutes, 5/16/64, page 11; Appendix B, pages 11 and 12.

May a court make an order under ORS 126.555 that constitutes a continuing authority to settle and receive payment of debts or other choses in action, to receive property or to sell for cash real or personal property, or must the order be limited to a particular transaction? Is this a matter in need of clarification?

Should any consideration be given to permitting a court other than one having probate jurisdiction to make an order under ORS 126.555?

Section 10. ORS 126.660 is amended to read:

126.660. (1) A conservatorship is terminated:

(a) By the death of the ward; or

(b) By the appointment and qualification of a guardian of the person and estate or a guardian of the estate for the ward.

(2) The court by order may terminate a conservatorship if the court determines that:

(a) The ward is competent and desires to terminate the conservatorship; or

(b) The conservatorship no longer is necessary.

[(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if competent, and otherwise to the ward's personal representative.]

Comment: Section 10 amends ORS 126.660 by deleting subsection (3) thereof. For disposition of subsection (3) of ORS 126.660, see section 12 and comment thereunder.

Section 11. Section 12 of this Act is added to and made a part of ORS 126.606 to 126.660.

Section 12. (1) Except as otherwise provided in subsection (2) of this section, the authority and duties of a conservator terminate when the conservatorship is terminated.

(2) If a conservatorship is terminated other than by the death of the ward, the conservator shall, if the ward is living and competent, account to the ward, or, if the ward is living and incompetent, account to the guardian of the person and estate or guardian of the estate for the ward. If a conservatorship is terminated by the death of the ward, the conservator shall wind up the affairs of the conservatorship, and his authority and duties and the provisions of law applicable thereto shall continue for such purpose, as provided in ORS 126.336 and 126.530, and ORS 126.535 to 126.545 shall apply.

Comment: The advisory committee at the May 16, 1964, meeting adopted in principle the following amendment of subsection (3) of ORS 126.660:

> "(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if <u>living and</u> competent, [and otherwise to the

ward's personal representative] or, if living and incompetent, to the guardian of the estate of the ward, or, if the ward has died, the affairs of the conservatorship shall be wound up in the same manner as provided in ORS 126.530 to 126.545."

See Minutes, 5/16/64, page 8; Appendix B, page 4. Upon consideration of the matter, the draftsman determined upon an approach involving deletion of subsection (3) of ORS 126.660 and a new separate statute section containing the substance of subsection (3), as revised, instead of an approach involving amendment of subsection (3).

The wording of parts of section 12 follow, in so far as appropriate, the pattern of ORS 126.525 and the first clause of ORS 126.530, which relate to winding up the affairs of a guardianship of the estate. As in the case of the amendment of subsection (3) of ORS 126.660 adopted in principle by the advisory committee, that part of section 12 relating to a conservatorship terminated by the death of the ward adopts by reference the provisions of ORS 126.530 to 126.545, which relate to winding up the affairs of a guardianship of the estate terminated by the death of the ward. ORS 126.336 also is adopted by reference, in order to make applicable the provisions of that statute section relating to a final account.

That part of section 12 relating to the duty of the conservator to account where the ward is living and incompetent refers to the "guardian of the person and estate or guardian of the estate for the ward," in order to conform to the wording of paragraph (b) of subsection (1) of ORS 126.660.

The first sentence of subsection (2) of section 12 prescribes the duty of the conservator to account upon termination of the conservatorship other than by the death of the ward. It appears that neither ORS 126.636 nor any other provision of the conservatorship statutes makes applicable the provisions of ORS 126.336 relating to a final account. Further, it does not appear that the provisions of ORS 126.540 and 126.545, relating to discharge of a guardian of the estate, are applicable in the conservatorship termination other than by the death of the ward situation. Should more detail be provided on what happens when a conservatorship is terminated other than by the death of the ward, particularly with respect to accounting and discharge?

REPORT
September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison and Robert W. Lundy

Subject: Revised rough draft on "Protecting Property Right During Marriage."

Prior to the last meeting of the Advisory Committee, we submitted a rough draft of proposed legislation entitled "Protecting Property Right During Marriage," dated August 4, 1964. The aim of that rough draft was to provide protection, by means of a recorded declaration, of a right of a surviving spouse to receive, upon the death of the other spouse, a fee estate in an undivided one-fourth interest in real property owned during the marriage by the other spouse in his sole right against an attempt by the owner spouse to convey or mortgage such real property without the joinder of the nonowner spouse in the conveyance or mortgage, and thus to defeat or diminish the right of the surviving spouse to receive such an interest in the real property by intestate succession or election against will under the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964.

The rough draft entitled "Protecting Property Right During Marriage," dated August 4, 1964, was considered at length at the last meeting of the committee, and a number of objections thereto were raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 3, 4 and 7 to 9, and Appendix A. At that meeting Mr. Allison indicated that we would endeavor to prepare and submit a revised rough draft embodying the declaration device to protect a property right during marriage, which would meet some of the objections raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 11. Following is such a revised rough draft.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county in which real property owned by the spouse of the declarant in his sole right is situated a written, signed and acknowledged declaration claiming a marital right in and to an undivided one-fourth interest in the real property so owned in the county by the spouse of the declarant. The declaration shall include a statement of the effect of the recording of the declaration as provided in subsection (3) of this section. The declaration may be in the

following form:

DECLARATION CLAIMING MARITAL RIGHT

_____, declarant, is now married to _____
(name of husband or wife owning real property), the owner of real property in _____ County, State of Oregon, in sole right, and declarant hereby claims a marital right in and to an undivided one-fourth interest in and to all real property now or hereafter owned during the marriage by _____
(name of husband or wife owning real property), the spouse of the declarant, in sole right, in the above named county.

The effect of the recording of this declaration, as provided in section 1, chapter , Oregon Laws 1965 (Enrolled Bill), is that the above named spouse of the declarant may not, during the marriage and while this declaration remains unrevoked, convey or mortgage real property owned in sole right by such spouse in the county in which this declaration is recorded free of the marital right of declarant in and to an undivided one-fourth interest in such real property unless declarant either joins in the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(Acknowledgment)

_____
Declarant

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(2) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, upon the death of the spouse of the declarant an undivided one-fourth interest in and to all real property owned during the

marriage by the spouse of the declarant in sole right in the county in which the declaration is recorded shall become vested in the declarant, unless the marital right has been released either by the joinder by the declarant in a conveyance or the execution of a separate conveyance, or the declaration has been revoked as provided in subsection (4) of this section.

(3) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, the soouse of the declarant may not, during the marriage and while the declaration remains unrevoked, convey or mortgage real property owned in sole right by such soouse in the county in which the declaration is recorded free of the marital right of the declarant in and to an undivided one-fourth interest in such real property unless the declarant either joins in the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(4) A declaration recorded as provided in subsection (1) of this section is revoked by:

(a) A written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration was recorded.

(b) A decree declaring the marriage void or dissolved.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (5) of this section.

(5) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a declaration recorded as provided in subsection (1) of this section is applicable without the joinder of the declarant, may

maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the revocation of the declaration.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward, the right of the ward to cause a declaration claiming a marital right of the ward or a revocation thereof to be recorded as provided in section 1 of this 1965 Act.

REPORT
October 1, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Revised rough draft on "Protecting Property Right During Marriage."

Prior to the August 22 meeting of the Advisory Committee, Mr. Allison and I submitted a rough draft of proposed legislation entitled "Protecting Property Right During Marriage," dated August 4, 1964. That rough draft was considered at the August 22 meeting. See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 3, 4 and 7 to 9, and Appendix A.

Prior to the September 12 meeting, Mr. Allison and I submitted a revised rough draft of the proposed legislation, dated September 11, 1964. That revised rough draft was considered at the September 12 meeting. See Minutes, Probate Advisory Committee Meeting, 9/12/64, pages 7 to 10, and Appendix.

I have prepared the following new revised rough draft of the proposed legislation pursuant to and based upon action by the committee at the September 12 meeting, and have incorporated therein some of the ideas embodied in the draft prepared by Mr. Gooding, dated September 14, 1964, and sent to all members of the committee. Mr. Allison did not participate in the preparation of the following new revised rough draft and thus bears no responsibility therefor.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county a written, signed and acknowledged declaration claiming a marital right to an undivided one-fourth interest in all or specifically described real property owned in sole right by the spouse of the declarant and situated in the county.

(2) A declaration applicable to all real property may be in the following form:

GENERAL DECLARATION CLAIMING MARITAL RIGHT

_____ (name of declarant), the spouse of _____ (name of husband or wife owning real property), hereby claims a marital right to an undivided one-fourth interest in all real property owned in sole right by _____ (name of husband or wife owning real property) and situated in _____ County, State of Oregon.

(Acknowledgment)

_____
Declarant

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(3) A declaration applicable to specifically described real property may be in the following form:

SPECIFIC DECLARATION CLAIMING MARITAL RIGHT

_____ (name of declarant), the spouse of _____ (name of husband or wife owning real property), hereby claims a marital right to an undivided one-fourth interest in real property owned in sole right by _____ (name of husband or wife owning real property), situated in _____ County, State of Oregon, and described as follows:

(Acknowledgment)

_____
Declarant

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(4) If a recorded declaration is not sooner revoked or the marital right claimed thereby is not sooner released, the marital right in the real property

to which the declaration is applicable becomes vested in the declarant upon the death of the spouse of the declarant.

(5) If a recorded declaration is not sooner revoked, the spouse of the declarant may not convey or mortgage the real property to which the declaration is applicable free of the marital right unless the declarant either joins in the conveyance or executes a separate conveyance thereby releasing the marital right, or joins in the mortgage or trust deed thereby subordinating the marital right.

(6) A recorded declaration may be revoked as to all or part of the real property to which it is applicable by a written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration is recorded.

(7) A recorded declaration is revoked by:

(a) A decree declaring the marriage void or dissolved.

(b) A decree of permanent or unlimited separation from bed and board specifically revoking the declaration.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (8) of this section.

(8) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a recorded declaration is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the declaration revoked.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward the right of the ward under section 1 of this 1965 Act to cause a revocation of a recorded declaration claiming a marital right of the ward to be recorded or release or subordinate the marital right.

REPORT
October 8, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison

Subject: Revised rough draft on "Protecting Property Right During Marriage."

I have prepared, and hereby submit for consideration by the Advisory Committee, the following revised rough draft of the proposed legislation entitled "Protecting Property Right During Marriage." Incorporated in this revised rough draft are some of the ideas embodied in Mr. Gooding's letter, dated September 14, 1964; my letter, dated October 1, 1964; and Mr. Lundy's report, dated October 1, 1964.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county a written, signed and acknowledged declaration claiming a marital right to an undivided one-fourth interest in specifically described real property or in all real property then or thereafter owned during the marriage in sole right by the spouse of the declarant and situated in the county.

(2) A declaration applicable to all real property may be in the following form:

GENERAL DECLARATION CLAIMING MARITAL RIGHT

_____ (name of declarant), the _____ (wife or husband) of _____ (name of husband or wife owning real property), claims a marital right to an undivided one-fourth interest in all real property now or hereafter owned during the marriage in sole right by _____ (name of husband or wife owning real property) and situated in _____ County, State of Oregon.

(Acknowledgment)

_____
Declarant

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(3) A declaration applicable to specifically described real property may be in the following form:

SPECIFIC DECLARATION CLAIMING MARITAL RIGHT

_____ (name of declarant), the _____ (wife or husband) of _____ (name of husband or wife owning real property), claims a marital right to an undivided one-fourth interest in the following described real property owned in sole right by _____ (name of husband or wife owning real property) and situated in _____ County, State of Oregon, to wit:

(Description of real property)

(Acknowledgment)

_____
Declarant

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(4) An undivided one-fourth interest in real property to which a recorded declaration is applicable, owned during the marriage in sole right by the spouse of the declarant and situated in the county in which the declaration is recorded, shall become vested upon the death of the spouse of the declarant in the declarant as a marital right, unless the marital right has been released or terminated or the declaration has been revoked as provided in this section.

(5) The spouse of the declarant may not convey or mortgage real property to which a recorded declaration is applicable free of the marital right of the declarant unless the declaration has been revoked, the marital right has been terminated or the marital right is released by the declarant joining in the conveyance or executing a separate conveyance or is subordinated by the declar-

ant joining in the mortgage or trust deed.

(6) A recorded declaration may be revoked as to all or part of the real property to which it is applicable by a written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration is recorded.

(7) A marital right is terminated by:

(a) A decree declaring the marriage void or dissolved.

(b) A decree of permanent or unlimited separation from bed and board specifically terminating the marital right.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (8) of this section.

(8) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a recorded declaration is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the marital right terminated.

(9) Nothing in this section shall affect the inheritance rights of a declarant to real property of which the spouse of the declarant died seised as provided in ORS 111.020.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward the right of the ward under

section 1 of this 1965 Act to cause a revocation of a recorded declaration claiming a marital right of the ward to be recorded or to release or subordinate the marital.

(D) If the ward is a minor or an incompetent, to the ward's spouse who is not under legal disability and to any of the ward's children, parents, brothers or sisters who is not under legal disability and has presented a request for a copy to the guardian before the filing of the account.

(b) The guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account have been mailed or delivered as provided in paragraph (a) of this subsection, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

* * *

Comment: The revision of subsection (4) of ORS 126.336 by the above draft is based upon Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 11 to 14, and Appendix B.

See also: Minutes, 7/18/64, pages 8 to 12.
Section 2, Guardianship and Conservatorship Bill, Rough Draft, 7/18/64, pages 4 and 5.
Minutes, 6/13/64, pages 11 to 13, and Appendix C.
Minutes, 5/16/64, pages 10 and 11, and Appendix B, page 8.

REPORT
September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Disposition of intermediate accounts of guardian of estate.

At the last meeting of the Advisory Committee, I submitted a revised draft of subsection (4) of ORS 126.336 (relating to the disposition of accounts other than final accounts of a guardian of the estate), embodying, in so far as possible, the revisions apparently agreed upon by the committee at the July 18 meeting. At the last meeting the committee considered that revised draft, directed or suggested certain revisions thereof and requested that I prepare and submit a new revised draft. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 13. Following is such a new revised draft of subsection (4).

126.336. * * *

* * *

(4) (a) [The] Before filing any account other than his final account, a guardian of the estate shall [give a copy of each account to the person or institution having the care, custody or control of the ward.] cause a copy of the account to be mailed or delivered:

(A) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, to the Secretary of the Oregon State Board of Control and to the superintendent of the institution who has presented a request for a copy to the guardian before the filing of the account.

(B) If there is a guardian of the person for the ward other than the guardian of the estate, to the guardian of the person.

(C) If the ward is a minor 14 years of age or older or a spendthrift, to the ward.

REPORT
September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison and Robert W. Lundy

Subject: Rough draft on owner spouse's statement in conveyance or mortgage that property conveyed or mortgaged not residence of either spouse.

At the last meeting of the Advisory Committee a number of alternatives to the rough draft of proposed legislation entitled "Protecting Property Right During Marriage," dated August 4, 1964, were suggested. See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 10 and 11. One of these alternatives was a suggestion that the joinder of a nonowner spouse be required in a conveyance of real property which is the place of residence of both spouses or either of them, and that to secure compliance with such requirement the owner spouse state in a conveyance without the joinder of the nonowner spouse that the real property conveyed is not such place of residence. At that meeting Mr. Allison indicated that we would endeavor to prepare and submit a rough draft of proposed legislation embodying the concept of such a statement in a conveyance executed by an owner spouse. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 11. Following is such a rough draft.

Section 1. A married person who owns in his sole right real property which is the place of residence of such married person, of his spouse or of both, may not convey or mortgage the real property unless the spouse of such married person joins in the conveyance or mortgage. This requirement does not create a proprietary right, title or interest in the spouse of such married person in the real property, and failure of the spouse to join in the conveyance or mortgage does not affect the validity of the conveyance or mortgage. If a married person executes a conveyance or mortgage of any real property owned by him in his sole right and the spouse of such married person does not join in the conveyance or mortgage, the conveyance or mortgage shall include the statement under oath of such married person that the real property is not the place of residence of such married person, of his spouse or of both.